STATE OF MINNESOTA
IN COURT OF APPEALS
A10-388

In The Matter of the Welfare of:
D. C. K., Child.

Filed November 30, 2010
Affirmed
Johnson, Chief Judge

Lincoln County District Court
File No. 41-JV-09-23

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant D.C.K.)

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

Glen A. Petersen, Lincoln County Attorney, Tyler, Minnesota (for respondent State of Minnesota)

Considered and decided by Johnson, Chief Judge; Ross, Judge; and Crippen, Judge.[*]

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

JOHNSON, Chief Judge

A Lincoln County jury found D.C.K. guilty of second-degree sale of a controlled substance based on evidence that he gave a narcotic painkiller to a friend, who died from

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

an overdose of the drug. The state's witnesses included three teenage boys, who testified that the boy who died made statements to them before his death that D.C.K. was the source of the drug. On appeal, D.C.K. argues that the district court erred by admitting hearsay evidence through the three teenage witnesses. D.C.K. also argues that the district court erred by imposing an extended-jurisdiction-juvenile disposition. We conclude that the district court did not err and, therefore, affirm.

FACTS

On May 24, 2009, 17-year-old M.H. died of a drug overdose in the city of Tyler. An autopsy revealed that M.H.'s blood contained a fatal amount of fentanyl, a Schedule II narcotic painkiller that may be administered by a disposable patch placed on a person's skin. M.H. was wearing such a patch on his right arm when he was found unconscious in his bedroom.

M.H. and D.C.K. were friends. On the day M.H. died, the Tyler police chief received information that D.C.K., then 15 years old, might be connected to M.H.'s fatal overdose. D.C.K.'s father had used fentanyl by prescription since suffering a back injury in 1992. But D.C.K. denied to the police chief that he gave "anything" to M.H. on the day before M.H. died. Further investigation, however, revealed that M.H. had told three other teenage boys—T.R., Z.B., and J.H.—in three separate conversations on May 23, 2009, that D.C.K. had given him a fentanyl patch.

In August 2009, the state charged D.C.K. by a delinquency petition with one count of third-degree murder, a violation of Minn. Stat. § 609.195, subd. (b) (2008); one count of second-degree sale of a controlled substance, a violation of Minn. Stat. § 152.022,

subd. 1(5) (2008); and one count of third-degree sale of a controlled substance, a violation of Minn. Stat. § 152.023, subd. 1(3) (2008). The delinquency petition requested that the district court designate the case as an extended-jurisdiction-juvenile (EJJ) prosecution. In September 2009, the state moved to designate the case as an EJJ prosecution. In November 2009, the district court issued an order designating the case an EJJ prosecution. Before trial, the state dismissed the count alleging third-degree sale of a controlled substance.

In December 2009, the state filed a motion *in limine* to establish that Z.B. and J.H. would be permitted to testify about M.H.'s statements that he received a fentanyl patch from D.C.K. The district court granted the motion, reasoning that the testimony is admissible pursuant to the statement-against-interest exception to the hearsay rule. *See* Minn. R. Evid. 804(b)(3).

The case was tried to a jury for two days in January 2010. Before calling T.R., the state's eighth witness, the prosecutor advised the district court that T.R. would testify that M.H. said that he had received a fentanyl patch from D.C.K. The prosecutor stated that T.R.'s testimony was inadvertently omitted from the state's motion *in limine* even though his testimony would be similar to the testimony of Z.B. and J.H. The district court ruled that T.R.'s testimony is admissible under two exceptions to the hearsay rule—the statement-against-interest exception, *see* Minn. R. Evid. 804(b)(3), and the residual exception, *see* Minn. R. Evid. 807. The district court also augmented its ruling on the motion *in limine* by noting that Z.B.'s and J.H.'s testimony is admissible under the residual exception as well as the statement-against-interest exception. All three boys—

T.R., Z.B., and J.H.—testified that M.H. told each of them on separate occasions that he had received a fentanyl patch from D.C.K. In D.C.K.'s testimony, he denied giving a fentanyl patch to M.H.

The jury found D.C.K. not guilty of third-degree murder but guilty of second-degree sale of a controlled substance. After trial, D.C.K. filed a motion requesting that the district court impose a juvenile disposition, not an EJJ disposition. The district court denied D.C.K.'s motion and imposed an EJJ disposition. The district court imposed a stayed adult prison sentence of 48 months and placed D.C.K. on juvenile probation until he is 21 years old. D.C.K. appeals.

