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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-2040**

State of Minnesota,
Respondent,

vs.

Morgan Leslie Pavey,
Appellant.

**Filed December 11, 2017
Affirmed
Schellhas, Judge**

Chisago County District Court
File No. 13-CR-14-594

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

Janet Reiter, Chisago County Attorney, David Hemming, Assistant County Attorney,
Center City, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Schellhas,
Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges her conviction of, and sentence for, third-degree murder, arguing that the district court abused its discretion by admitting certain hearsay evidence and denying her motion for a downward dispositional sentencing departure. We affirm.

FACTS

When friends inquired at a social outing about Samuel Manthey's apparent intoxication, Manthey said, "I'm on liquid methadone" and "I got it from [appellant Morgan Pavey]." Later that day, Manthey also told other friends that he was on "liquid methadone." The next morning, Manthey's family found him unresponsive; first responders could not revive him. The medical examiner ruled that Manthey's death was accidental, caused by methadone toxicity in his blood. Respondent State of Minnesota charged Pavey with third-degree murder in connection with Manthey's death. At Pavey's jury trial, the district court allowed the admission of Manthey's out-of-court statements under the residual-hearsay exception. The jury found Pavey guilty as charged.

Pavey moved the district court for downward dispositional and durational departures. The district court denied the motions and sentenced Pavey to an 86-month presumptive sentence for third-degree murder.

This appeal follows.

DECISION

Admission of out-of-court statements

Pavey objected at trial to the admission of Manthey's out-of-court statements and argues on appeal that the district court erred by admitting the statements because they did not contain circumstantial guarantees of trustworthiness, that the error was not harmless, and that she is entitled to a new trial. "[E]videntiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Griffin*, 834 N.W.2d 688, 693 (Minn. 2013) (quotation omitted). Pavey has the burden of establishing that the court abused its discretion and that she was prejudiced by the evidentiary ruling. *Id.*

"When a defendant has objected to an alleged error, the harmless-error standard applies." *State v. Lilienthal*, 889 N.W.2d 780, 786 (Minn. 2017). "When an error implicates a constitutional right, [appellate courts] will award a new trial unless the error is harmless beyond a reasonable doubt." *Id.* at 786–87 (quotation omitted). Here, Pavey does not argue that Manthey's statements were testimonial and that the Confrontation Clause therefore is implicated. Indeed, Manthey's statements were not testimonial. *See State v. Moua Her*, 750 N.W.2d 258, 265 (Minn. 2008) ("[S]tatements made to non-government questioners who are not acting in concert with or as agents of the government are considered nontestimonial."), *rev'd on other grounds by*, 555 U.S. 1092, 129 S. Ct. 929 (2009).

"Erroneous admission of evidence that does not have constitutional implications is harmless if there is no reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Robinson*, 718 N.W.2d 400, 407 (Minn. 2006)

(quotation omitted). “In evaluating whether an error was harmless, [appellate courts] will not analyze whether a jury would have convicted the defendant without the error, but instead look to whether the error reasonably impacted upon the jury’s decision.” *Lilienthal*, 889 N.W.2d at 787 (quotations omitted).

Here, after properly classifying Manthey’s statements as hearsay, *see* Minn. R. Evid. 801(c), 802, the district court admitted the hearsay statements under Minn. R. Evid. 807, which allows admission of hearsay that possesses “equivalent circumstantial guarantees of trustworthiness.”

Rule 807 of the Minnesota Rules of Evidence provides that a hearsay statement not specifically covered by rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, may be admitted into evidence if it meets the criteria identified in the rule. When determining whether the statement has equivalent circumstantial guarantees of trustworthiness, a district court uses a totality of the circumstances test.

Griffin, 834 N.W.2d at 693 (quotations omitted).

A district court should generally consider the following factors in evaluating trustworthiness:

whether the statement was given voluntarily, under oath, and subject to cross-examination and penalty of perjury; the declarant’s relationship to the parties; the declarant’s motivation to make the statement; the declarant’s personal knowledge; whether the declarant ever recanted the statement; the existence of corroborating evidence; and the character of the declarant for truthfulness and honesty.

Id. (quotation omitted). Here, Manthey made his statements voluntarily, based on his personal knowledge, but not under oath or subject to cross-examination. He made the

statements to friends, who did not know Pavey. Manthey never recanted his statements, and no record evidence suggests that he had a motive to lie.

