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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1247**

State of Minnesota,
Respondent,

vs.

Duane Cedric Allen,
Appellant.

**Filed June 17, 2019
Affirmed
Larkin, Judge**

Hennepin County District Court
File No. 27-CR-17-5222

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Ross, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his conviction of third-degree criminal sexual conduct, arguing that the district court erroneously concluded that the victim's out-of-court statements to a police officer and to the nurse who performed her sexual-assault exam fell within exceptions to the hearsay rule. Appellant also argues that the district court erred by not awarding him jail credit dating back to the date law enforcement matched his DNA to a sample taken from the victim during her sexual-assault exam. We affirm.

FACTS

On March 1, 2000, C.C. flagged down a police officer near a park in Minneapolis and reported that she had just been raped in the park. The officer transported C.C. to Hennepin County Medical Center (HCMC) where a Sexual Assault Resource Services (SARS) nurse performed a sexual-assault exam. The police attempted to contact C.C. later that month but were unable to do so. The police therefore closed their criminal investigation on March 21.

In 2009, the Hennepin County Sheriff's Office Crime Laboratory received a federal grant to test samples from backlogged sexual-assault cases. In 2010, the crime laboratory lifted an unidentified male DNA profile from vaginal swabs taken during C.C.'s sexual-assault exam and entered the profile into a DNA computer database. In 2013, the crime laboratory learned that the male DNA profile matched a sample in the database belonging to appellant Duane Cedric Allen and notified the Minneapolis Police Department of the match. In 2015, the case was assigned to Sergeant Matthew Wente. Sergeant Wente

contacted C.C. and began looking for Allen. On February 28, 2017, police located Allen and obtained a buccal-swab DNA sample from him. Allen's DNA sample matched the DNA profile obtained from C.C.'s 2000 vaginal swabs.

On March 1, 2017, respondent State of Minnesota charged Allen with third-degree criminal sexual conduct. The case was tried to a jury. Prior to trial, Allen moved to exclude, as inadmissible hearsay, evidence contained in notes taken by the SARS nurse who performed C.C.'s sexual-assault exam. The district court denied the motion, reasoning that the proffered evidence fit "within the medical diagnosis hearsay exception."

At trial, Officer Stot Dunphy of the Minneapolis Police Department testified that at approximately 1:35 a.m. on March 1, 2000, he was flagged down by a woman, whom he later identified as C.C., next to a park in Minneapolis. Officer Dunphy testified that C.C. was "upset and frantic" when he encountered her. When the state asked Officer Dunphy questions regarding C.C.'s statements at the scene, Allen objected on hearsay grounds. The district court overruled the objection, reasoning that C.C.'s statements to Officer Dunphy were excited utterances.

Officer Dunphy testified that C.C. told him that she had "just" been raped in the park. C.C. reported that she had been at a bar before going to the park, that she left the bar in a vehicle along with her sister and three unnamed men they met at the bar, that there was an argument among the occupants of the vehicle regarding whether to drive C.C. home, that she told the occupants of the vehicle she would walk home, and that one of the men in the vehicle offered to walk her home. C.C. reported that she walked through the park with that man and that when they reached the top of a hill, he forced her onto the ground and

raped her. C.C. reported that as she was forced to the ground, she said, “What are you doing?” The man replied, “[Y]ou know what I’m doing and we’re going to get it on.” C.C. described the perpetrator’s physical appearance to Officer Dunphy, but she did not provide any other identifying information. Officer Dunphy testified that he brought C.C. to HCMC for a sexual-assault exam.

The SARS nurse who performed C.C.’s sexual-assault exam testified at trial. The SARS nurse testified that she was 85 years old at the time of trial and had retired from nursing. She testified that when she performed sexual-assault exams, she would explain the nature of the exam to the patients and would ask them to tell her what had happened to them. The SARS nurse testified that she asked for that information to help her determine what specimens to collect for laboratory analysis and what medical treatment was necessary. The SARS nurse testified that she usually took notes to document the patients’ descriptions of the events that caused the need for their examinations and that she took such notes while examining C.C.