D E C I S I O N

I. Hearsay

D.C.K. first argues the district court erred by permitting three witnesses to testify that M.H. said that D.C.K. gave him a fentanyl patch. D.C.K. challenges the district court's reasoning that the hearsay statements are admissible pursuant to two exceptions to the hearsay rule. We apply an abuse-of-discretion standard of review to a district court's evidentiary rulings. *State v. Matthews*, 779 N.W.2d 543, 553 (Minn. 2010).

Hearsay is an out-of-court statement offered into evidence to prove the truth of the matter asserted in the statement. Minn. R. Evid. 801(c); *State v. Litzau*, 650 N.W.2d 177, 182-83 (Minn. 2002). Out-of-court statements are inadmissible unless they fall within an exclusion from or exception to the hearsay rule. *State v. Greenleaf*, 591 N.W.2d 488, 502 (Minn. 1999). One of the exceptions to the hearsay rule on which the district court relied is the residual exception:

> 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.

D.C.K. contends that the district court erred by determining that M.H.'s hearsay statements have the necessary "guarantees of trustworthiness," as required by the first clause of rule 807. To determine whether a hearsay statement has "circumstantial guarantees of trustworthiness," a court must apply a totality-of-the-circumstances approach. *State v. Keeton*, 589 N.W.2d 85, 90 (Minn. 1998); *State v. Byers*, 570 N.W.2d 487, 492 (Minn. 1997). In doing so, the court should look "to all relevant factors bearing on trustworthiness." *State v. Stallings*, 478 N.W.2d 491, 495 (Minn. 1991). The relevant factors include

> [t]he character of the witness for truthfulness and honesty, and the availability of evidence on the issue; whether the testimony was given voluntarily, under oath, subject to cross-examination and a penalty for perjury; the witness' relationship with both the defendant and the government and his motivation to testify . . . ; the extent to which the witness' testimony reflects his personal knowledge; whether the witness ever recanted his testimony; the existence of corroborating evidence; and, the reasons for the witness' unavailability.

Keeton, 589 N.W.2d at 90 (citing *Byers*, 570 N.W.2d at 492-93). These factors are not exclusive; a court may consider additional factors as well. *See State v. Martinez*, 725

N.W.2d 733, 738 (Minn. 2007); *State v. Ortlepp*, 363 N.W.2d 39, 44 (Minn. 1985). A reviewing court must bear in mind that a district court "has considerable discretion in determining admission" of statements under the residual exception. *Stallings*, 478 N.W.2d at 495.

In ruling that the residual exception applies to the testimony of T.R., Z.B., and J.H., the district court stated the following reasons:

> The Court finds that the context of the all of the statements that the Court has ruled admissible and the persons they were made to suggest the statements are reliable. There's no evidence that the declarant, the decedent in this case, had any motive for lying or problem with memory at the time he made the statements. The declarant certainly had a personal knowledge of the transaction as an active participant in it. The statements were made relatively contemporaneously with the alleged transfer, and the statements were reported to law enforcement shortly after the decedent's death.

The district court's ruling reflects a proper application of the totality-of-the-circumstances approach. The district court considered some of the factors that the supreme court has specifically identified as being relevant, such as M.H.'s personal knowledge of the subject matter and his motivation when making the statements. *See Keeton*, 589 N.W.2d at 90; *Byers*, 570 N.W.2d at 492-93. In addition, the district court properly considered the fact that M.H. made the statements "relatively contemporaneously" with his receipt of a fentanyl patch and that the statements were reported to law enforcement shortly after his fatal overdose. These factors support the conclusion that M.H.'s statements bear circumstantial guarantees of trustworthiness. In his brief, D.C.K. asserts that M.H. was not under oath or subject to cross-examination

when he made the statements, and that M.H. was "troubled" and chemically dependent at the time. Even so, those factors do not compel the conclusion that the district court abused its discretion by relying on the factors favoring trustworthiness.

D.C.K. also contends that M.H.'s statements are untrustworthy because they reflect "finger-pointing," *i.e.*, an attempt to shift or spread blame away from M.H. toward D.C.K. More specifically, D.C.K. contends that the hearsay statements reflect an attempt by M.H. to implicate D.C.K. in the unlawful possession of narcotics and thereby to avoid or minimize responsibility for his own unlawful possession of narcotics. D.C.K. relies on caselaw stating that such statements are "viewed with special suspicion." But the caselaw on which D.C.K. relies is inapplicable because it is concerned with statements made by co-defendants after a criminal investigation has commenced. *See Lilly v. Virginia*, 527 U.S. 116, 133, 119 S. Ct. 1887, 1898 (1999); *Lee v. Illinois*, 476 U.S. 530, 541, 106 S. Ct. 2056, 2062 (1986); *Crawford v. United States*, 212 U.S. 183, 203-04, 29 S. Ct. 260, 268 (1909); *State v. King*, 622 N.W.2d 800, 809 (Minn. 2001). In this case, M.H. made the out-of-court statements before any police investigation was underway and before anyone knew that such an investigation would occur. In fact, prior to M.H.'s death, there was no police investigation into unlawful possession of the fentanyl patch. Thus, M.H.'s out-of-court statements are not untrustworthy on the ground that M.H. was trying to shift or spread blame.

