

*This opinion is nonprecedential except as provided by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
A22-1146**

State of Minnesota,
Respondent,

vs.

Kenneth Darrick Robinson,
Appellant.

**Filed September 5, 2023
Affirmed
Johnson, Judge**

Hennepin County District Court
File No. 27-CR-20-2878

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

Mary F. Moriarty, Hennepin County Attorney, Adam E. Petras, Assistant County Attorney,
Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Gaïtas, Judge; and Florey,
Judge.*

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

NONPRECEDENTIAL OPINION

JOHNSON, Judge

A Hennepin County jury found Kenneth Darrick Robinson guilty of third-degree criminal sexual conduct based on evidence that he engaged in sexual penetration of a woman while she was asleep. We conclude that the district court did not err by admitting three video-recordings into evidence or by excluding evidence of Robinson's post-arrest investigative interview. We also conclude that Robinson's *pro se* supplemental brief does not present any arguments that require appellate relief. Therefore, we affirm.

FACTS

In October 2018, E.B. lived alone in a two-bedroom apartment in Minneapolis because her roommate recently had died. Her friend T.T. asked her whether she would sublet the vacant bedroom to his friend, Robinson. E.B. agreed. T.T. and Robinson arrived at E.B.'s apartment on October 27, 2018. Both T.T. and Robinson stayed at the apartment for several days. E.B., T.T., and Robinson spent time together, listened to music, danced, and drank alcoholic beverages.

During the evening of October 30, 2018, E.B., T.T., and Robinson again spent time together, listening to music and drinking. Between 10:00 and 11:00 p.m., E.B. went to her bedroom, closed the door, and fell asleep. At approximately midnight, she awoke and realized that Robinson was on top of her, that her underpants had been removed, and that Robinson had inserted his penis into her vagina.

E.B. got out of bed, grabbed her cell phone, went into the bathroom, and locked the door behind her. She called a sister who lived in Georgia after turning on the shower to

make noise to conceal her phone conversation. Three other family members eventually joined the call. E.B. told them that she had been sexually assaulted. A sister who lived close to E.B.'s apartment went to that location and waited outside. Another sister called 911 at 12:07 a.m. and connected E.B. to the call so that she could speak with the dispatcher.

After officers arrived at E.B.'s apartment building, E.B. went outside and spoke with them. E.B. "looked terrified," was "tearful," and was "shaking." E.B. described the incident to Officer Starr and answered the officer's questions while standing outside the apartment building. E.B. later entered an ambulance and described the incident further for the officer and for paramedics before she was taken to a hospital for a sexual-assault examination.

More than a year later, in January 2020, the state charged Robinson with one count of third-degree criminal sexual conduct, in violation of Minn. Stat. § 609.344, subd. 1(d) (2018), based on the allegation that he engaged in sexual penetration with E.B. while knowing or having reason to know that she was "mentally impaired, mentally incapacitated, or physically helpless." *See id.*

The case was tried to a jury on eight days in March 2022. The state called 13 witnesses, including E.B. and T.T. The defense called two witnesses, including Robinson.

E.B. testified first and described the incident and the events that preceded it. On cross-examination, Robinson's attorney challenged E.B.'s versions of events, questioning why E.B. first called her sister rather than law enforcement and probing various inconsistencies between her testimony and her earlier statements to law enforcement.

Robinson's attorney also asked E.B. whether she previously had had consensual sex with Robinson, which she denied.

The state's second witness was Officer Starr. Earlier, before the evidentiary phase of trial, Robinson had moved *in limine* to exclude prior statements by E.B. on hearsay grounds. The discussion between the district court and counsel at that time focused on statements by E.B. in four video-recordings created by Officer Starr's body-worn video-camera. The district court asked the prosecutor for copies of the video-recordings and reserved ruling. Immediately before Officer Starr took the witness stand, the district court ruled on Robinson's motion *in limine* by admitting the first, second, and third video-recordings, which were recorded at 12:24, 12:50, and 1:10 a.m., under the excited-utterance exception to the hearsay rule. The district court excluded the fourth video-recording, which was recorded at 1:44 a.m.

The prosecutor played the three video-recordings for the jury and asked questions of Officer Starr about his interactions with E.B. The officer testified that when he first arrived at the apartment building, E.B. was still inside her apartment and her sister was standing outside. The officer also described E.B.'s demeanor after she came outside and spoke with him.

