

*This opinion is nonprecedential except as provided by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
A20-0922**

State of Minnesota,
Respondent,

vs.

Ronald James Cartharn,
Appellant.

**Filed August 23, 2021
Affirmed
Florey, Judge**

Hennepin County District Court
File No. 27-CR-19-21587

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

Michael O. Freeman, Hennepin County Attorney, Nicole S. Cornale, 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 Connolly, Presiding Judge; Reyes, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

In this direct appeal from the judgment of conviction for first-degree criminal sexual conduct, appellant Ronald James Cartharn argues that the district court erred in concluding that the state had provided sufficient foundation to introduce four audio clips from a

recorded phone call. Because we conclude that the district court did not abuse its discretion in making this evidentiary ruling, we affirm.

FACTS

The state charged appellant Ronald James Cartharn with first-degree criminal sexual conduct, third-degree criminal sexual conduct, and domestic assault by strangulation. The complaint alleged that Cartharn violently and sexually assaulted the victim, who had been living in a hotel room with him, by strangling her and forcing intercourse upon her.

The case proceeded to a jury trial. The victim testified to her memory of the purportedly hours-long incident, which was consistent with the allegations in the complaint. She also claimed that her friend, B.M., was on the phone with her during the assault and that she had placed the phone under a pillow while her friend recorded the audio. Later, the victim testified, her friend sent her four audio recordings of portions of the phone call through Instagram. She testified that she had listened to the recordings and that they depicted “what happened in that hotel room.”

The victim played the four recordings for a Hennepin County Attorney’s Office investigator during a recorded interview. At trial, the state introduced an audio recording of that interview—including the portion of the interview in which the victim played the Instagram recordings. Cartharn objected to the evidence, asserting that the state had failed to establish a sufficient foundation to introduce it. The district court, however, overruled the objection, concluding that the victim’s testimony was sufficient to establish an adequate foundation.

The jury ultimately found Cartharn guilty of all three counts.¹ The district court entered a judgment of conviction on the first-degree criminal-sexual-conduct count and the domestic-assault count. The court sentenced Cartharn to 168 months' imprisonment. This appeal follows.

DECISION

Cartharn argues that the district court erred by allowing the state to introduce the Instagram recordings at trial. We review a district court's evidentiary rulings, including a ruling on foundation, for an abuse of discretion. *Dolo v. State*, 942 N.W.2d 357, 362 (Minn. 2020); *Turnage v. State*, 708 N.W.2d 535, 542 (Minn. 2006); *State v. Farah*, 855 N.W.2d 317, 320 (Minn. App. 2014), *review denied* (Minn. Dec. 30, 2014).

The proponent of evidence must establish an adequate foundation for the evidence to be admissible. *See Turnage*, 708 N.W.2d at 542; *see also* Minn. R. Evid. 901(a). The supreme court has identified seven “foundational elements” that the proponent of an audio recording must establish before the audio recording may be admitted:

(1) [A] showing that the recording device was capable of taking testimony; (2) a showing that the operator of the device was competent; (3) establishment of the authenticity and correctness of the recording; (4) a showing that changes, additions and deletions have not been made; (5) a showing of the manner of the preservation of the recording; (6) identification of the speakers; and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement.

¹ Because the only issue raised in this appeal is the sufficiency of the foundation for the Instagram recordings, we have omitted a full description of the voluminous evidence introduced in this case and only focus on the circumstances relevant to that issue.

Turnage, 708 N.W.2d at 542 (quotation omitted). One method of establishing a foundation for evidence is by the testimony of a witness that the evidence is what the proponent claims it to be. See Minn. R. Evid. 901(b)(1).²

Cartharn argues that the district court abused its discretion because the state failed to establish the seven foundational elements required to introduce the recordings.³ The state argues that the foundational elements did not apply, and that even if they did, the state laid a sufficient foundation.

We are not persuaded by the state’s argument that the foundational elements discussed in *Turnage* did not apply to the audio recordings at issue here. The state’s argument is easily dismissed after a close reading of the case it primarily relies upon. In *In re Welfare of S.A.M.*, 570 N.W.2d 162, 165-67 (Minn. App. 1997), we concluded that the foundational elements did not apply to a *video* recording, noting that video recordings are inherently more reliable than audio recordings. And although we may have questioned

² The parties agree that the recordings at issue here—the Instagram recordings—were duplicate recordings of the original audio recordings. “A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.” Minn. R. Evid. 1003. Although Cartharn argues that the Instagram recordings might not have been authentic, he does not expressly contend that this duplicate recording was inadmissible under rule 1003.