The SARS nurse testified that C.C. was “angry, weeping, and afraid” when the nurse met her at HCMC. The SARS nurse read her notes regarding C.C.’s first-person narrative account describing the sexual assault aloud at trial as follows:

My sister was visiting here from Cape Cod. She is going home tomorrow, and we were at a bar tonight and had several drinks.

When we left there, she went with some of the people, and I decided to walk home. This man who had been talking to me—to us, said he’d walk home with me because it wasn’t safe.

We walked a ways, came to the—this park and he . . . just pushed me to the ground and had sex with me. I was afraid to fight him He had seemed nice. . . . [W]hen he was

done, he jumped up and left, and I started walking and ran into a police officer and they brought me here.

C.C. testified that on the night of March 1, 2000, she awoke on a hill in a park, felt what she believed to be a penis sliding out of her vagina, and saw the back of a person walking away from her. Her pants and underwear were “a little above [her] knees” when she woke. She felt terrible and was “wondering what happened.” She flagged down a police officer approximately two or three minutes after she woke and told the officer what had just happened. C.C. testified that she went to the hospital that night. C.C. testified that she had been drinking that evening and that she did not remember other details of the incident. But she also testified that she did not consent to any sexual activity in the park and that she had not engaged in any consensual sexual activity that evening.

The jury found Allen guilty as charged. The district court entered judgment of conviction and sentenced Allen to serve 84 months in prison. The district court awarded Allen 236 days of jail credit dating back to March 2015. Allen appeals, challenging his conviction and the district court’s jail-credit award.

D E C I S I O N

I.

“‘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). “A ‘statement’ is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” Minn. R. Evid. 801(a). Hearsay

is inadmissible unless an exception to the hearsay rule applies. Minn. R. Evid. 802; *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006).

“Evidentiary rulings rest within the sound discretion of the district court, and [appellate courts] will not reverse an evidentiary ruling absent a clear abuse of discretion.” *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). A district court abuses its discretion when its “ruling is based on an erroneous view of the law or is against logic and the facts in the record.” *State v. Bustos*, 861 N.W.2d 655, 666 (Minn. 2015) (quotation omitted). To prevail on appeal, a party usually must show error and prejudice resulting from that error. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981). Accordingly, a district court’s ruling on an evidentiary objection is reviewed for harmless error. *State v. Matthews*, 800 N.W.2d 629, 633 (Minn. 2011). A nonconstitutional error is harmless unless it “substantially influenced the jury’s verdict.” *State v. Morrow*, 834 N.W.2d 715, 729 n.7 (Minn. 2013).

Allen contends that the district court abused its discretion by admitting C.C.’s out-of-court statements to Officer Dunphy and the SARS nurse. We address each contention in turn.

C.C.’s Statements to Officer Dunphy

Allen contends that the district court abused its discretion by allowing Officer Dunphy to testify regarding C.C.’s statements to him when he encountered her near the location of the sexual assault. The district court overruled Allen’s objection to the testimony, reasoning that C.C.’s statements to Officer Dunphy fell under the excited-utterance exception to the hearsay rule.

The excited-utterance exception allows admission of a “statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Minn. R. Evid. 803(2). The rationale for the excited-utterance exception “stems from the belief that the excitement caused by the event eliminates the possibility of conscious fabrication, and insures the trustworthiness of the statement.” *State v. Daniels*, 380 N.W.2d 777, 782 (Minn. 1986).

The basic elements of an “excited utterance” under Minn. R. Evid. 803(2) . . . are (a) that there be a startling event or condition, (b) that the statement relates to the event or condition, and (c) that the statement is made under the stress caused by the event or condition. It is for the [district] court, in the exercise of its discretion in making evidentiary rulings, to determine whether the declarant was sufficiently under the aura of excitement.

State v. Edwards, 485 N.W.2d 911, 914 (Minn. 1992) (quotation and citation omitted).

“There are no strict temporal guidelines for admitting an excited utterance.” *State v. Martin*, 614 N.W.2d 214, 223-24 (Minn. 2000) (quotation omitted).

