

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0615**

State of Minnesota,
Respondent,

vs.

Hussein Abdulahi Ahmed,
Appellant.

**Filed March 1, 2021
Affirmed
Reilly, Judge**

Olmsted County District Court
File No. 55-CR-17-2065

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

Mark A. Ostrem, Olmsted County Attorney, Jennifer D. Plante, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

James McGeeney, Doda McGeeney, Rochester, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Florey, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

Appellant retained private counsel after the state charged him with second-degree criminal sexual conduct. Before trial, the supreme court suspended appellant's counsel from the practice of law. Appellant requested that his trial be indefinitely continued to a

time when his counsel could try the case, and the district court denied appellant's request. At trial, the district court admitted out-of-court statements made by the child-victim under the residual hearsay exception. The jury found appellant guilty. In this appeal, appellant challenges (1) the district court's denial of his continuance request on the ground that it violated his Sixth Amendment right to counsel of his choice, and (2) the district court's admission of the four out-of-court statements on the ground that they were not trustworthy. We affirm.

FACTS

In March 2017, respondent State of Minnesota charged appellant Hussein Abdulahi Ahmed with second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a) (2016). Soon after, appellant retained private counsel. At a pretrial hearing in March 2019, appellant's attorney (attorney) made comments about the judge assigned to try his case to the prosecuting attorney. Attorney stated that he would be afraid to be a male defendant and that "a black male would have received 48 months in prison" for an offense that the judge would not "even give [a white female defendant] 30 days." The prosecuting attorney then notified the judge of attorney's comments and sought an advisory opinion from the Board of Professional Responsibility.

For events not connected to this case, the supreme court suspended attorney from the practice of law beginning on April 22, 2019. Attorney was eligible for reinstatement on June 21, 2019. Ten days before attorney's suspension went into effect, attorney sent a letter to the judge informing her of his suspension and requesting that "this case be re-scheduled for a date that will allow me to serve as [appellant's] trial counsel." At the

direction of the Chief Judge of the district, the judge continued the jury trial and removed herself from the case. The district court rescheduled appellant's trial to begin in May, the following month, before a different district court judge.

After the case was continued, attorney sent the Chief Judge a letter stating that scheduling appellant's trial to take place during a time when attorney could not represent him, without explanation, was "a blatant violation of the 6th Amendment, which has been construed to provide a criminal defendant with the constitutional right to hire paid counsel of his/her choice." The Chief Judge responded by letter and stated that the case was "well beyond the timing standards set by the Supreme Court for serious felony offenses" and it was thus "imperative that this file be given scheduling priority." The Chief Judge also noted that "the reason the jury trial was continued was due to [attorney's] very public comments that [the judge] could not be fair and impartial to [attorney's] client" and that another complicating factor was "the suspension of [attorney's] license to practice law."

Appellant appeared pro se at his next pretrial hearing and stated that he would like to continue his trial until attorney could represent him. The district court declined to continue the case. Appellant retained counsel (trial counsel) in place of attorney and on May 7, 2019, trial counsel requested a continuance so that he could prepare for trial. The district court granted the continuance and scheduled appellant's trial for July 22, 2019. Trial counsel did not argue that the district court violated appellant's Sixth Amendment rights. On June 28, 2019, attorney was conditionally reinstated to the practice of law subject to his successful completion of the Minnesota Professional Responsibility

Examination by April 8, 2020. *In re Disciplinary Action Against French*, 930 N.W.2d 437 (Minn. 2019).¹

At trial, respondent sought to introduce out-of-court statements made by the five-year-old child-victim under Minn. R. Evid. 807 or under Minn. Stat. § 595.02, subd. 3 (2018). The child-victim made statements to her mother, a police officer, and a forensic interviewer.² The child-victim told her mother that appellant “wanted to see [her] panties” and that appellant kissed her on the mouth, pulled her panties down, and rubbed her butt. The child-victim told the police officer that appellant kissed her on the lips and touched her butt. And the child-victim told the forensic interviewer that appellant asked to see her panties, kissed her on the lips, pulled her pants down, and rubbed her bottom.

