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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0422**

State of Minnesota,
Respondent,

vs.

De'Aries Calvin Collins,
Appellant.

**Filed April 15, 2019
Affirmed
Reyes, Judge**

Ramsey County District Court
File No. 62-CR-15-8367

Keith Ellison, Minnesota Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Charles F. Clippert, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Hooten, Judge; and Jesson,
Judge.

UNPUBLISHED OPINION

REYES, Judge

In a direct appeal of his conviction, appellant argues that (1) the district court abused
its discretion by admitting expert gang testimony; (2) he is entitled to a new trial because

the prosecutors presented false testimony; and (3) the district court improperly excluded exculpatory evidence. We affirm.

FACTS

This appeal involves a homicide stemming from a gang rivalry between two St. Paul gangs: the Selby Siders and the Eastside Boyz. On October 14, 2015, members of the Selby Siders attended a vigil in honor of one of their members, N.T., whom a member of the Eastside Boyz killed in 2012. N.T.'s murder led to heightened rivalry between the gangs. Appellant De'Aries Calvin Collins attended the vigil and is a member of the Selby Siders. At the vigil, someone drove up and fired shots into the crowd, killing a man. The Selby Siders believed that the Eastside Boyz were responsible for this murder.

Later that evening, appellant went to S.W.'s home, where appellant appeared upset and stated that the Eastside Boyz were going to pay for the murder at the vigil. The next day, on October 15, appellant again appeared at S.W.'s home looking for D.M., S.W.'s boyfriend. S.W. saw that appellant had a gun. T.B. also came to the home. Appellant, D.M., and T.B. left together in D.M.'s mother's car. D.M. drove, T.B. sat in the front passenger seat, and appellant sat in the back seat. They drove to the Earl Street Bridge in St. Paul, where five members of the Eastside Boyz, including the victim, E.W.-S., were walking. Appellant fired gunshots from the backseat of the car, killing E.W.-S.

Law enforcement arrested appellant on October 21, 2015. The state charged appellant with 20 separate counts, including second-degree murder, second-degree murder while committing a felony, four counts of attempted second-degree murder, and four counts of second-degree assault. The state charged him with ten additional counts alleging

that these crimes were committed for the benefit of a gang. The state’s theory at trial was that appellant shot E.W.-S., a member of a rival gang, as revenge for the killing at the vigil the previous night. The main issue at trial was the identity of the shooter.

A jury found appellant guilty on all 20 counts. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by allowing in expert gang testimony.

Appellant argues that the district court abused its discretion by allowing the state to present expert testimony on gang activity that exceeded the district court’s evidentiary ruling. Appellant also contends that this evidence was irrelevant, inflammatory, unfairly prejudicial, and not helpful to the factfinder. We disagree.

We review a district court’s ruling admitting expert testimony for an abuse of discretion.¹ *State v. Thao*, 875 N.W.2d 834, 840 (Minn. 2016). An expert witness may testify if his or her knowledge will assist the trier of fact in understanding the evidence or resolve an issue of fact. Minn. R. Evid. 702. The state may present expert testimony on gangs when “a defendant has been charged with committing a crime for the benefit of a

¹ The parties dispute whether this court should review the admission of gang testimony for an abuse of discretion or plain error. The state contends that the plain-error standard of review applies because appellant did not object to the gang testimony at trial. Appellant contends that abuse-of-discretion review is appropriate because the district court adopted the motion in limine ruling with respect to the gang testimony in D.M.’s trial. Because the district court ruled on the admission of the gang expert testimony when it ruled on the other motions in limine, we apply the abuse-of-discretion standard. *See State v. Litzau*, 650 N.W.2d 177, 183 (Minn. 2002) (“[A] party need not renew an objection to the admission of evidence to preserve a claim of error for appeal following a ruling on a motion in limine.”).

gang . . . and the testimony adds precision or depth to the jury's ability to reach conclusions about matters that are not within its experience." *Thao*, 875 N.W.2d at 840-41 (quotations and citations omitted). But the fact that gang involvement is an element of the crime does not permit the state to present unlimited expert gang testimony. *State v. Jackson*, 714 N.W.2d 681, 691 (Minn. 2006)

Minnesota appellate courts have upheld the admission of expert testimony in circumstances similar to here. Expert gang testimony consisting of general information about the gang, the gang's hand signals and colors, criminal activities of members, and the role of respect in the gang's culture is admissible. *Jackson*, 714 N.W.2d at 692 (affirming admission of expert testimony regarding Jackson's involvement in gang and that Jackson murdered the victim for "showing disrespect" to gang). Testimony about the gang's criminal activities is helpful in aiding the jury's determination of whether the commission of crimes is one of the primary activities of the gang. *Id.* Testimony about the role of respect in the gang's culture is helpful in establishing the benefit-of-the-gang element and the state's theory of motive. *Id.* In *Thao*, the supreme court upheld expert gang testimony when the issues involved the identity of the shooter, the motivation for the crime, and whether the commission of the crime related to Thao's involvement in a gang. 875 N.W.2d at 841 (expert gang testimony necessary to provide context for state's theory of case and to prove for-the-benefit-of-the-gang element on several charged offenses).