The state also called as a witness Sergeant Wentz, who interviewed T.T. and Robinson on the night of the incident and interviewed E.B. a week after the incident. Sergeant Wentz testified that Robinson stated that the sexual encounter with E.B. was consensual.

In Robinson's case-in-chief, a private investigator testified that, in a May 2020 interview, T.T. stated that E.B. was "provocative" and "flirtatious" toward Robinson. The private investigator also testified that T.T. stated that Robinson told him that, the night before the incident, Robinson had gone into E.B.'s bedroom and she "was down with it."

Robinson testified that E.B. was provocative and flirtatious toward him before the night of the incident. With respect to the evening of October 30, 2018, Robinson testified that, after T.T. fell asleep on a living-room chair, E.B. called Robinson into her bedroom, kissed him, and asked him whether he had a condom. Robinson testified that he went to the living room and asked T.T. whether he had a condom, but he did not. Robinson testified that he returned to E.B.'s bedroom and that they began having consensual sex. Robinson testified that E.B. received two phone calls and that, after the second call, they stopped having sex so that E.B. could send a text message. Robinson testified that E.B. then left the bedroom and went into the bathroom.

Before resting, Robinson sought to recall Sergeant Wentz for additional questioning about his investigative interview of Robinson and to introduce portions of a video-recording of the interview as prior consistent statements. The state objected. The district court sustained the state's objection.

The jury found Robinson guilty. The district court imposed a sentence of 180 months of imprisonment. Robinson appeals.

DECISION

I. Admissibility of Video-Recordings

Robinson first argues that the district court erred by admitting the three body-cam video-recordings under the excited-utterance exception to the hearsay rule.

Hearsay is defined 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.” Minn. R. Evid. 801(c). As a general rule, hearsay is inadmissible. Minn. R. Evid. 802. But the rules of evidence provide numerous exceptions to the general rule of exclusion. *See* Minn. R. Evid. 803, 804.

One such exception is the excited-utterance exception. An out-of-court statement may be admissible under the excited-utterance exception if it “relat[es] 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). To be admissible, “three requirements must be met: (1) there must be a startling event or condition; (2) the statement must relate to the startling event or condition; and (3) the declarant must be under a sufficient aura of excitement caused by the event or condition to insure the trustworthiness of the statement.” *State v. Daniels*, 380 N.W.2d 777, 782 (Minn. 1986). The third requirement is the most important. *State v. Davis*, 820 N.W.2d 525, 536 (Minn. 2012). This court applies an abuse-of-discretion standard of review to a district court’s evidentiary rulings. *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019).

The district court admitted three video-recordings under the excited-utterance exception after reviewing them and making findings relevant to the third factor. The

district court noted that the first and second video-recordings were recorded within an hour after the incident and that, while E.B. was recorded, she was crying, unable to “catch her breath,” and “very clearly . . . under the stress of excitement caused by the event.” With respect to the third video-recording, which was recorded in the ambulance, the district court noted that it was recorded slightly more than an hour after the incident and that “it is very clear” that E.B. was “distraught” and “visibly crying and upset still.” Robinson does not directly challenge the district court’s findings, but we nonetheless note that they are confirmed by our review of the three video-recordings, which indicates that E.B. remained under an “aura of excitement” when she made the statements at issue. Her demeanor fluctuated, but she cried several times and remained visibly upset throughout the time periods in which she made the statements.

Robinson’s primary contention on appeal is that the district court erred by not considering the fact that E.B.’s statements were made in response to questioning by a police officer. Robinson cites *State v. Page*, 386 N.W.2d 330 (Minn. App. 1986), *rev. denied* (Minn. June 30, 1986), for the proposition that “*ex parte* statements made during police questioning are ‘inherently untrustworthy.’” *Id.* at 334 (quoting *State v. Hansen*, 312 N.W.2d 96, 103 (Minn. 1981)). We reversed and remanded in *Page* because the police officer who interviewed the declarant testified that the declarant “was calmed down” when he made the statements because the officer “had worked at getting him calmed, and that this effort took ‘quite a little time.’” *Id.* In the present case, the district court was well aware that E.B. was being questioned by a police officer but, nonetheless, made findings,

based on the district court's own observation of the video-recordings, that E.B. was not calm.