Appellant argued that the child-victim’s statements were inconsistent and untrustworthy, and thus inadmissible. The district court disagreed and admitted all of the out-of-court statements into evidence under Minn. R. Evid. 807. The jury found appellant guilty of second-degree criminal sexual conduct and the district court sentenced him to 120 days in county jail. This appeal followed.

¹ Attorney did not petition for reinstatement until January 2, 2020, asserting that he received notice that he achieved a passing score on the Minnesota Professional Responsibility Examination on December 12, 2019.

² Before trial respondent gave notice that it intended to offer statements that appellant’s wife made to law enforcement to show that appellant and the child-victim were alone together at the home. In other words, to show that appellant had the opportunity to assault the child-victim. Thus at trial, trial counsel did not argue, and the district court did not analyze, these out-of-court statements under a rule 807 analysis.

DECISION

I. The district court did not violate appellant's Sixth Amendment right to choice of counsel by denying his request for a continuance.

Appellant argues that we must reverse his conviction because the district court violated his Sixth Amendment right to choice of counsel “in finding that the scheduling of [a]ppellant’s trial for a time when his chosen attorney was not available was reasonable under the circumstances.” “Claimed Sixth Amendment violations are subject to de novo review.” *State v. Taylor*, 869 N.W.2d 1, 19 (Minn. 2015). And if we determine that a Sixth Amendment violation occurred, the violation is considered a structural error that is not subject to harmless-error review. *State v. Camacho*, 561 N.W.2d 160, 171 (Minn. 1997). In other words, if the district court’s denial of the continuance request violated appellant’s Sixth Amendment rights, the error requires automatic reversal of his conviction for a new trial without an evaluation of prejudice.

The Sixth Amendment guarantees a defendant the right to the assistance of counsel in criminal cases. U.S. Const. amend. VI; Minn. Const. art. I, § 6. “[C]omprehended” by this guarantee is “the right to select and be represented by one’s preferred attorney.” *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 1697 (1988). The choice-of-counsel is thus part of the overall right-to-counsel guarantee. *See State v. Courtney*, 696 N.W.2d 73, 81 (Minn. 2005) (“We recognize that a defendant’s constitutional right to assistance of counsel includes a fair opportunity to secure counsel of his own choice.”).

But this right is not absolute and is constrained in several respects, including, for instance, that “an advocate who is not a member of the bar may not represent clients (other

than himself) in court.” *Wheat*, 486 U.S. at 159, 108 S. Ct. at 1697. The right to counsel is also limited by the broad discretion that must be afforded trial courts concerning continuances. *Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 1616 (1983). The mere fact that the denial of a continuance may restrict an attorney’s ability to represent a defendant does not necessarily violate the Sixth Amendment. *Id.* at 11, 103 S. Ct. at 1616. Rather, “only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel.” *Id.* at 11-12, 103 S. Ct. at 1616 (quotation omitted).

Here, the district court’s denial of appellant’s request that it continue his trial until attorney’s license was no longer suspended was not “unreasoning and arbitrary.” First, while suspended from the practice of law, attorney was not a member of the bar and appellant could not insist that an attorney with a suspended license represent him at trial. Second, appellant’s trial had been postponed well beyond the timing standards set by the Minnesota Supreme Court for serious felony offenses³ and there was no guarantee when, or *if*, attorney would satisfy the conditions of his suspension and be reinstated despite his eligibility date. Considering that appellant did not request that the trial be held *before* attorney’s suspension went into effect, the district court was under no obligation to grant appellant an indefinite continuance until attorney *might* be able to practice law again.

Because the district court’s denial of appellant’s continuance was not an “arbitrary insistence upon expeditiousness in the face of a justifiable request for delay,” we conclude

³ Respondent filed charges against appellant in March 2017. The district court scheduled appellant’s trial for April 2019.

that the district court did not violate appellant's Sixth Amendment right to choice of counsel.

