

*This opinion is nonprecedential except as provided by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
A22-0783**

State of Minnesota,
Respondent,

vs.

Charles Thomas Ortley,
Appellant.

**Filed May 15, 2023
Affirmed
Wheelock, Judge**

Hennepin County District Court
File No. 27-CR-20-14730

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

Mary F. Moriarty, 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 Gaïtas, Presiding Judge; Wheelock, Judge; and Halbrooks, Judge.*

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

NONPRECEDENTIAL OPINION

WHEELLOCK, Judge

Appellant challenges his convictions for second-degree assault with a dangerous weapon and illegal possession of a firearm, arguing that the district court violated his right to confrontation by admitting testimony and body-worn-camera footage of nontestifying witnesses' out-of-court statements and further arguing that his firearm conviction was not supported by sufficient evidence. We affirm.

FACTS

Respondent State of Minnesota charged appellant Charles Thomas Ortley with second-degree assault with a dangerous weapon in violation of Minn. Stat. § 609.222, subd. 1 (2018), and illegal possession of a firearm in violation of Minn. Stat. § 624.713, subd. 1(2) (2018). The state alleged that Ortley entered a home occupied by N.B. (the victim) and shot him. The case proceeded to a jury trial.

At trial, the state called two of the officers who responded at the scene, a police investigator, and the victim to testify. The state also introduced into evidence body-worn-camera footage of the officers' response to the shooting, surveillance-camera footage, and 911-call transcripts. The officers' testimony and body-worn-camera footage contained statements made by two witnesses, K.B. and D.B., who are the victim's relatives and who did not testify at trial. The officers testified that K.B. and D.B. told them at the scene that Ortley shot the victim—K.B. said Ortley was the shooter without being prompted, and D.B. identified Ortley as the shooter in response to the officers' questions. The officers' body-worn-camera footage corroborates this testimony, showing K.B. and

D.B. volunteering information to the officers and identifying Ortley as the shooter immediately upon the officers' arrival at the scene. It also shows the officers asking witnesses, including occupants of the home and neighbors, about the shooting and about the location and identifying details of the victim and Ortley—both of whom had fled shortly after the shooting occurred. Surveillance footage showed the shooter fleeing the scene with a gun in his hand. It also showed the shooter exchanging gunfire with another armed individual moments after the first shooting occurred.

Ortley moved the district court to exclude the statements made by K.B., D.B., and any other witnesses identifying him as the shooter, alleging a violation of his Sixth Amendment rights because the state did not intend to call those witnesses at trial and instead planned to introduce the statements through the officers' testimony and body-worn-camera footage. The district court denied Ortley's motion, and the statements came into evidence without the testimony of the persons who made them. A jury found Ortley guilty of both offenses.

Ortley appeals.

DECISION

I. The district court did not violate Ortley's right to confrontation.

Ortley contends that statements identifying Ortley as the shooter captured by the officers' body-worn cameras and described via officer testimony at trial are testimonial and that because the witnesses who made these statements did not testify at trial, the admission of these statements violated his constitutional right to confrontation. The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all

criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. Subject to exceptions, the Confrontation Clause bars the admission of prior testimonial statements of an unavailable witness who was not previously subject to cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Whether the admission of evidence violates a defendant’s rights under the Confrontation Clause is a question of law that we review de novo. *State v. Sutter*, 959 N.W.2d 760, 764 (Minn. 2021).

The admissibility of a prior statement under the Confrontation Clause depends on whether the statement is testimonial in nature. *Davis v. Washington*, 547 U.S. 813, 821 (2006). To determine whether a statement given to a police officer is testimonial in nature, this court “objectively evaluate[s] the circumstances in which the encounter occurs and the statements and actions of the parties.” *Michigan v. Bryant*, 562 U.S. 344, 359 (2011). A statement is testimonial when the “primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *State v. Wright*, 726 N.W.2d 464, 472 (Minn. 2007) (emphasis omitted) (quoting *Davis*, 547 U.S. at 822). But “[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” *Id.* (emphasis omitted) (quoting *Davis*, 547 U.S. at 822). This is so if the police questioning “relate[s] directly to addressing

the emergency.” *State v. Warsame*, 735 N.W.2d 684, 694 (Minn. 2007). A statement is admissible as made during an ongoing emergency when

(1) the [person] described events as they actually happened and not past events; (2) any “reasonable listener” would conclude that the [person] was facing an ongoing emergency; (3) the questions asked and answers given were necessary to resolve a present emergency, rather than only to learn what had happened in the past; and (4) there was a low level of formality in the interview because the [person’s] answers were frantic and [their] environment was not tranquil or safe.

