

*This opinion is nonprecedential except as provided by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
A23-1654**

State of Minnesota,
Respondent,

vs.

Michael Eugene Johnson,
Appellant.

**Filed December 30, 2024
Affirmed in part, reversed in part, and remanded
Bentley, Judge**

Ramsey County District Court
File No. 62-CR-22-3591

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

John Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul,
Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Slieter, Judge; and Bentley,
Judge.

NONPRECEDENTIAL OPINION

BENTLEY, Judge

In this direct appeal from a judgment of conviction for two counts of driving while impaired (DWI), appellant argues that he is entitled to a new trial because the district court excluded an out-of-court statement that a third-party, the declarant, was driving instead of

appellant. Alternatively, appellant contends that the district court erred by convicting him of two counts of DWI under different statutory subsections based on the same conduct, in violation of Minn. Stat. § 609.04 (2022). We affirm the district court’s exclusion of the out-of-court statement because the court did not abuse its discretion in determining that the statement was not sufficiently corroborated. But we conclude that the district court erred in convicting appellant of both DWI counts. We therefore reverse appellant’s second DWI conviction and remand for the district court to vacate it.

FACTS

Respondent State of Minnesota charged appellant Michael Eugene Johnson with one count of DWI, Minn. Stat. § 169A.20, subd. 1(2) (2020) (driving under the influence of a controlled substance), and one count of DWI, Minn. Stat. § 169A.20, subd. 1(7) (2020) (body contains any amount of Schedule I or II controlled substance or its metabolite). The following facts were elicited at a jury trial in July 2023.

In June 2022, an officer arrived at a scene where a driver had hit multiple parked cars on a residential street in the city of Lauderdale. A bystander directed the officer to the car that caused the collision, which was an SUV registered to Johnson. The officer approached Johnson, who was standing next to and reaching into the SUV’s driver-side door. Johnson had a bloody lip. When the officer asked him what happened, Johnson said something about his brakes. He told the officer that he was driving and that he injured his lip when it “bounced off the wheel,” but he did not need medical attention.

Several minutes later, after the officer ran Johnson’s information, the officer asked Johnson if anyone else was in the car with him. Johnson said there was not. The officer

pointed his flashlight at a woman standing several feet behind Johnson and asked who she was. Johnson replied that she was “a friend.” When the officer again asked if she had been in the car, Johnson said that she had.

Another patrol officer who had arrived on the scene spoke with the woman, who was later identified as J.W. The officer did not observe that J.W. had any injuries and her demeanor “appeared normal.” The officer later learned that J.W. had outstanding warrants for her arrest. During an inventory search of the SUV, the officer found a detached ignition interlock device, two small bags of methamphetamine, and other drug paraphernalia.

Meanwhile, the officer speaking with Johnson noticed that Johnson’s eyes were “abnormally dilated.” The officer asked Johnson, “When was the last time you did methamphetamine?” Johnson replied that it had been at least three-and-a-half years. Suspecting that Johnson was under the influence of a stimulant, he directed Johnson through field-sobriety tests. The tests indicated that Johnson was impaired, so the officer placed Johnson under arrest. Later, the officer obtained a warrant to draw Johnson’s blood, and the blood sample came back positive for methamphetamine.

At trial, the defense’s theory was that Johnson lied about driving the car to protect J.W. because he knew that she had active warrants. To support that theory, Johnson intended to call J.W. as a witness. She had spoken with a defense investigator in August 2022 and said that she was the one driving at the time of the accident. She repeated that statement to the defense investigator the week before trial.

At the conclusion of the second day of trial, defense counsel stated that they had not yet personally served J.W. with a subpoena to testify. Defense counsel explained that the

defense investigator had attempted to serve J.W. with a subpoena at her last known address—her mother’s house. But J.W.’s mother said that J.W. did not live there and that she did not know where J.W. lived.

The next day, J.W. did not appear for trial. Defense counsel proposed that his office attempt service at the Dorothy Day Center, which J.W. had recently provided as her address during an unrelated court hearing. The district court allowed for a “brief continuance to allow for procuring [J.W.],” but the defense investigator was told by Dorothy Day staff that “[J.W.] has not been housed there or sheltered there and she has not been since 2021.”