Allen does not dispute that the first two elements of the excited-utterance exception were established at trial. But he argues that the excited-utterance exception did not justify the admission of C.C.’s statements to Officer Dunphy because the state did not establish that “C.C. was under the stress of excitement when she provided her statement to law enforcement.” Specifically, he argues that it was not “enough for the State to establish that C.C. was frantic when she initially flagged down law enforcement. Instead, the State [had] to prove that C.C. remained frantic when she provided her statement.” Allen concludes that the state did not present such evidence.

Officer Dunphy testified that C.C. was “upset and frantic” when he encountered her. Officer Dunphy also testified that C.C. said that she had been raped and that it had “just happened.” That testimony reasonably suggests that C.C.’s statements to Officer Dunphy occurred just after the sexual assault and that C.C. was under the stress of excitement from the assault when she spoke to Officer Dunphy. Indeed, nothing in the record suggests that there was any appreciable delay between Officer Dunphy’s initial encounter with C.C. and C.C.’s description of the events that had caused her to be “upset and frantic.” Moreover, the SARS nurse testified that C.C. was “angry, weeping, and afraid” when the nurse met her at HCMC. That testimony suggests that C.C. continued to be under the stress of excitement from the sexual assault when she met with the SARS nurse at HCMC.

On this record, there is no basis to conclude that the district court abused its discretion by admitting C.C.’s statements to Officer Dunphy under the excited-utterance exception to the hearsay rule.

C.C.’s Statements to the SARS Nurse

Allen contends that the district court “abused its discretion by allowing the treating nurse to read from her notes that included C.C.’s out-of-court statements because the notes and C.C.’s statements were inadmissible hearsay.”

“Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule” Minn. R. Evid. 805. In a pretrial ruling, the district court denied Allen’s motion to exclude evidence contained in the SARS nurse’s written notes as hearsay, reasoning that the notes fit “within the medical diagnosis hearsay exception because [they were] made for the

purpose of reaching a medical diagnosis and providing treatment, which includes describing a medical history.” The district court further reasoned that, based on the state’s proffer, it was clear that C.C. “knew she was speaking to . . . medical personnel and . . . was there in the hospital for medical reasons.” When ruling on Allen’s motion, the district court did not distinguish between C.C.’s statements to the SARS nurse and the SARS nurse’s notes regarding C.C.’s statements.

The medical-diagnosis exception allows for the admission of “[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.” Minn. R. Evid. 803(4). The rationale behind the medical-diagnosis exception is “the patient’s belief that accuracy is essential to effective treatment.” *State v. Robinson*, 718 N.W.2d 400, 404 (Minn. 2006) (quotation omitted). “This special assurance of reliability also applies to statements concerning the cause of the condition.” *Id.* (quotation omitted).

Allen argues that the SARS nurse’s notes do not fall under the medical-diagnosis hearsay exception because the “notes are [the SARS nurse’s] statements—not C.C.’s.” Allen relies on nonprecedential authority in support of that argument, and we are not aware of any precedential authority supporting it. However, we need not decide whether the district court erred by relying solely on the medical-diagnosis exception so long as the SARS nurse’s notes were properly read at trial. *See id.* at 410 (concluding that because out-of-court statements to nurses were admissible under the residual exception, district court’s error in admitting them under medical-diagnosis exception was harmless); *see also*

State v. Fellegy, 819 N.W.2d 700, 707 (Minn. App. 2012) (“We may affirm the district court on any ground, including one not relied on by the district court.”), *review denied* (Minn. Oct. 16, 2012).

The recorded-recollection exception allows for the admission of

[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’ memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Minn. R. Evid. 803(5).

The SARS nurse’s notes described statements that C.C. had made during a sexual-assault exam that had occurred approximately 18 years before the trial in this case. The SARS nurse’s testimony established that she took those notes contemporaneously with C.C.’s sexual-assault exam and that they accurately reflected what C.C. told her during the exam. In addition, the record shows that the SARS nurse had insufficient recollection to testify fully and accurately. For example, the SARS nurse testified that she examined C.C. 18 years earlier, at “about the end of [her] career as a SARS” nurse, and she needed to look at her report regarding C.C.’s sexual-assault exam multiple times to refresh her recollection regarding that exam. Lastly, the SARS nurse read her notes aloud; the written notes were not received as an exhibit. Under the circumstances, the SARS nurse’s notes were properly read to the jury under the recorded-recollection exception to the hearsay rule.