In addition, a recent supreme court opinion concerning body-cam video-recordings makes clear that out-of-court statements made in response to a police officer's questions may qualify for the excited-utterance exception. In *State v. Tapper*, 993 N.W.2d 432 (Minn. 2023), the supreme court stated that “an excited utterance is not necessarily rendered inadmissible by the fact that the declaration was made in response to a question.” *Id.* at 438 (quoting *In re Chuesberg's Welfare*, 233 N.W.2d 887, 889 (Minn. 1975)). Rather, such a fact is “a relevant consideration as to ‘whether the utterance was spontaneous and excited.’” *Id.* (quoting *Chuesberg's Welfare*, 233 N.W.2d at 889). But the supreme court in *Tapper* did not rest its decision on that factor; instead, the supreme court affirmed the district court's exclusion of hearsay statements based on the two reasons stated by the district court: that the declarant had an “unexcited demeanor” and that a considerable amount of time had passed since the alleged assault. *Id.* at 437-39. The supreme court emphasized that a district court has broad discretion in determining whether the excited-utterance exception applies, and the supreme court affirmed the district court's ruling even though the district court did not expressly state that the out-of-court statements were made in response to a police officer's question, which was obvious from the video-recording. *Id.* at 438-39. Accordingly, the district court in this case did not err by not expressly stating that E.B.'s out-of-court statements were made in response to Officer Starr's questions, which was obvious from the video-recordings.

Robinson also contends that the district court erred by not considering the fact that E.B. did not yell or scream while in her bedroom with Robinson or the fact that she called her sister rather than calling 911, which, he asserts, shows that E.B. was thinking too clearly to be under an “aura of excitement.” This general contention is at odds with the district court’s specific findings about E.B.’s actual demeanor at the time of the out-of-court statements, as evidenced by the video-recordings themselves. Consequently, Robinson’s contention is inconsistent with our deferential standard of review and our own review of the video-recordings.

Thus, the district court did not abuse its discretion by ruling that the three video-recordings are admissible under the excited-utterance exception to the hearsay rule.

In the alternative, Robinson contends that the district court erred by not excluding the video-recordings on the ground that they are cumulative of other evidence concerning E.B.’s version of the incident. Evidence that is relevant may nonetheless be inadmissible “if its probative value is substantially outweighed by . . . needless presentation of cumulative evidence.” Minn. R. Evid. 403.

Robinson did not object to the video-recordings on the ground of cumulativeness. As a consequence, we review only for plain error. Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). At the time of the district court’s ruling, only E.B. had testified; other witnesses had not yet taken the witness stand. At that stage of the trial, the video-recordings were not plainly cumulative. Thus, the district court did not plainly err by not excluding the video-recordings on the ground that they were cumulative of other evidence.

In sum, the district court did not err by denying Robinson's motion *in limine* with respect to the three video-recordings.

II. Admissibility of Investigative Interview

Robinson also argues that the district court erred by sustaining the state's objection to his attempt to introduce a video-recording of Sergeant Wente's investigative interview of him. Robinson contends that portions of the video-recording should have been admitted as prior consistent statements.

A prior statement by a witness that is consistent with the witness's trial testimony is considered non-hearsay and, thus, is not inadmissible on hearsay grounds. Minn. R. Evid. 801(d)(1)(B). The applicable rule provides: "A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing 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 as a witness" *Id.* Rule 801(d)(1)(B) allows for the admission of prior consistent statements "'to enhance the credibility of a witness and as substantive evidence if the court determines the statements would be helpful in evaluating credibility.'" *State v. Farrah*, 735 N.W.2d 336, 344 (Minn. 2007) (quoting 11 Peter N. Thompson, *Minnesota Practice – Evidence* § 801.01 at 439 (3d ed. 2001)). That purpose is served only if the credibility of a witness has been challenged. *Id.*; *State v. Fields*, 679 N.W.2d 341, 347-48 (Minn. 2004); *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997). This court applies an abuse-of-discretion standard of review to a district court's ruling on a hearsay objection. *Hallmark*, 927 N.W.2d at 291.

After Robinson testified, he sought to recall Sergeant Wentz and to play portions of the video-recording of Sergeant Wentz's investigative interview of him. The state objected. The district court ruled that excerpts from the video-recording are not admissible as prior consistent statements. The district court reasoned that, although Robinson's credibility was challenged, the proffered evidence would not bolster his credibility in response to the challenge. In doing so, the district court read aloud from the supreme court's opinion in *Nunn*, in which the supreme court stated:

Under the rule, prior consistent out-of-court statements are not automatically admitted. The statements must be helpful to the trier of fact in evaluating the witness' credibility. Thus, before the statement can be admitted, the witness' credibility must have been challenged, and the statement must bolster the witness' credibility with respect to that aspect of the witness' credibility that was challenged. Finally, under Rules 403 and 611, the trial court retains authority to either limit or exclude the statement and, if admitted, to control the manner in which it is admitted.