The testimony in this case is very similar to that in *Thao* and *Jackson*. Sergeant Vang-Sitcler testified to his familiarity with the Eastside Boyz and the Selby Siders and that the victim, E.W.-S., was a member of the Eastside Boyz. He testified about the Selby

Siders' criminal activity and their colors, and he explained the rivalry between the Selby Siders and the Eastside Boyz, stating that they have had hostility, shootings, murders, and assaults between each other for nearly a decade. He explained how the murder of N.T. has escalated the violence between the two gangs and that the annual vigil can lead to violence. He further testified to the importance of respect and retaliation in gang culture and that the shooting at the vigil would be an incident that would likely lead to retaliation. He noted that appellant met some of the criteria of being a Selby Siders gang member but never testified that appellant killed E.W.-S.

Here, the state had to prove that appellant acted “for the benefit of, at the direction of, in association with, or motivated by involvement with a criminal gang, with the intent to promote, further, or assist in criminal conduct by gang members.” Minn. Stat. § 609.229, subd. 2 (2014). Understanding the rivalry between the gangs and the tension surrounding the vigil assisted the jury in understanding the motivation for this murder and whether it was done for the benefit of a gang. The state also had to prove that the Selby Siders met the statutory definition of a gang, namely, of having as its primary activities the commission of crimes, whether the gang has a common name or symbol, and whether members engage in or have engaged in criminal activity. *Id.* at subd. 1 (2014). Sergeant Vang-Sitcler provided relevant testimony to establish this element.

Under Minn. R. Evid. 403, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice. While expert gang testimony can be highly prejudicial, it has significant probative value in proving the for-the-benefit-of-a-gang element. *Jackson*, 714 N.W.2d at 692. Sergeant Vang-Sticler's testimony was

undoubtedly prejudicial to appellant, but the danger of unfair prejudice did not significantly outweigh its probative value because of the gang elements that the state had to prove.

Further, even if we were to assume the district court erroneously admitted the expert gang testimony, reversal is only warranted if the error substantially influenced the jury's decision. *State v. DeShay*, 669 N.W.2d 878, 888 (Minn. 2003). Here, another witness, C.W.-S., testified that he was a member of the Eastside Boyz, he was present on the Earl Street Bridge during the shooting, he knew appellant, and appellant is associated with the Selby Siders. He discussed the rivalry between the Eastside Boyz and the Selby Siders and how the rivalry between the gangs escalated after N.T.'s death. Admitting inadmissible expert gang testimony does not substantially influence the jury's decision when it is duplicative of lay-witness testimony establishing the appellant as a member of a criminal gang. *DeShay*, 669 N.W.2d at 888.

II. The district court acted within its discretion by allowing appellant's accomplice, D.M., to testify regarding the identity of the shooter.

Appellant argues that the state improperly compelled D.M. to testify at appellant's trial "when the prosecutor knew and had argued that the testimony was false in [D.M.]'s trial." We disagree.

We review a district court's decision to admit evidence for an abuse of discretion. *State v. Pendleton*, 759 N.W.2d 900, 908 (Minn. 2009). Here, the district court found that the state did not knowingly present false testimony. This case is analogous to *Pendleton*. Pendleton claimed that the state offered false testimony when it presented accomplice testimony because the state challenged aspects of the accomplice's testimony at the

accomplice's own trial. *Id.* at 908. The supreme court noted that, while the state had undoubtedly challenged many aspects of the accomplice's testimony at the accomplice's trial, it did not challenge the portion of the accomplice's testimony during which he stated that he observed Pendleton stab the victim. *Id.* As a result, Pendleton's claim that the state had offered false testimony had no basis. *Id.* at 909.

Here, appellant failed to present any evidence that the state has knowingly offered false testimony. Similar to *Pendleton*, the state challenged D.M.'s minimization of his involvement in the crime during his own trial. But it did not challenge other aspects of the testimony, including that appellant was the shooter, which D.M. testified consistently to in both trials. The issue in this case was not D.M.'s involvement but the identity of the shooter. Therefore, because there is no basis for appellant's claim that the prosecutor knowingly offered false testimony, the district court did not abuse its discretion.

