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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1693**

State of Minnesota,
Respondent,

vs.

Rarity Shemeire Abdullah,
Appellant.

**Filed September 18, 2017
Reversed and remanded
Kirk, Judge**

Ramsey County District Court
File No. 62-CR-15-5356

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

John Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Kirk, Judge; and Florey, Judge.

UNPUBLISHED OPINION

KIRK, Judge

Appellant challenges his conviction for possession of a firearm by an ineligible person under Minn. Stat. § 624.713, subd. 1(2) (2014), arguing that: (1) he is entitled to a

new trial because the district court erred in admitting his brother's prior recorded statement identifying him; and (2) his conviction must be vacated because the evidence identifying him as the person in possession of the firearm was insufficient. We conclude that the evidence was sufficient to support the conviction, but because the district court erred when it admitted appellant's brother's prior recorded statement, we reverse and remand for a new trial.

FACTS

Following a three-day jury trial, appellant Rarity Shemeire Abdullah was convicted of possession of a firearm by an ineligible person under Minn. Stat. § 624.713, subd. 1(2). At trial, the only contested issue was whether appellant was the person who possessed the firearm.

Officer Timothy Filiowich of the St. Paul Police Department (SPPD) testified that while on duty on June 24, 2015, he and his partner heard gunshots, drove toward the shots, then noticed a black four-door Lincoln speeding away, which made them believe it was involved in the shooting. They pursued the Lincoln in their squad car with the lights and sirens activated and it slowed and nearly stopped as someone got out of the passenger side. Officer Filiowich described the person who got out of the Lincoln as a black male, with a bigger build, over six feet tall, with long dreadlocks. Officer Filiowich testified that he believes dreadlocks are common and a fashion trend in the African American community. Appellant's brother, R.A., was driving the Lincoln and Officer Filiowich arrested him following the car chase.

Officer Nicole Carle of the SPPD was with Officer Filiowich in the squad car when they heard the gunshots and began pursuing the Lincoln. She saw a male passenger get out of the Lincoln and flee on foot. Officer Carle described the passenger as a very tall black male, with a big build and shoulder length black dreadlocks. She also described the passenger as between 6 feet, 2 inches and 6 feet, 4 inches tall. She testified that she also saw what appeared to be a firearm in his right hand. Officer Carle got a side view of the passenger's face but could not identify him. She testified that appellant is of similar height and has similar hair to the passenger she saw fleeing.

Sergeant Todd Feroni of the SPPD testified that appellant is 6 feet, 6 inches tall. Sergeant Feroni also testified that people who witnessed the shooting described the shooter as a black male with a dark complexion and dreadlocks.

R.I. testified that on June 24 she saw a very nervous-looking man dump something in her neighbor's garbage can. There were also law enforcement officers moving around her neighborhood, and she told them about the man. R.I. described the man as African American and fairly tall, probably between 5 feet, 8 inches and 5 feet, 11 inches, with dreadlocks. She did not see his face. R.I. testified that appellant's dreadlocks looked similar to the man's, and after appellant stood, R.I. testified that she believed he is approximately 5 feet, 10 inches tall.

A firearm was recovered from the garbage can and skin cells were collected from it. Forensic scientist Allison Dolenc of the Bureau of Criminal Apprehension (BCA) recovered DNA from the skin cells and created a DNA profile. Dolenc determined that the DNA came from "a mixture of three or more individuals." Dolenc was also provided with

a DNA profile for appellant that she compared to the DNA profile she created from the skin cells. The results of Dolenc's analysis indicated that 51.6 percent of the general population, including appellant, could not be excluded.

Officer Jeffrey Cragg of the SPPD recovered four shell casings from the scene of the shooting. A BCA forensic scientist test-fired the gun and compared the discharged shell casings to the four shell casings recovered from the scene of the shooting. The shell casings all matched, indicating that the firearm recovered from the garbage can fired all of the shell casings.

On the second day of trial, R.A. was arrested and brought to the courthouse to compel his testimony. R.A. was combative and testified that he did not remember where he was on June 24, whether he was arrested, or if he was chased or questioned by police. He did claim that there was no one else in the Lincoln with him when the shots were fired.

After R.A.'s testimony, the state recalled Officer Filiowich who testified that after R.A. was arrested and placed in the back of the squad car, he said that "[h]e thought somebody was shooting at his vehicle so he took off with his brother in the vehicle." R.A. said that his brother's name is Rarity. Prior to this testimony, appellant raised a hearsay objection.¹ Following a bench conference, the testimony was allowed. Appellant also objected to exhibit 21, Officer Filiowich's squad video, which was nonetheless admitted and played for the jury from the beginning of the car chase through R.A.'s statement as described by Officer Filiowich.

¹ The parties agreed at the outset of the trial that the statement R.A. made in the backseat of Officer Filiowich's squad car was a hearsay statement.

Outside of the hearing of the jury, the district court made a record of appellant's objections and the court's rulings. The court explained that R.A.'s prior recorded statement was admitted as substantive evidence as a prior inconsistent statement under Minn. R. Evid. 801(d)(1)(A). The court concluded that the statement was not hearsay because it was inconsistent with R.A.'s testimony, it was not cumulative, and it was helpful to the trier of fact. Exhibit 21 shows R.A. sitting still in the backseat of the squad car and answering questions by law enforcement. Exhibit 21 shows that R.A. told law enforcement that he fled the scene of the shooting with his brother Rarity in the vehicle. R.A. also asserted that he had nothing to do with the shooting and that he did not flee the police.

In its closing argument, the state argued that R.A.'s prior recorded statement, captured in exhibit 21, was more reliable than his trial testimony and that the jury should conclude that appellant was the person seen fleeing R.A.'s Lincoln with the firearm. During deliberations, the jury was permitted to watch exhibit 21 again. The jury found appellant guilty.