In sum, the district court did not abuse its discretion by admitting T.R.'s, Z.B.'s, and J.H.'s testimony concerning M.H.'s out-of-court statements pursuant to the residual exception to the hearsay rule. In light of that conclusion, we need not consider whether

the district court properly admitted the hearsay evidence pursuant to the statement-against-interest exception.

II. EJJ Disposition

D.C.K. also argues that the district court erred by imposing an EJJ disposition. More specifically, D.C.K. argues that the legal basis of the district court's EJJ designation applies only to juveniles who are 16 or 17 years old when committing an offense and that the district court erred because he was only 15 years old at the time of his offense. Because D.C.K.'s argument implicates the district court's application of a statute to undisputed facts, we apply a *de novo* standard of review. *In re Welfare of D.D.R.*, 713 N.W.2d 891, 907 (Minn. 2006).

"An EJJ prosecution is a blending of juvenile and adult criminal dispositions that extends jurisdiction over a young person to age twenty-one and permits the court to impose both a juvenile disposition and a criminal sentence." *In re Welfare of B.N.S.*, 647 N.W.2d 40, 42 (Minn. App. 2002). If a district court imposes an EJJ disposition, "[e]xecution of the adult sentence is stayed so long as the offender does not violate the provisions of the juvenile disposition and does not commit a new offense." *Id.* (citing Minn. Stat. § 260B.130, subd. 4 (2000)). If a juvenile is alleged to have committed a felony offense, the delinquency action may be designated an EJJ prosecution if:

> (1) the child was 14 to 17 years old at the time of the alleged offense, a certification hearing was held, and the court designated the proceeding an extended jurisdiction juvenile prosecution;
>
> (2) the child was 16 or 17 years old at the time of the alleged offense; the child is alleged to have committed an

> offense for which the Sentencing Guidelines and applicable statutes presume a commitment to prison or to have committed any felony in which the child allegedly used a firearm; and the prosecutor designated in the delinquency petition that the proceeding is an extended jurisdiction juvenile prosecution; or
>
> (3) the child was 14 to 17 years old at the time of the alleged offense, the prosecutor requested that the proceeding be designated an extended jurisdiction juvenile prosecution, a hearing was held on the issue of designation, and the court designated the proceeding an extended jurisdiction juvenile prosecution.

Minn. Stat. § 260B.130, subd. 1 (2008).

To analyze D.C.K.'s argument, we must determine which of the three foregoing legal bases the district court relied on when imposing an EJJ disposition. The district court's post-trial order is not explicit on that issue. D.C.K. notes that the district court's order refers to section 260B.130, subdivision 1(2). If the district court had based its EJJ disposition on subdivision 1(2), the district court would have erred because subdivision 1(2) plainly applies only if "the child was 16 or 17 years old at the time of the alleged offense." Minn. Stat. § 260B.130, subd. 1(2).

Notwithstanding the district court's citation to subdivision 1(2), we believe that the record as a whole reflects that the district court based its EJJ disposition on subdivision 1(3) of section 260B.130. In the delinquency petition, the state requested that the prosecution be designated an EJJ prosecution. The state later moved to designate the case as an EJJ prosecution. The district court held a hearing on the state's motion and thereafter issued an order designating the case an EJJ prosecution. Each of these steps is a requirement for an EJJ designation made pursuant to subdivision 1(3), and all of the

requirements of that subdivision were satisfied. The procedural history of this case is inconsistent with an EJJ designation made pursuant to subdivision 1(1), which applies only if a certification hearing was held, because no such hearing was held in this case. Furthermore, D.C.K.'s trial counsel never argued to the district court that D.C.K.'s age precluded an EJJ designation pursuant to subdivision 1(2). Thus, we construe the record to reflect that the district court designated the case an EJJ prosecution pursuant to subdivision 1(3).

Having construed the district court record in that way, further analysis is unnecessary. D.C.K. does not argue that the district court could not designate the case as an EJJ prosecution pursuant to subdivision 1(3). As stated in the preceding paragraph, the four requirements of subdivision 1(3) were satisfied. The record also reflects that D.C.K. was 15 years old at the time of the offense. Thus, the district court did not err by imposing an EJJ disposition pursuant to section 260B.130, subdivision 1(3).

Affirmed.