Allen also argues that the statements in C.C.’s first-person narrative account regarding the sexual assault, which were read aloud by the SARS nurse at trial, “were not related to any treatment or diagnosis of C.C. and were therefore not admissible under the medical diagnosis hearsay exception.” (Emphasis omitted.)

C.C.’s statements to the SARS nurse that a man pushed her to the ground at the park and had sex with her, that she was afraid to fight him, and that he jumped up and left when he was done described “the inception or general character of the cause or external source” of C.C.’s present need for treatment and were “reasonably pertinent to diagnosis or treatment.” See Minn. R. Evid. 803(4). Other statements in C.C.’s narrative account—that she had been at a bar drinking with her sister, that a man said he would walk home with her, that the man had “seemed nice,” and that she ran into a police officer after the assault—are not probative regarding why C.C. needed treatment. But those statements neither alleged nonconsensual sexual conduct nor provided a physical description of the alleged perpetrator. For those reasons, they did not incriminate Allen and their admission was harmless. See *State v. Sanders*, 775 N.W.2d 883, 888 (Minn. 2009) (concluding that admission of evidence was harmless in part because evidence was not incriminating). In sum, even if the district court erred by allowing the SARS nurse to read all of C.C.’s statements in the nurse’s notes, the error was harmless.

II.

Allen contends that the “district court erred by denying [him] custody credit for the time he spent in custody [on other offenses] after the state had matched his DNA to the alleged crime on July 31, 2013.”

A criminal defendant is entitled to jail credit for time “spent in custody in connection with the offense or behavioral incident.” Minn. R. Crim. P. 27.03, subd. 4(B). “The defendant bears the burden of establishing entitlement to credit for time spent in custody during criminal proceedings.” *State v. Johnson*, 744 N.W.2d 376, 379 (Minn. 2008). “A district court’s decision whether to award credit is a mixed question of fact and law; the court must determine the circumstances of the custody the defendant seeks credit for, and then apply the rules to those circumstances.” *Id.* Appellate courts review the factual findings underlying jail-credit determinations for clear error, but review questions of law de novo. *State v. Clarkin*, 817 N.W.2d 678, 687 (Minn. 2012); *see also Johnson*, 744 N.W.2d at 379 (“The decision to award custody credit is not discretionary with the district court.”).

A defendant may receive jail credit for time spent in custody on another offense before being charged with the offense of conviction. *Clarkin*, 817 N.W.2d at 689-90. In which case, jail credit is appropriate for

time spent in custody after the date when (1) the State has completed its investigation in a manner that does not suggest manipulation by the State, and (2) the State has probable cause and sufficient evidence to prosecute its case against the defendant with a reasonable likelihood of actually convicting the defendant of the offense for which he is charged.

Id. at 689.

Prior to the sentencing hearing, Allen requested jail credit from “the date that his DNA was matched to the DNA taken from the victim (7/31/13), which would be 578 days.” At the sentencing hearing, defense counsel noted the original request for “jail credit to be

given as far back as 2013” and stated that jail credit dating back to 2013 was Allen’s first request. Defense counsel then stated, “However, I think that the more solid credit date supported by the *Clarkin* Rule would have to be March of 2015, because that is when the state had all of the evidence they needed to produce the charges.” The state argued that the district court should award Allen jail credit dating from “2015 . . . at the earliest, and then perhaps even 2017,” when Sergeant Wentz was “able to get [Allen] into custody.”

The district court awarded jail credit back to March 2015, for an award of 236 days.

The district court thoroughly explained its rationale as follows,

I’m aware that the standard really is whether or not a prosecution is viable, but . . . by awarding credit back to the time when prosecution is viable, I agree with [defense counsel] that it’s to prevent the manipulation of the charging decision to prejudice the defendant. And, here . . . I accept the notion that the state needed a confirmatory DNA [match] and therefore did a buccal swab and they didn’t get it until 2017. And I . . . get why they didn’t get it until 2017, but they started looking for it in 2015, and . . . malfeasance in the . . . police department where people were not matched up to the jail’s records is certainly not [Allen’s] fault, and I don’t know if [the] state could manipulate the time filing by that, so that’s why I went back to 2015. I considered going back to 2013 because I can’t see any reason why . . . there was a two-year delay between the [DNA database] match and notice of the match at which time they could have been working on finding [Allen]—and he was in custody during that period, from 2013 to 2015—but decided against it, using the middle date instead.