II. The district court did not err by admitting the child-victim's out-of-court statements.

Appellant argues that he is entitled to a new trial because the district court abused its discretion by admitting four hearsay statements made by the child-victim to her mother, a police officer, a forensic interviewer, and appellant's wife. We disagree. After a careful review of the record, we determine that the district court did not abuse its discretion when it properly admitted the out-of-court statements made by the child-victim to her mother, a police officer, and a forensic interviewer under rule 807 of the Minnesota Rules of Evidence. The record does not, however, support appellant's assertion that the district court admitted the out-of-court statement made by the child-victim to appellant's wife under rule 807. Rather, appellant never tendered an objection to this testimony and so the district court was never asked to determine the statement's admissibility. Because the introduction of this fourth statement did not constitute plain error, appellant is not entitled to relief. We address each of appellant's evidentiary challenges in turn.

A. The district court did not abuse its discretion by admitting the child-victim's out-of-court statements to her mother, a police officer, and a forensic interviewer under Minn. R. Evid. 807.

"Evidentiary rulings rest within the sound discretion of the district court, and we 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 it acts arbitrarily, without justification, or in contravention of the law." *State v. Mix*, 646 N.W.2d

247, 250 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). Appellant bears “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).

“‘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). Hearsay is generally not admissible unless an exception to the hearsay rule applies. *State v. Vangrevenhof*, 941 N.W.2d 730, 736 (Minn. 2020) (citing Minn. R. Evid. 802). The residual exception under rule 807 of the Minnesota Rules of Evidence “allows admission of statements not falling under one of the accepted hearsay exceptions that have ‘equivalent circumstantial guarantees of trustworthiness.’” *State v. Ahmed*, 782 N.W.2d 253, 259 (Minn. App. 2010) (quoting Minn. R. Evid. 807).

District courts conduct a two-step analysis to determine whether to admit hearsay statements under rule 807. *State v. Hallmark*, 927 N.W.2d 281, 292 (Minn. 2019). First, the district court must examine the totality of the circumstances to determine whether the hearsay statement is trustworthy. *Id.* The relevant circumstances are those “actually surrounding the making of the statements.” *Ahmed*, 782 N.W.2d at 260. In cases involving a child-victim, these circumstances include:

Whether the statement was spontaneous, whether the questioner had a preconceived idea of what the child should say, whether the statement was in response to leading questions, whether the child had any apparent motive to fabricate, whether the statements are of the type one would expect a child of that age to fabricate, whether the statement remained consistent over time, and the mental state of the child at the time of the statements.

Id. Second, the district court must determine whether the three enumerated requirements of rule 807 are met. *Hallmark*, 927 N.W.2d at 293. They require that (1) the statement relate to material fact, (2) the statement be more probative on the point for which it is offered than any other evidence that can be secured through reasonable efforts, and (3) the admission of the statement into evidence serves the purposes behind the Minnesota Rules of Evidence and the interests of justice. Minn. R. Evid. 807.

The district court admitted three out-of-court statements by the child-victim to her mother, a police officer, and a forensic interviewer under rule 807. On appeal, appellant does not challenge the district court's finding that the child-victim's statements met the enumerated requirements of Minn. R. Evid. 807.⁴ Instead, appellant argues that because the "district court found the inconsistencies in the [child-victim's] statement to be peripheral," the district court erred in determining the statements were trustworthy. We disagree.

The district court found that at trial, the child-victim could not remember whether appellant touched her butt and was confused about what clothing she was wearing the day of the sexual assault. In so finding, the district court noted that "if you call loss of memory of a five[-] . . . year-old over a three-year period inconsistency, well there's that inconsistency." The district court however considered the totality of the circumstances surrounding the making of the statements and found that the child-victim had no motive to

⁴ The district court found that the statements met the enumerated requirements of rule 807 because the statements related to a material fact, were more probative on the point for which they were offered than any other evidence, and the interests of justice were furthered by the admission of the statements.

fabricate the statements which concerned “pretty specific sexual allegations” and were not of the type that “any five-year-old would talk about.” The district court also considered that the child-victim did not make the statements in response to any leading questions; instead, the district court found that the child-victim’s statement to her mother was “out of the blue.” The district court ultimately found that “[t]he core of the [child-victim’s] statements” that appellant kissed her on the mouth, pulled her panties down, and rubbed her butt, “remained the same” from the first time that she stated that appellant sexually assaulted her throughout the duration of the case; the statements were “worthy of belief”; and the general purpose of the Minnesota Rules of Evidence would be furthered by the admission of the statements.

