



In the Missouri Court of Appeals
Eastern District
DIVISION ONE

STATE OF MISSOURI,)	No. ED108959
)	
Respondent,)	
)	Appeal from the Circuit Court
)	of the City of St. Louis
vs.)	Cause No. 1822-CR04311-01
)	
DARIN SCHMIDT,)	Honorable Thomas C. Clark II
)	
Appellant.)	Filed: June 15, 2021

OPINION

I. Introduction

Darin Schmidt (“Defendant”) appeals the judgment entered on his convictions after a jury trial for murder in the first degree and armed criminal action arising from the shooting death of David Bewig, Jr. (“Victim”). On appeal, Defendant contends the trial court plainly erred by (a) admitting Defendant’s out-of-court statements that he shot and killed Victim as substantive evidence of guilt without independent proof of the *corpus delicti* and (b) allowing three of the State’s witnesses to testify that they believed Defendant’s statements were true. We conclude that the extrajudicial statements were admissible, but it was plain error to allow the witnesses to testify that they believed those statements and thereby impermissibly comment on the ultimate issue of Defendant’s guilt. We reverse and remand for a new trial.

II. Procedural and Factual Background

Victim was a music promoter. On December 8, 2016, Victim traveled from his home in Pevely to the City of St. Louis to conduct business. Early the next morning, Victim was found in the driver's seat of his vehicle with two gunshot wounds on the right side of his head, one in the hairline above his right ear and one in his right ear. An autopsy revealed that the fatal wound was the one that entered Victim's head at the hairline above his right ear. Around the other wound in his right ear, there were stippling marks, which occur when a gun is fired at close range. There was no evidence at trial as to which gunshot occurred first or from what distance either shot was fired. In Victim's right hand, there was a small plastic bag containing suspected drugs. There were no guns found in the vehicle.

Ballistics evidence revealed that a .380 caliber weapon had been used in this crime. A gun matching that evidence was eventually found in a stairwell of an apartment building in St. Louis, but it was never traced to any individual. It was determined that all of the fingerprints in the car belonged to Victim. The only DNA match from the swabs taken from the car was to a man Victim was supposed to meet on the night he was killed, according to Victim's family. The police had previously investigated this man's social media account and cell phone records, which revealed no useful information. When he was interviewed by the police, the man said he had been in Victim's car on several occasions--he was a singer who worked with Victim--but did not know anything about the night of the murder. The police testified there was no basis to arrest this person.¹

¹ The police also investigated various other leads that did not lead to arrests or charges: a person found to be in possession of one of Victim's guns--which was believed to have been stolen from his car the night of the murder--did not have any information about the crime; someone claimed on Facebook to have information about the murder, but when interviewed did not actually know anything about it; a woman claimed to be in possession of a piece of Victim's jewelry and to have information about the murder and a suspect, but she passed away before the police could speak to her; and Victim's ex-girlfriend told his family at one point after their breakup that she could have killed him, but she could never be located.

In December of 2018--two years after his death--Victim's family notified the police that Shawnee Richie and Kyle Ayers had information about the murder. Ayers is Defendant's nephew, and both he and Richie were Victim's friends. Richie and Ayers were interviewed by police, and Defendant was arrested shortly thereafter. Police then interviewed Ayers's mother, Crystal Ayers-Adams, who is Defendant's sister and also knew Victim because of his friendship with her son. At trial, Richie, Ayers, and Ayers-Adams testified about statements Defendant made to them regarding Victim's death.

Richie and Ayers lived together in a trailer in Pevely with their children, and Defendant slept there a couple of nights a week. She testified that Victim had been her best friend. Richie said that one evening in November or December of 2018, she, Ayers, and Defendant were the only ones at home. Richie and Ayers began reminiscing about Victim. Defendant was in another room but could hear them. Richie testified that Defendant "got mad" that she had brought up Victim's name. "His whole demeanor changed. He was fine. Then his actions. He was angry." Richie testified that Defendant got in front of her "and looked at me with anger." She said she asked him what was wrong: "He said, do you want to know why I get so mad that you talk about [Victim]? I said, why. And he said, because I killed him." Richie testified that she was "shocked" and that when she asked him why he did it, Defendant said it was revenge for someone else who owed him money. Richie said Defendant also told her that after he shot Victim, he hid the gun under the passenger-side tire. Richie testified she was looking at Defendant "face to face" while he was making these statements. The State then asked Richie: "When you were looking at [Defendant] and he was telling you he shot and killed [Victim], did you believe he had done that?" She said "yes."