561 N.W.2d at 909. In addition, the district court read aloud from a comment to rule 801 that states, "more proof that the witness repeated the same story in and out of court does not necessarily bolster credibility." Minn. R. Evid. 801(d)(1)(B), 1989 comm. cmt. The district court also reasoned that Robinson had ample opportunity to cross-examine Sergeant Wentz about the investigative interview and ample opportunity to address the subject during his own testimony.

Robinson contends that the district court erred by reasoning that the proffered evidence would not bolster his credibility. Specifically, he contends that the proffered evidence would have shown that he had been consistent in his position that his sexual

penetration of E.B. was consensual and would have explained why he did not tell Sergeant Wentz everything that he testified to at trial. But there was no dispute that Robinson had been consistent in his version of what occurred in E.B.'s bedroom. Sergeant Wentz had already said so in his prior testimony. Also, the video-recording would not have bolstered Robinson's credibility with respect to what questions Sergeant Wentz asked him because Robinson testified that he was uncertain whether Sergeant Wentz asked him certain questions that would have elicited information relevant to his defense. In addition, Robinson does not challenge the district court's reasoning that he had prior opportunities to present evidence about his investigative interview, both during his cross-examination of Sergeant Wentz and during his own testimony. Furthermore, Robinson does not challenge the district court's reasoning that a party does not have a right to introduce his own prior consistent statement. *See Dolo v. State*, 942 N.W.2d 357, 367 n.9 (Minn. 2020) (concluding that video-recording of investigative interview was inadmissible self-serving hearsay). Moreover, a district court has discretion to exclude a prior consistent statement even if the requirements of rule 801(d)(1)(B) are satisfied. *See Nunn*, 561 N.W.2d at 909; Minn. R. Evid. 801(d)(1)(B), 1989, comm. cmt.

Thus, the district court did not abuse its discretion by sustaining the state's objection to Robinson's attempt to introduce a video-recording of the investigative interview.

III. *Pro Se* Arguments

Robinson also makes three arguments in his *pro se* supplemental brief.

First, Robinson argues that E.B.'s conduct during his stay at her apartment shows that the sexual encounter was consensual. The evidence to which Robinson refers does not

overcome the state's evidence that he sexually penetrated E.B. while she was asleep, without her consent. Thus, the evidence is sufficient to support the jury's verdict.

Second, Robinson requests a new trial on the ground that he received ineffective assistance of counsel. Specifically, he asserts that (1) a private attorney (whom he retained before being represented by a public defender) attended an omnibus hearing without his being present, (2) that his public defender waived an omnibus hearing without his consent, and (3) that his public defender did not challenge two potential jurors for cause. "Generally, an ineffective assistance of counsel claim should be raised in a postconviction petition for relief, rather than on direct appeal." *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000). A post-conviction proceeding allows for the development of "additional facts to explain the attorney's decisions,' so as to properly consider whether a defense counsel's performance was deficient." *Id.* (quoting *Black v. State*, 560 N.W.2d 83, 85 n.1 (Minn. 1997)). An appellate court may consider an ineffectiveness argument on direct appeal if the trial record is sufficiently developed such that the claim can be decided based on the trial record. *Torres v. State*, 688 N.W.2d 569, 572 (Minn. 2004). In this case, the trial record, by itself, does not allow for a determination of whether Robinson's attorneys were deficient in their representation of him or whether any such deficiency prejudiced him. Thus, we decline to consider the merits of this argument on direct appeal. Robinson's right to assert the claims in a future post-conviction action is preserved. *See State v. Christian*, 657 N.W.2d 186, 194 (Minn. 2003); *Gustafson*, 610 N.W.2d at 321; *State v. Xiong*, 638 N.W.2d 499, 504 (Minn. App. 2002), *rev. denied* (Minn. Apr. 16, 2002).

Third, Robinson argues that he was denied his right to due process on the ground that the state introduced perjured testimony. In support of this argument, Robinson refers to certain documents in an addendum that he submitted with his *pro se* supplemental brief. Those documents are not in the district court record and, thus, are not properly before this court. Minn. R. App. P. 110.01; *State v. Cao*, 788 N.W.2d 710, 718 n.2 (Minn. 2000). In any event, this court must defer to the jury's credibility determinations and its resolution of disputed factual issues. *See, e.g., State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980).

Affirmed.