

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1887**

State of Minnesota,
Respondent,

vs.

Charles Fornizy,
Appellant.

**Filed November 25, 2019
Affirmed
Reyes, Judge**

Norman County District Court
File No. 54-CR-18-102

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

James D. Brue, Norman County Attorney, Ada, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Tracy M. Smith, Judge; and Peterson, Judge.*

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

UNPUBLISHED OPINION

REYES, Judge

In this direct appeal from his conviction of and sentence for threats of violence and domestic assault, appellant argues that the district court erred by admitting the victim's out-of-court statement as a prior consistent statement because it differed materially from the victim's in-court testimony and prejudiced appellant. We affirm.

FACTS

Appellant Charles Fornizy and victim R.B. have known each other for about 21 years. On April 11, 2018, R.B. resided at the house of her mother, J.B. Appellant had also been residing there for the past several weeks while helping care for J.B. R.B. and appellant argued for hours before R.B. called 911. When the sheriff's deputy arrived in response to the 911 call, he took recorded statements from R.B. and J.B. The state charged appellant with threats of violence under Minn. Stat. § 609.713, subd. 1, and domestic assault, under Minn. Stat. § 609.2242, subd. 4.

On July 31, 2018, the district court held a one-day jury trial which included R.B.'s testimony, R.B.'s 911 phone call, R.B.'s prior out-of-court recorded statement, J.B.'s testimony, and J.B.'s prior out-of-court recorded statement to the sheriff's deputy. Appellant also testified in his defense. At trial, R.B. testified that appellant threatened her, but she could not recall what he said. In addition, R.B. did not testify that appellant touched or hit her. The state admitted into evidence R.B.'s 911 call without objection. In that call, R.B. stated that appellant was "saying he's going to kill me," and that appellant "grabbed the phone and hit me in the face." Appellant can also be heard yelling menacingly at R.B.,

and R.B. can be heard crying out after what appears to be the sound of something striking her phone. In R.B.'s out-of-court recorded statement to the sheriff's deputy, she said that "he was ranting and raving, threatening me," and "[w]hen I called 911 he hit me in the face and he pulled my hair and tried to grab the phone." At issue on appeal is the admissibility of the recorded statement R.B. gave to the sheriff's deputy.

J.B. testified that appellant "went over to [R.B.] and grabbed her by the hair," and "said he was gonna kill [R.B.] and the friends she had." In this statement, J.B. said that "all of a sudden he went for [R.B.] and he grabbed her by the hair and the arm," and "tried to get her phone away from her," and "rattle[d] on about killing [R.B.] and killing that boyfriend."

Appellant objected to the admission of R.B.'s out-of-court recorded statement to the sheriff's deputy as hearsay. He also objected to J.B.'s out-of-court recorded statement, but agreed that it was "even more consistent than that of [R.B.]" After considering the arguments of both parties and listening to R.B.'s out-of-court recorded statement, the district court admitted it as a prior consistent statement. The jury returned a unanimous verdict of guilty on both charges of threats of violence and domestic assault. The district court sentenced appellant to 18 months in prison, stayed the sentence for five years, and placed him on probation. This appeal follows.

DECISION

I. Any alleged error in admitting R.B.'s out-of-court recorded statement as a prior consistent statement is harmless.

Appellant argues that the district court erred by admitting R.B.'s out-of-court recorded statement to the sheriff's deputy because it differed materially from R.B.'s in-court testimony by providing more detail and including key facts about which appellant failed to testify. Appellant contends that this wrongful admission did not constitute harmless error because it prejudiced him. We conclude that any alleged error is harmless.

Hearsay is a generally inadmissible out-of-court statement offered "to prove the truth of the matter asserted." Minn. R. Evid. 801(c), 802. But a prior out-of-court statement is not hearsay if "[t]he declarant testifies . . . and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility." Minn. R. Evid. 801(d)(1). Furthermore, admitting an out-of-court statement that is "cumulative, and merely corroborate[s] other [evidence]" is harmless error. *State v. Washington*, 521 N.W.2d 35, 42 (Minn. 1994).

We review a district court's decision to admit evidence under the abuse-of-discretion standard. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Even if the district court abuses its discretion, an appellant has no right to a new trial if the error is harmless. *State v. Robinson*, 718 N.W.2d 400, 407 (Minn. 2006). To avoid a finding of harmless error, appellant must show prejudice to him. *See State v. Hall*, 764 N.W.2d 837, 841 (Minn. 2009). A district court's erroneous admission of a prior statement under Minn. R. Evid.

801(d)(1)(B) in a criminal prosecution does not prejudice an appellant when the statement does not substantially influence the jury to convict the appellant. *See State v. Brown*, 455 N.W.2d 65, 70 (Minn. App. 1990), *review denied* (Minn. July 6, 1990).

Appellant does not challenge the district court's admission of the 911 call, J.B.'s out-of-court recorded statement, or the admissibility of J.B.'s testimony on appeal. Instead, appellant focuses on R.B.'s prior statement being inconsistent with her limited trial testimony.

As to the charge of making threats of violence, appellant argues that R.B.'s testimony about appellant's threat was potentially vague enough to prevent the jury from convicting him. As to the charge of domestic assault, appellant points out that R.B. never testified that appellant assaulted her. But, even if we were to assume, without deciding, that the statement was improperly admitted as a prior consistent statement, its admission did not prejudice appellant because it was cumulative of properly admitted evidence. *See State v. Washington*, 521 N.W.2d at 42.

The 911 phone call, J.B.'s statement to the sheriff's deputy, and J.B.'s trial testimony each include consistent statements that appellant threatened to kill R.B. They each also provide consistent accounts of appellant striking R.B. R.B.'s out-of-court recorded statement is cumulative of and corroborates this evidence.

Appellant argues that J.B.'s biased testimony compounded the prejudice resulting from R.B.'s out-of-court recorded statement, further improperly influencing the jury. But on appeal, we defer to the jury's determination of the credibility of witnesses. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982). In addition, the jury convicted appellant based

on more than just J.B.'s testimony or R.B.'s out-of-court recorded statement. They also considered the 911 phone call and J.B.'s out-of-court recorded statement to the sheriff's deputy.

Because R.B.'s out-of-court recorded statement is cumulative of and corroborates other evidence that supports appellant's convictions, we cannot say that its admission substantially influenced the jury to convict appellant. As a result, appellant did not suffer prejudice, and we conclude that its admission, even if improper, amounted to harmless error.

Affirmed.