Ayers testified that he too was a good friend of Victim's. Ayers said he and Richie discussed Victim every so often, including a couple of times when Defendant was also at the trailer with them, but Defendant never joined the conversations. Ayers testified that on one occasion in late November or early December 2018, he and Richie were talking about Victim because his birthday was coming up. Ayers testified that Defendant "got mad" and "was pacing back and forth between the kitchen and the living room. He said, do you want to know what happened to [Victim]?" Ayers was "kind of stunned." Ayers testified that Defendant said he shot and killed Victim. The State asked Ayers: "As you're sitting back and you're thinking about that evening when you, [Richie], and [Defendant] were in the living room of your trailer and you watched, you looked at [Defendant] while he said this to you, did you believe he was telling you the truth?" Ayers said "yes."

Ayers-Adams testified that one night in September of 2018, Defendant came to her house and asked her to come outside and talk to him privately. She said Defendant told her that he shot and killed Victim and that it had something to do with drugs stolen from him by a friend of Victim's. Ayers-Adams did not ask any other details, she just wanted him to leave. The State asked Ayers-Adams: "When you were talking to him, seeing his face, watching what he was telling you, did you believe he was telling you the truth?" She said "yes." She was asked this again at the end of her direct examination: "[W]hen you were talking about [Defendant], and he was telling you he shot and killed [Victim], did you believe he was telling you the truth?" She answered "Yes, I feel like he was."

No objection was raised to the admission of Defendant's extrajudicial statements, nor to the witnesses' testimony that they believed Defendant was telling the truth. Defendant did not testify. He called one witness, Clara Clifton, who is Defendant's and Ayers-Adams's mother, to

impeach Ayers-Adams's statement that she believed Defendant. Clifton testified that Ayers-Adams had told her "on a couple occasions she didn't believe [Defendant] did it."

Throughout the first portion of the State's closing argument, the State repeatedly reminded the jury to "focus in on witness credibility" because Defendant's confessions were "the key to this case." The State pointed out that Richie, Ayers, and Ayers-Adams all "said the defendant told them that he shot and killed [Victim]" and the jury had to "consider[] whether that's truthful." The State argued that these witnesses had no reason to lie.

Defendant argued to the jury that there was nothing connecting him to the death of Victim "other than the stories of those three people." He argued that it did not make sense that Defendant would confess suddenly two years after the crime and to Victim's friends. Defendant also highlighted Clifton's testimony that Ayers-Adams had told her she did *not* believe Defendant did it and suggested Ayers-Adams was lying now to protect her son.

In its final argument before deliberations, the State reiterated that the witnesses had no reason to lie. As to Clifton's testimony, the State suggested that Ayers-Adams simply did not want to tell her mother that she believed Defendant did it. The State then pointed out that both Ayers-Adams and Ayers testified under oath that they believed Defendant: "[Y]ou heard what [Ayers-Adams] had to say under oath today. She did believe the defendant did kill [Victim]. You did hear [Ayers] believed the defendant did kill [Victim]." The State's argument concluded by again reminding the jury that the "confessions are key."

The jury found Defendant guilty of murder in the first degree and armed criminal action. He was sentenced to life imprisonment on both counts, to be served concurrently. This appeal follows.

III. Standard of Review

Because none of the errors raised on appeal were preserved, Defendant seeks plain error review under Rule 30.20.² Plain error review under the rule is a two-step process. *State v. Ashcraft*, 530 S.W.3d 579, 586 (Mo. App. E.D. 2017). First, we decide if the record “facially demonstrates substantial grounds” to believe a manifest injustice or miscarriage of justice has resulted from a plain error, which is an error that is “evident, obvious, and clear.” *Id.* If so, then, second, we consider whether a manifest injustice or miscarriage of justice has actually occurred as a result of that plain error. *Id.* at 587. “The appellant bears the burden of establishing that the trial court committed an error that was evident, obvious, and clear as well as that such error actually resulted in manifest injustice or miscarriage of justice.” *Id.*

IV. Discussion

In his first three points on appeal, Defendant contends the trial court plainly erred in allowing Richie, Ayers, and Ayers-Adams to opine about the truth of Defendant’s statements. In his fourth point on appeal, Defendant claims the trial court plainly erred in admitting the statements themselves. Taking the points out of order, we conclude it was not plain error to admit the extrajudicial statements, but it was plain error to allow the witnesses to testify that they believed those statements. Therefore, we reverse and remand for a new trial because of the error alleged in the first three points. Although we find no error in the fourth point, we discuss it because the issue is likely to arise on retrial.

Admission of Extrajudicial Statements

Defendant contends there was no independent proof of the *corpus delicti* of the offense, and therefore his extrajudicial statements were plainly inadmissible. We disagree.

²All rule references are to the Missouri Supreme Court Rules (2020).