Defense counsel then sought to offer J.W.’s out-of-court statement through the defense investigator’s testimony. The district court denied that request on two bases. First, the court determined that J.W. was not unavailable as a witness because defense counsel had not diligently worked to secure her testimony in the months leading up to trial, despite the defense’s efforts to serve the subpoena that week. Second, the district court found that the out-of-court statement was not sufficiently corroborated to ensure its reliability. Defense counsel suggested that Johnson might have testified to corroborate the statement if J.W. had been deemed unavailable but conveyed that Johnson decided not to testify “under these circumstances as they are.” The district court noted, “[t]here are issues with corroboration, in any event.” In particular, the court pointed out contradictory evidence in the record, including evidence that Johnson “[told] the officer that he was driving and that he was injured when his face hit the steering wheel.”

The jury found Johnson guilty of both DWI counts. At a sentencing hearing, the district court convicted Johnson of both counts. The district court sentenced Johnson to 60

months of incarceration on the driving-under-the-influence offense, but it did not sentence Johnson for the count based on the presence of a controlled substance in his blood.

Johnson appeals.

DECISION

Johnson challenges the district court’s exclusion of J.W.’s out-of-court statement. Alternatively, Johnson argues that the district court erred in convicting him of two counts of DWI that arose from the same behavioral incident. We address each issue in turn.

I

Criminal defendants have a right to present a complete defense. *State v. Fraga*, 898 N.W.2d 263, 271 (Minn. 2017). But “the evidence proffered in support of the defense must still comply with the rules of evidence.” *Id.* (quoting *State v. Nissalke*, 801 N.W.2d 82, 102 (Minn. 2011)). Appellate courts will not reverse a district court’s evidentiary ruling absent a clear abuse of discretion. *Id.* “A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *State v. Vangrevenhof*, 941 N.W.2d 730, 736 (Minn. 2020) (quoting *State v. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017)).

An out-of-court statement by a nonparty is hearsay and is inadmissible to prove the truth of the matter asserted unless an exception applies. Minn. R. Evid. 801(c), 802. Johnson contends that J.W.’s hearsay statement to the investigator was admissible under the statement-against-interest exception of Minnesota Rules of Evidence 804(b)(3).

Rule 804(b)(3) provides that “[a] statement[,], which . . . at the time of its making . . . so far tended to subject the declarant to civil or criminal liability . . . that a reasonable

person in the declarant's position would not have made the statement unless believing it to be true," is "not excluded by the hearsay rule if the declarant is unavailable as a witness." *Id.* But when such a statement is offered in a criminal case, and tends to subject the declarant to criminal liability, it still "is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." *Id.*

Even assuming that J.W. was unavailable for purposes of rule 804(b)(3) and that her statement tended to subject her to civil or criminal liability, the district court did not abuse its discretion in excluding her statement because the record supports the determination that the statement was not sufficiently corroborated.

The supreme court has identified the following six factors to guide a determination as to whether a party satisfied Rule 804(b)(3)'s corroboration requirement:

(1) whether other evidence corroborates the facts in the hearsay statement; (2) the extent to which the hearsay statement is consistent with the declarant's prior testimony and other statements; (3) the relationship between the declarant and other witnesses and parties, including the defendant; (4) whether the declarant has reason to fabricate the statement; (5) the overall credibility and character of the declarant; and (6) the timing of the statement.

Ferguson v. State, 826 N.W.2d 808, 813 (Minn. 2013). In assessing corroboration, the district court views "the totality of the circumstances, and the relevance of each of the six factors will vary depending on the facts of each case." *Id.* at 814.

As to the first *Ferguson* factor, the district court may consider whether the "weight of the evidence from trial contradict[s]" the hearsay statement. *Dobbins v. State*, 845 N.W.2d 148, 153 (Minn. 2013). Even if the evidence contradicting the out-of-court

statement is weak, the defendant still has the burden to show that the hearsay statement is “sufficiently trustworthy.” *Bobo v. State*, 969 N.W.2d 829, 836 (Minn. 2022).