Moreover, other evidence corroborates Manthey's statements. The state offered testimony about the observations of multiple friends of Manthey regarding his intoxicated state the night before his death, including from a friend experienced with using methadone. The state also offered testimony from K.T., one of Manthey's friends. After Manthey's death, K.T. confronted Pavey on Facebook regarding her involvement in Manthey's death. Pavey thereafter engaged in text messaging with K.T., saying,

Your [sic] pathetic it wasn't even mine im on 48 mgs just stop . . . That wouldn't of even got high he had 150i told him exactly how to take it he was doing what he always did. Pushed his limits that the way sam was . . . That goes for a dollar a mg I didn't make a profit on it so stfu you sound so ignorant you have no idea what happened so why do you act like you do?

To determine "that the statement has the necessary 'guarantees of trustworthiness,'"

Minnesota Rule of Evidence 807 also requires that the district court consider whether

(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.

Id. (quotation omitted).

Here, the state offered Manthey's statements as evidence of a material fact to prove that Manthey was intoxicated from methadone and that Pavey provided him with the methadone. The district court correctly determined that Manthey's statements were more probative about the source of the methadone that caused his death than any other available

evidence. Manthey's statements were the only direct evidence that Pavey provided the methadone to Manthey that caused his death.

We conclude that the general purposes of the rules of evidence and interests of justice were served by admitting the statement into evidence. Manthey's statements allowed the jury to better ascertain the truth by considering Manthey's out-of-court statements. See Minn. R. Evid. 102 (providing that the rules shall be construed "to the end that the truth may be ascertained"). Because the district court applied the correct legal test and based its decision on its overall analysis of the relevant factors under rule 807, we hold that the court did not abuse its discretion by admitting Manthey's out-of-court statements. We therefore need not address whether the court's admission of Manthey's out-of-court statements significantly affected the verdict.

Denial of Downward Dispositional Sentencing Departure

The district court sentenced Pavey to a presumptive guidelines sentence of 86 months executed. Pavey argues that the district court abused its discretion by denying her motion for a downward dispositional sentencing departure because her age and amenability to treatment provided "substantial and compelling circumstances" warranting a downward departure.¹

"[Appellate courts] afford the [district] court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion." *State v.*

¹ Pavey does not challenge the district court's denial of her motion for a downward durational departure.

Soto, 855 N.W.2d 303, 307–08 (Minn. 2014) (quotation omitted). “The Minnesota Sentencing Guidelines . . . limit the sentencing court’s discretion by prescribing a sentence or range of sentences that is presumed to be appropriate. *Id.* at 308 (quotation omitted). Only in a rare case will a reviewing court reverse the imposition of a presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

A sentencing court can exercise its discretion to depart downward from the guidelines only if mitigating circumstances are present and those circumstances provide a substantial and compelling reason to depart. *Soto*, 855 N.W.2d at 308. “If the district court has discretion to depart from a presumptive sentence, it must exercise that discretion by deliberately considering circumstances for and against departure.” *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011).

The supreme court has established a list of factors for sentencing courts to consider when deciding whether to grant a downward dispositional departure. *See State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).² One of the *Trog* factors is a defendant’s particular suitability to treatment in a probationary setting. *Id.*; *see also Soto*, 855 N.W.2d at 308.

In this case, the district court considered Pavey’s amenability to treatment and other *Trog* factors and concluded that the factors disfavored a downward dispositional departure. The court noted that Pavey had an extensive juvenile record and charges in two other pending criminal files; she failed to cooperate with the initial investigation; she failed to

² “Numerous factors, including the defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family, are relevant to a determination whether a defendant is particularly suitable to individualized treatment in a probationary setting.” *Trog*, 323 N.W.2d. at 31.

show remorse; she showed “a great lack of respect” by violating the court’s pretrial-release orders; and she lacked familial support to assist her in treatment. The court accordingly deemed Pavey to be unamenable to treatment due to her probation violations, failure to remain law-abiding, and failure to abide by various court-ordered instructions. We conclude that the district court properly exercised its discretion by considering the *Trog* factors and denying Pavey’s downward dispositional departure request.

Affirmed.