³ Cartharn also argues that the district court abused its discretion by entirely failing to consider the foundational elements when it ruled on the admissibility of the recordings. We do not address this argument because even if the district court abused its discretion in this way, we would only reverse if the error was prejudicial—necessarily requiring a conclusion that the recordings were actually inadmissible because they did not meet the foundational elements. *Dolo*, 942 N.W.2d at 362-63; see also Minn. R. Crim. P. 31.01. Thus, we focus our attention on Cartharn’s arguments concerning the foundational elements themselves.

the applicability of the foundational elements generally in that opinion, any doubt that the foundational elements did not apply generally to the admission of audio recordings in Minnesota was put to rest in *Turnage*, decided by the supreme court nine years after *S.A.M.* See *Turnage*, 708 N.W.2d at 542.⁴

Having concluded that the foundational elements applied to the Instagram recordings at issue here, we turn to Cartharn's argument that the state failed to establish the elements at trial, rendering the recordings inadmissible. Cartharn asserts that the state failed to establish each foundational element, but only advances specific arguments on two foundational elements: (1) the authenticity and correctness of the recording and (2) that the recording was not altered. We focus our analysis on these more specific challenges.⁵

⁴ The state also relies on *State v. Washington*, 725 N.W.2d 125, 137 (Minn. App. 2006), review denied (Minn. Mar. 20, 2007), which was decided after *Turnage*, to argue that the *Turnage* elements do not apply. In *Washington*, we concluded that the state laid an adequate foundation for a 911-call recording, noting that:

The state claimed that the tape was a recording of LR speaking. The police arrived at the apartment within five minutes of the 911 call. They spoke to LR and she acknowledged calling 911. She described the same assault. This was sufficient evidence to find that the 911 caller was LR. There was thus adequate foundation for the 911 tape.

725 N.W.2d at 137. We agree that we did not discuss the *Turnage* elements in that case, but we disagree that the absence of that discussion establishes that the foundational elements established by supreme court precedent do not apply.

⁵ To address each other element briefly: the fact that the recordings exist demonstrate that the recording device was capable of taking testimony and that the operator of the device was competent in using the device. Cf. *In re Gonzalez*, 456 N.W.2d 724, 728 (Minn. App. 1990) (concluding that existence of audio recording demonstrated that recording device—an answering machine—was capable of recording and that the operator was competent). The manner of the preservation of the recording was described by trial testimony—they were audio recordings preserved on Instagram by B.M. and sent to the victim. The victim

Generally, Cartharn argues that the state failed to establish the foundational elements because it failed to call B.M., the friend who made the recordings, to testify about them. But Cartharn cites no authority requiring the person who actually made an audio recording to lay foundation for its admission. We find no authority that establishes such a requirement and observe that a proponent of evidence may lay foundation through the testimony of a witness that the evidence is what the proponent claims it to be. *See* Minn. R. Evid. 901(b)(1).

Considering the victim’s testimony about the recordings, we conclude that the district court acted within its discretion when it determined that the state had laid sufficient foundation. The victim testified about the authenticity and correctness of the recordings. She testified that her voice and Cartharn’s voice were on the recordings and that the recordings depicted what occurred in the hotel room. This testimony was sufficient to establish that the recording was authentic and correct.

We analyze the other challenged foundational element—that no changes, additions, or deletions were made to the recordings—with consideration of what the state claimed that the evidence was—short, partial recordings of the incident at issue. The state did not introduce the evidence as a full recording of the incident. It was very clear to the jury that the Instagram recordings were merely “snippets” of the incident, which the victim testified lasted for hours. Viewing the evidence through that lens, we conclude that the victim’s

identified the speakers on the recording at trial. And the circumstances of the recording—a purportedly surreptitious recording of an assault—support the conclusion that Cartharn’s statements made were voluntary and not induced.

testimony sufficiently established the foundational element that the recording was not altered. Her testimony that the recordings depicted portions of the incident allowed the district court to infer that the recordings were not altered. Any questions surrounding whether the recordings omitted portions of the incident—which the state readily conceded and was obvious from the recordings themselves—or whether the recordings were fabricated could have been raised through cross-examination and argument.

In sum, the district court acted within its discretion when it concluded that the state had established a sufficient foundation for the admission of the recordings.

Affirmed.