Here, the evidence at trial contradicted J.W.’s statement. It is directly at odds with Johnson’s admission to the responding officer that he was driving and that he injured his lip when it “bounced off the wheel” during the collision. J.W.’s statement is also in tension with the evidence that the SUV belonged to Johnson and that Johnson was standing at the driver-side door when the officer arrived on the scene. Thus, the first *Ferguson* factor weighs against admissibility.

Johnson does not explicitly argue that the first factor supports admissibility and instead claims that the district court abused its discretion by failing to consider other *Ferguson* factors. But Johnson did not argue that the other *Ferguson* factors support admissibility until his brief to this court. At trial, defense counsel’s corroboration arguments—that Johnson could testify to corroborate J.W.’s statement and that his injuries were consistent with J.W. driving—both relate to the first *Ferguson* factor. In any event, *Ferguson* provides that “it is unnecessary to consider each of these six factors in every case.” 826 N.W.2d at 814. Therefore, the district court did not misapply the law by considering only one *Ferguson* factor.

Even if we were to consider the remaining *Ferguson* factors, we are not persuaded that they show an abuse of discretion. Johnson focuses on factors two and four: the consistency in J.W.’s statements, and the lack of evidence that J.W. would benefit from fabricating her admission. Assuming without deciding that those factors weigh in Johnson’s favor, J.W.’s statement would still be inadmissible “unless corroborating

circumstances *clearly* indicate the trustworthiness of the statement.” Minn. R. Evid. 804(b)(3) (emphasis added). No evidence in the record corroborates J.W.’s statement that she was driving, and Johnson’s injuries and statements to police officers contradict her statement. Thus, although some circumstances surrounding the statement lend it credence, we conclude that the district court’s decision was not “against logic and the facts in the record” such that it would constitute an abuse of discretion. *Vangrevenhof*, 941 N.W.2d at 736.

II

In the alternative, Johnson argues the district court wrongfully convicted him of both DWI counts instead of only one. The state agrees, but we have “an obligation to decide cases in accordance with [the] law even when the parties agree on an issue.” *State v. Brown*, 937 N.W.2d 146, 157 (Minn. App. 2019) (alteration in original) (quoting *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1999)), *rev. denied* (Minn. Feb. 18, 2020). In our independent consideration, we also agree that the district court erred.

If a person faces prosecution for multiple offenses arising out of a single behavioral incident, they “may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1. The supreme court has interpreted section 609.04 to prohibit “multiple convictions under different sections of a criminal statute.” *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). Whether a conviction is barred by section 609.04 is a legal question that an appellate court reviews *de novo*. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

Johnson was convicted of one count of DWI, Minn. Stat. § 169A.20, subd. 1(2) (under the influence of a controlled substance), and one count of DWI, Minn. Stat. § 169A.20, subd. 1(7) (body contains any amount of Schedule I or II controlled substance or its metabolite). These offenses arose out of the same behavioral incident: Johnson’s driving while under the influence of methamphetamine. *Cf. State v. Bonkowske*, 957 N.W.2d 437, 444 (Minn. App. 2021) (holding that convictions for DWI and test refusal arose out of same behavioral incident and collecting cases holding same). They also arise under different sections of the same criminal statute—section 169A.20. For that reason, the judgment that convicts Johnson on both counts was unlawful. *See State v. Clark*, 486 N.W.2d 166, 170-71 (Minn. App. 1992) (concluding that convictions for driving under the influence of alcohol and driving with a blood alcohol concentration of 0.10 violated section 609.04 because they arose under “different subsections of the same statute”). We therefore reverse Johnson’s conviction of driving while his body contains any amount of Schedule I or II controlled substance or its metabolite. We remand to the district court with instructions to vacate that conviction. The guilty verdict remains intact. *State v. Hallmark*, 927 N.W.2d 281, 300 (Minn. 2019).¹

Affirmed in part, reversed in part, and remanded.

¹ Johnson also contends that his conviction under section 169A.20, subdivision 1(7), was necessarily proved by—and is thus an “included offense” of—his conviction under section 169A.20, subdivision 1(2). *See* Minn. Stat. § 609.04, subd. 1(4) (defining an “included offense” as a “crime necessarily proved if the crime charged were proved”). Because we conclude that Johnson’s second conviction violated the rule articulated in *Jackson*, 363 N.W.2d 758, we do not reach this issue.