Allen argues that the district court erred by not awarding him jail credit dating back to 2013 because “[t]he State’s investigation was complete at that point, charges could have been filed, and an arrest warrant could have been sought.” He argues that “[t]he State’s failure to charge [him] on July 31st” can “only be seen as the State’s failure, and a potential

manipulation by the State to wait until [he] was out of custody to file the charge against him.”

Trial testimony regarding the investigation timeline, which Allen does not appear to dispute, explains why the state did not charge Allen in 2013. Former Sergeant Jane Emberly of the Minneapolis Police Department testified that she closed the case regarding the March 1, 2000 sexual assault because C.C. had not responded to multiple police contacts. A former forensic scientist for the crime laboratory testified that in 2013, the laboratory notified the Minneapolis Police Department of the DNA match between the male profile obtained from C.C.’s vaginal swabs and the DNA profile in the DNA computer database for Allen. Sergeant Wentz testified that the case was assigned to him in 2015 and that he contacted C.C. and began looking for Allen.

Allen points out that “the prosecutor agreed at the sentencing hearing that the State could not explain why the case was not pursued in 2013.” The district court similarly stated that it is unclear why there was a two-year gap between notification of the DNA match and investigation of the case by Sergeant Wentz. But the manipulation concern in jail-credit cases is based on intentional charging delays by the prosecution, and not investigation delays by the police. *See, e.g., Clarkin*, 817 N.W.2d at 689-90 (noting that the *Clarkin* test “benefits defendants by reducing the possibility of manipulation by the State when it makes *charging* determinations” and finding “no evidence of *prosecutorial* manipulation” (emphasis added)).

For example, in *State v. Folley*, the prosecutor intentionally delayed charging the defendant with criminal sexual conduct until he was released from custody on a driving

while impaired (DWI) charge. 438 N.W.2d 372, 374 (Minn. 1989). There was evidence in the record that the investigation of the criminal-sexual-conduct charges was completed before the defendant was arrested for the DWI and that the police told him, one or two days after his arrest, that he would be charged with sex crimes. *Id.* at 374-75. The defendant did not post bail, was acquitted of the DWI charge, and the state charged him with criminal sexual conduct before he could be released after his acquittal. *Id.* at 374. Based on the prosecutor's actions, the supreme court concluded that the defendant should have been given jail credit from the date of his arrest for the DWI charge. *Id.* at 374-75.

Allen argues that the state's investigation was complete when it received the DNA match in 2013 because there was probable cause to charge him at the time. But the triggering event under the *Clarkin* test is not just probable cause to charge, it is "probable cause *and sufficient evidence to prosecute [the] case against the defendant with a reasonable likelihood of actually convicting the defendant of the offense for which he is charged.*" 817 N.W.2d at 689 (emphasis added). The test is intended to discourage the state from "charg[ing] defendants at a point in time earlier than when that charging decision is appropriate or can be justified." *Id.* In 2013, the police had not communicated with C.C. regarding the allegations in over a decade and had not attempted to locate Allen. Thus, the state did not have sufficient evidence to prosecute the case against Allen with a reasonable likelihood of obtaining a conviction.

Allen had the burden of establishing entitlement to jail credit dating back to 2013, including any alleged prosecutorial manipulation of the state's charging decision. Allen recognizes that the prosecutor did not know why there was a two-year delay in the

investigation of this case following the DNA match. And he does not point to any evidence in the record indicating that the prosecutor intentionally delayed charging to extend Allen's imprisonment or that the prosecutor even knew that he was in custody at the relevant time. In sum, the record does not show prosecutorial manipulation of the charging decision or that the state had sufficient evidence to prosecute Allen with a reasonable likelihood of obtaining a conviction in 2013. The district court therefore did not err by refusing to award Allen jail credit dating back to July 31, 2013.

Affirmed.