The district court did not act arbitrarily, without justification, or in contravention of the law by finding that under the totality of the circumstances, the child-victim’s statements were trustworthy. We thus conclude that the district court did not abuse its discretion by admitting the statements under Minn. R. Evid. 807.

B. The district court did not plainly err when it admitted the child-victim’s out-of-court statements to appellant’s wife.

At trial, appellant’s wife testified that the child-victim told her that “[a]ppellant wanted to see her panties” and that the sexual assault occurred on April 3. Appellant did not object. Appellant now argues that the district court abused its discretion in admitting these statements under rule 807 as well. But this mischaracterizes the record. As discussed above, the district court did specifically admit three out-of-court statements made by the child victim to her mother, a police officer, and the forensic interviewer under rule 807.

But because appellant did not object to the out-of-court statement of the child-victim to appellant's wife, the district court was not provided an opportunity to rule on its admissibility under rule 807 or on any other basis.

“In the absence of an objection, we may review the admission of evidence for plain error.” *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006) (citing Minn. R. Crim. P. 31.02). Plain error requires the defendant to show “(1) error (2) that was plain and (3) that affected the defendant's substantial rights.” *Id.* If all three requirements are met, we determine whether it is “necessary to address the error to ensure the fairness and integrity of the judicial proceedings.” *Id.* To constitute plain error, the error “must have been so clear under applicable law at the time of conviction, and so prejudicial to the defendant's right to a fair trial, that the defendant's failure to object—and thereby present the trial court with an opportunity to avoid prejudice—should not forfeit his right to a remedy.” *Id.* (quotation omitted).

On their face, the statements by respondent's wife that the child-victim told her that appellant “wanted to see her panties” and that “it happened on Sunday” appear to be hearsay. See Minn. R. Evid. 801(c) (defining hearsay as “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”). The Minnesota Rules of Evidence bar the admission of hearsay unless it fits under one of the many exceptions to the hearsay exclusionary rule. See Minn. R. Evid. 802 (barring the admission of hearsay); Minn. R. Evid. 803, 804 (providing exceptions to the hearsay exclusionary rule). The vast number and variety of exceptions to the hearsay exclusionary rule, therefore, “make objections to such testimony

particularly important to the creation of a record of the trial court's decision-making process in either admitting or excluding a given statement." *Manthey*, 711 N.W.2d at 504. And "[t]he complexity and subtlety of the operation of the hearsay rule and its exceptions make it particularly important that a full discussion of admissibility be conducted at trial." *Id.*

Because appellant did not object, respondent did not have the opportunity to argue which of the many exceptions to the hearsay rule applied to these out-of-court statements made by the child-victim. And even if the statements were inadmissible hearsay, their admission unlikely affected the verdict. The child-victim testified that appellant "asked me to let him see my underwear." The child-victim's mother, the forensic interviewer, and appellant's brother-in-law testified that the child-victim stated that appellant wanted to see her panties. And the date on which the sexual assault occurred is not clear. The child-victim's mother testified that the child-victim told her that appellant asked to see her panties on April 6, but that she believed it happened on April 4. The police officer testified that the child-victim told him that the sexual assault happened on April 6. Thus, the evidentiary value of appellant's wife's statements was not all that strong.

It is not clear that the statements made by appellant's wife were inadmissible hearsay, and even if they were, the evidentiary value of the statements was so weak that their admission unlikely affected the verdict. We conclude that the district court did not plainly err by admitting the statements by appellant's wife.

Affirmed.