Sutter, 959 N.W.2d at 767 (quoting *Warsame*, 735 N.W.2d at 690); *see also Davis*, 547 U.S. at 827 (analyzing these four factors in the context of statements made during a 911 call). We apply each factor to the circumstances present here to determine whether the challenged statements identifying Ortley as the shooter were testimonial.

The first *Warsame* factor is whether the statements were made while the events were happening. Here, the statements were made very shortly after the shooting—the first 911 call was placed at 11:49 p.m., immediately after the shooting occurred, and the officers arrived at the scene at 11:53 p.m.—but not during the shooting. However, initial statements received at the start of an investigation following a dangerous or violent incident can be nontestimonial in nature. *See Davis*, 547 U.S. at 832 (“We have . . . observed of domestic disputes that officers called to investigate need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim. Such exigencies may often mean that initial inquiries produce nontestimonial statements.” (quotation omitted)). This case involves the same type of exigencies present during the officers’ initial contact with the speakers—specifically, the

brevity of the time that had elapsed between the shooting and K.B.'s and D.B.'s first statements to the officers and the dangerous and violent nature of the shooting—that the United States Supreme Court contemplated in *Davis*. *Id.* at 826-32. Thus, this factor weighs in favor of a conclusion that the challenged statements were nontestimonial.

The second factor is whether a reasonable listener would conclude that the speaker was facing an ongoing emergency. K.B. and D.B. made their statements to the officers within minutes of the shooting. And following the victim being shot, a gunfight ensued nearby between the shooter and a third party. K.B. and D.B. were in a panicked state when the officers arrived and instantly began providing the officers with information about the victim and shooter. In the body-worn-camera footage, when K.B. first yells that Ortleby is the shooter, she is upset and frantic. And when the officers interview D.B., she is crying and very upset. They did not know where their injured relative, the victim, had gone or how seriously he was injured, and they did not know where the shooter was. One of the witnesses had been lying down in the same room with the victim when he was shot. Based on these facts, a reasonable listener would conclude that K.B. and D.B. were facing an ongoing emergency.

The shooter fleeing the scene does not change this analysis. *See Warsame*, 735 N.W.2d at 693-94. “[T]he necessity to assess the assailant and any threat to personal safety is equally applicable when the police are pursuing [an] assailant outside of the victim’s proximity.” *Id.* at 694. As we have noted, the shooter was still at large when the challenged statements were made, and a second shooting had occurred moments earlier. K.B. and D.B. faced an ongoing emergency stemming from their family member being

shot and leaving the scene, possibly with life-threatening injuries, as well as fear for their personal safety and for additional shootings based on the gunfire that was exchanged when the shooter fled the scene without being apprehended. Because a reasonable listener would conclude that the speakers made the statements during an ongoing emergency, this factor favors a conclusion that the statements were nontestimonial.

The third factor is whether the questions asked and answers given were necessary to resolve a present emergency. When the officers first arrived, the suspect was still at large, the victim was missing and suffering from a gunshot wound, and more gunshots had been fired nearby as the shooter fled the scene. The officers asked about the names, ages, descriptions, and present locations of the victim and the shooter. These questions were designed to assist the officers with identifying and locating the victim and the shooter to administer aid, secure the firearm, and manage the scene for public safety. The shooter was at large, was armed, and could still return; the victim needed medical attention; and it was likely that the community remained in danger of additional gun violence. Given these circumstances, it is evident that the officers were facing ongoing emergencies as well and that the questions asked related to resolving those emergencies. Because the questions the officers asked were necessary to help resolve the emergencies present when they arrived at the scene, this factor favors a conclusion that the statements were nontestimonial.

The fourth factor is whether there was a low level of formality during the questioning because the speaker's answers were frantic or their environment was not tranquil or safe. The body-worn-camera footage shows that the exchanges between K.B., D.B., and the officers exhibited a low level of formality. K.B., D.B., and others began

shouting information at the officers as soon as they realized the officers were present. The witnesses continued to offer information as the officers walked through the home and around the premises, assessing the scene. Ortley admits that the setting was informal and chaotic, taking place in the residence where the shooting occurred, but argues that, eventually, the chaos subsided and the house was calm and controlled. However, most of the statements identifying Ortley as the shooter occurred immediately after the officers arrived and while the scene was still chaotic. The officers spoke with witnesses wherever they could while simultaneously trying to control the flow of individuals moving through the home and other people gathering outside of it. As Ortley acknowledges, the setting was largely informal and favors a conclusion that the statements were nontestimonial. Because all four *Warsame* factors establish that the statements identifying Ortley as the shooter were made to the officers during an ongoing emergency, we conclude that the statements are nontestimonial in nature.