This appeal follows.

D E C I S I O N

I. The district court abused its discretion when it allowed the jury to hear R.A.'s prior recorded statement and the related testimony.

“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) (citations omitted). “If no

constitutional right was implicated, we will reverse only if the district court's error substantially influenced the jury's decision." *State v. Vang*, 774 N.W.2d 566, 576 (Minn. 2009) (quotation omitted). In determining what effect erroneously admitted evidence had on the verdict, the reviewing court considers "the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether the defense effectively countered it." *Townsend v. State*, 646 N.W.2d 218, 223 (Minn. 2002); *see also State v. Sanders*, 775 N.W.2d 883, 888 (Minn. 2009). An out-of-court statement is not admissible as substantive evidence unless it is non-hearsay or falls within an exception to the hearsay rule. *State v. Greenleaf*, 591 N.W.2d 488, 502 (Minn. 1999).

Here, the parties agree that R.A.'s prior recorded statement is a hearsay statement and that the district court erred when it admitted it substantively as non-hearsay under Minn. R. Evid. 801(d)(1)(A). R.A.'s prior recorded statement was not given under oath, which is a requirement for admission under Minn. R. Evid. 801(d)(1)(A). Appellant argues that this evidentiary error entitles him to a new trial, because the admission of R.A.'s prior recorded statement was prejudicial and without it the state did not have sufficient evidence to support his conviction. He also notes that during its closing argument, the state encouraged the jury to consider the substance of R.A.'s prior recorded statement.

The state argues that this court should affirm despite the district court's erroneous admission of the statement as non-hearsay because the statement is an excited utterance and was therefore admissible under an exception to the hearsay rule. *See* Minn. R. Evid. 803(2). The state classifies R.A.'s prior recorded statement as an excited utterance because

there was a startling event, the statement related to the startling event, and R.A. was “under a sufficient aura of excitement caused by the event” to guarantee the statement’s trustworthiness. *State v. Daniels*, 380 N.W.2d 777, 782 (Minn. 1986) (quoting Minn. R. Evid. 803(2) 1977 advisory comm. cmt.). The state failed to argue this alternative ground for admission at trial.

Although *State v. Grunig* allows this court to consider alternative arguments on appeal, we are unable to consider the state’s excited-utterance argument here because there are not sufficient facts in the record for us to analyze the alternative theory. 660 N.W.2d 134, 137 (Minn. 2003) (noting that a respondent may raise an alternative theory on appeal when there are sufficient facts in the record to consider the alternative theory, there is legal support for the argument, and the alternative theory would not expand the relief previously granted). The district court did not make specific findings regarding the circumstances surrounding R.A.’s prior recorded statement, and our review of exhibit 21 does not compel the conclusion that the statement is admissible as an excited utterance. In order to address the state’s argument on appeal, we would be required to make factual findings, which is not a function of appellate courts. *Kucera v. Kucera*, 275 Minn. 252, 254, 146 N.W.2d 181, 183 (1966). Here, we cannot conclude that R.A.’s prior recorded statement was admissible as an excited utterance under Minn. R. Evid. 803(2).

On this record, R.A.’s prior recorded statement was inadmissible hearsay, and the district court abused its discretion in admitting it into evidence. Because there is no other evidence in the record to sufficiently identify appellant as R.A.’s passenger, the erroneous

admission of R.A.'s prior statement was prejudicial and substantially influenced the jury's decision. We reverse and remand to the district court for a new trial.

II. There was sufficient evidence presented to the jury to support the finding beyond a reasonable doubt that appellant possessed the firearm.

Appellant also argues that there was insufficient evidence presented to the jury to support his conviction. Appellant argues that because R.A.'s prior recorded statement should not have been admitted, the only evidence implicating him in this offense is circumstantial. Appellant asks this court to disregard R.A.'s prior recorded statement and to review the remaining evidence under the circumstantial-evidence standard. *See State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). Appellant argues that without R.A.'s statement, there is not sufficient evidence to identify him as R.A.'s passenger and no physical evidence to connect him to the firearm or the shooting. Appellant notes that if the evidence presented at trial was insufficient to support his conviction, the appropriate remedy is reversal of his conviction and the attachment of jeopardy. *See, e.g., State v. Al-Naseer*, 788 N.W.2d 469, 481 (Minn. 2010). In its brief, the state acknowledges that without R.A.'s prior recorded statement there is no evidence tying appellant to the firearm.

In considering a claim of insufficient evidence, this court's review is limited to a thorough analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court assumes that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court will

not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). “Direct evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *Id.* at 477 n.11 (quotation omitted).

Here, R.A.’s prior recorded statement was admitted as substantive evidence of who got out of the Lincoln. That person was seen holding a firearm. That direct evidence satisfied the element of who possessed the firearm, so this court need not apply the circumstantial-evidence standard to the remaining evidence in the record. *State v. Horst*, 880 N.W.2d 24, 39 (Minn. 2016). Although without R.A.’s statement there would not have been sufficient evidence to support this conviction, the jury nonetheless heard the statement and was permitted to consider it substantively. Therefore, there was sufficient evidence presented for the jury to conclude beyond a reasonable doubt that appellant possessed the firearm. Appellant’s sufficiency-of-the-evidence claim fails.

III. Appellant’s pro se arguments.

Appellant filed a pro se supplemental brief and a pro se supplemental reply brief reiterating his attorney’s arguments and additionally raising ineffective-assistance-of-counsel and prosecutorial-misconduct claims. Because appellant has obtained a new trial on other grounds, we need not address these issues.

Reversed and remanded.