III. The district court did not improperly exclude exculpatory evidence.

Appellant argues that he must be granted a new trial because the state took inconsistent positions on the reliability of two confidential reliable informants' (CRIs) statements that T.B. was the shooter, and the district court erred by preventing him from calling the CRIs as witnesses when they later recanted their statements. We are not persuaded.

A. The state did not improperly take inconsistent positions on the reliability of the statements by the CRIs.

Appellant argues that the state took inconsistent positions with respect to the reliability of the statements by the CRIs because police officers initially relied on the statements to obtain a search warrant but then moved to preclude the defense from presenting the statements at trial, arguing that they were unreliable.

As the state points out, appellant appears to advance a judicial-estoppel argument. The purpose of the doctrine of judicial estoppel is to prevent a party from taking inconsistent positions in a lawsuit. *State v. Pendleton*, 706 N.W.2d 500, 507 (Minn. 2005). There are generally three requirements that must be met: (1) the party presenting the allegedly inconsistent theories must have prevailed in the separate proceeding; (2) there must be a clear inconsistency between the party's two different positions; and (3) there must not be any distinct or different issues of fact in the proceedings. *Id.* The doctrine prevents the state from relying upon factually inconsistent theories and irreconcilable evidence to obtain murder convictions in separate trials for the same murder. *Id.* But this doctrine has not been expressly recognized by Minnesota courts. *Id.* We review the question of whether to apply this doctrine de novo. *Id.*

Law enforcement initially used the CRIs' statements to obtain a search warrant and later, prior to trial, the state opposed the testimony of the CRIs. The state did not succeed in obtaining a conviction based on an inconsistent factual theory in a different case. As a result, this doctrine does not apply.

B. The district court properly excluded the CRIs' statements based on *Dexter*.

Appellant argues that the district court improperly excluded these statements based on *State v. Dexter*, 269 N.W.2d 721 (Minn. 1978) because they were offered as substantive evidence and were admissible under the residual-hearsay exception.

Under Minn. R. Evid. 607, a party may impeach witnesses. However, under *Dexter*, a party is not allowed to offer evidence under “the guise of impeachment” if the evidence is not admissible as substantive evidence. 269 N.W.2d at 721. The *Dexter* issue arises when a witness gives a statement and then recants the statement, and the evidence of the initial statement is not admissible as substantive evidence but is sought to be used as impeachment evidence. *Oliver v. State*, 502 N.W.2d 775, 778 (Minn. 1993). A statement is properly excluded as impeachment evidence when it is clear from the record that the primary reason for calling the witness is to get the recanted statement before the jury. *State v. Hodges*, 384 N.W.2d 175, 184 (Minn. 1986).

In this case, two CRIs stated to law enforcement that T.B. was the shooter, which law enforcement used to obtain a search warrant. They later recanted these statements and denied making any statements relating to the murder to law enforcement. The district court ruled that neither CRI could testify based on *Dexter*. It reasoned that it was clear the CRIs would deny giving statements to the police during their testimony, and thus, the only purpose for which they would be introduced is to impeach their credibility with their prior out-of-court statements.

The parties agree that the CRIs' out-of-court statements are hearsay. If a prior inconsistent statement is admissible as nonhearsay or as an exception to the hearsay rule, there is no *Dexter* problem. *Oliver*, 502 N.W.2d at 778. Prior inconsistent statements are not admissible as substantive evidence if they were not given under oath subject to the penalty of perjury. Minn. R. Evid. 801(d)(1)(A). The CRIs' statements were not made under oath and thus were not admissible as substantive evidence.

Appellant argues that the statements are admissible under Minn. R. Evid. 807. Under the residual-hearsay exception, a statement "having equivalent circumstantial guarantees of trustworthiness" is admissible if (1) the statement is offered as evidence of a material fact; (2) it is more probative on the point for which it is offered than any other evidence that the proponent can procure; and (3) the interests of justice and purposes of the rules of evidence will be served. Minn. R. Evid. 807. Courts use "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." *State v. Robinson*, 718 N.W.2d 400, 408 (Minn. 2006). The district court's determination as to whether a statement falls under a hearsay exception is reviewed for an abuse of discretion. *Holt v. State*, 772 N.W.2d 470, 483 (Minn. 2009).

The district court determined, and we agree, that the statements do not fall under the residual-hearsay exception because they did not have circumstantial guarantees of trustworthiness. Moreover, the statements are uncorroborated. The district court did not abuse its discretion.

Affirmed.