Nevertheless, Ortley relies on *Sutter* to persuade us that the statements were testimonial, arguing that *Sutter* is controlling and that there are similarities between that case and this one. In *Sutter*, police detained the defendant hours after a handgun had been reported stolen. 959 N.W.2d at 763. The defendant was later arrested for the theft. *Id.* Law enforcement detained and questioned an associate of the defendant around the same time it detained the defendant. *Id.* The associate provided inconsistent statements during questioning, and the state intended to introduce those statements via body-worn-camera footage shown at trial but not to call the associate to testify. *Id.* at 763-64. The supreme court applied the *Warsame* factors and held that the statements were testimonial because

the associate was a potential co-conspirator and the theft did not implicate an ongoing emergency. *Id.* at 767.

The facts in this case differ significantly from those in *Sutter*. Unlike in *Sutter*, police questioned witnesses minutes after a *shooting*, not hours after a *theft*. The challenged statements were made within 20 minutes of the shooting, at a time when the locations of both the victim and the assailant were unknown. And the speakers of the challenged statements were members of a household who had just suffered a home invasion in which their relative was shot, not potential co-conspirators as in *Sutter*. Although a stolen handgun poses some threat to public safety, it is not comparable to the threat posed by an active shooter who has just engaged in two shootings in the same neighborhood. We conclude that Ortley's reliance on *Sutter* is misplaced and this case is distinguishable because here the presence of an emergency is clear and the challenged statements were not made by a potential co-conspirator.

Our review of the circumstances surrounding the encounter and the four *Warsame* factors leads us to conclude that because the challenged statements identifying Ortley as the shooter were made to the officers during an ongoing emergency, the statements were nontestimonial in nature. Thus, the district court's admission of the challenged statements did not violate Ortley's Sixth Amendment rights.

II. Sufficient evidence supports Ortley’s conviction for illegal possession of a firearm.

In a pro se supplemental brief, Ortley argues that the evidence was insufficient to prove that he illegally possessed a firearm.¹ We are not persuaded.

When a defendant challenges the sufficiency of the evidence supporting a conviction, we “carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the factfinder to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted.” *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation omitted). “The evidence must be viewed in the light most favorable to the verdict, and it must be assumed that the fact-finder disbelieved any evidence that conflicted with the verdict.” *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016). This standard of review applies as long as a conviction is adequately supported by direct evidence. *State v. Horst*, 880 N.W.2d 24, 39 (Minn. 2016). “[D]irect evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted).

If the state uses circumstantial evidence to prove an element of the offense, we apply a heightened standard of review to the evidence underlying that element. *State v. Olson*, 982 N.W.2d 491, 496 (Minn. App. 2022) (citing *State v. Al-Naseer*, 788 N.W.2d 469, 471

¹ Ortley also argues in his pro se supplemental brief that the state’s failure to call eyewitnesses, such as D.B. or K.B., to testify constituted prosecutorial misconduct. We construe this argument as being the same argument raised in his principal brief that the state violated his Sixth Amendment right to confront the witnesses, which we have already addressed.

(Minn. 2010)). Circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *Harris*, 895 N.W.2d at 599 (quotation omitted). To prove the offense of possession of a firearm by an ineligible person, the state must prove that a defendant knowingly possessed a firearm while prohibited by law from doing so. Minn. Stat. § 624.713, subd. 1(2); *Harris*, 895 N.W.2d at 601. The state may establish a violation of section 624.713 by proving either actual possession or constructive possession of a firearm. *Harris*, 895 N.W.2d at 601. “Actual possession . . . involves direct physical control” of an item. *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016). However, “[t]he mere fact that an item is not in a defendant’s physical possession at the time of apprehension does not preclude prosecution for actual possession.” *Id.* at 354.

The parties disagree as to what standard of review should apply; Ortley argues that only circumstantial evidence supported his conviction, while the state argues that direct evidence supported the conviction. The challenged element is whether Ortley possessed a firearm. The state established this element through multiple evidentiary sources: surveillance footage depicting a man fitting Ortley’s description holding and using a firearm, body-worn-camera footage containing statements from eyewitnesses that Ortley had shot someone, and a 911 call reporting the same. Because these sources supply the type of evidence that does not require additional inferences or presumptions, we apply the direct-evidence standard of review.

The direct evidence the state presented shows that Ortley had actual, not constructive, possession of a firearm. Although Ortley did not have actual possession of

the firearm at the time of his arrest, the officers testified that witnesses told them that Ortley had shot someone, an act that is necessarily dependent on Ortley possessing a firearm. The surveillance footage also depicts the shooter—who, witnesses testified, resembled Ortley—climbing a fence while holding a firearm before immediately discharging the weapon during a second shooting. Ortley does not argue that the eyewitness testimony and video evidence inaccurately establish him as the shooter. Viewing this evidence in the light most favorable to the verdict, see *Griffin*, 887 N.W.2d at 263, we conclude that the direct evidence the state presented established that Ortley illegally possessed a firearm.

Affirmed.