Corpus delicti describes the State’s “burden of proving that a crime was committed by someone, independent from a defendant’s extrajudicial statements.” *State v. Madorie*, 156 S.W.3d 351, 353–54 (Mo. banc 2005) (emphasis in original). Thus, “[e]xtrajudicial admissions or statements of the defendant are not admissible in the absence of independent proof of the commission of an offense.” *Id.* at 355. The circumstances tending to prove the *corpus delicti* must correspond with the confession, and “[s]light corroborating facts are sufficient.” *Id.* (emphasis in original, internal quotation marks and citations omitted). The extrajudicial statement and proof of the *corpus delicti* “need not stand separately, but may augment each other in providing proof of the crime’s essential elements.” *State v. Davis*, 797 S.W.2d 560, 564 (Mo. App. W.D. 1990). “When circumstances independent of the inculpatory statement tend to prove matters recited in the statement and corroborate the statement, the reviewing court may deem the proof of the *corpus delicti* sufficient.” *Id.*

In a homicide case, the *corpus delicti* consists of two elements: “(1) proof of the death of the victim and (2) evidence that the criminal agency of another was the cause of the victim’s death.” *State v. Edwards*, 116 S.W.3d 511, 544 (Mo. banc 2003). It also must be proven that the death was not self-inflicted, accidental, or due to natural causes. *Id.* The *corpus delicti*, even in a homicide case, may be proven solely by circumstantial evidence, which “need not demonstrate the impossibility of his innocence.” *State v. Williams*, 66 S.W.3d 143, 153 (Mo. App. S.D. 2001) (internal quotation marks and citations omitted).

Here, there was sufficient evidence to corroborate Defendant’s extrajudicial statements. Defendant said he shot and killed Victim, and the evidence showed Victim died as a result of a gunshot wound. Defendant argues that there was no evidence as to which gunshot wound occurred first and that one of the wounds had stippling and appeared to be fired at close-range,

consistent, he says, with suicide. But when viewed in the light most favorable to the verdict, the circumstantial evidence and reasonable inferences therefrom show the gunshot wound was not self-inflicted. *See State v. Bullington*, 684 S.W.2d 52, 57 (Mo. App. W.D. 1984) (stating that when determining sufficiency of *corpus delicti* proof, reviewing court views evidence and reasonable inferences therefrom in light most favorable to the verdict, disregarding contrary evidence and inferences).

First, it is reasonable to infer from the fact that there were *two* shots that Victim did not inflict them himself. Regardless of which shot came first and from what distance, when a person shoots himself in the head, it is reasonable to infer the resulting wound is sufficient to at the very least incapacitate him from shooting himself a second time, even if he were to ultimately survive. Second, Victim was found with a baggie in his right hand, not a gun, as one would reasonably expect to find if he had shot himself in the right side of the head. And, in fact, there was no gun found in the car. Rather, the gun that was used to shoot him was found many months later in a totally different location. As Defendant points out, it is not impossible to imagine an explanation for how a suicide victim could be found without the fatal weapon near him. But the existence of other hypotheses based on this fact does not preclude a conclusion that this was a murder, not a suicide. *See Williams*, 66 S.W.3d at 153. Third, the supposed discrepancies in detail between the statements and the evidence that Defendant cites--he did not mention the caliber of gun, but the evidence showed a .380 was used; the gun was not found where Defendant told Richie he put it after he shot Victim; and no evidence was adduced as to Defendant's stated revenge motive--are simply not determinative here. It is enough that the evidence tends to corroborate Defendant's statements as to the essential elements of the crime. *See Davis*, 797 S.W.2d at 564. The essential statement that Defendant killed Victim by shooting him and the independent evidence showing

Victim died by gunshot wound corroborate and augment one another sufficiently to establish the *corpus delicti* in this case.

Because there was independent evidence of the *corpus delicti*, it was not error--plain or otherwise--to admit the extrajudicial statements into evidence. Point IV is denied.

Admission of Opinions as to Guilt

Defendant argues that it was plain error to allow Richie, Ayers, and Ayers-Adams to testify that they believed Defendant was telling the truth when he said he shot and killed Victim. We agree.

In general, a non-expert witness is not permitted to give opinions. *State v. Langford*, 455 S.W.3d 73, 76 (Mo. App. S.D. 2014). The State contends the challenged testimony falls into an exception to this rule: lay witnesses who personally observed an event are permitted to testify as to their understanding of what they saw in a descriptive manner even if that testimony contains a conclusion, opinion, or inference. *See id.* at 76-77; *Shockley v. State*, 147 S.W.3d 189, 194 (Mo. App. S.D. 2004). The State argues that Richie's, Ayers's, and Ayers-Adams's testimony that they believed Defendant was telling the truth when he said he shot and killed Victim was just a short-hand rendition of their personal observations based on Defendant's demeanor and expression at the time. This testimony was relevant, the State contends, because these witnesses were in a better position than the jury to determine the veracity of Defendant's statements in that they were familiar with Defendant and the jury was not present when they were made.

"However, a lay person may not give an opinion when 'it has the effect of answering the ultimate issue the jury is to determine.'" *Shockley*, 147 S.W.3d at 194 (quoting *State v. Cason*, 596 S.W.2d 436, 440 (Mo. 1980)); *see also State v. Schelsky*, 597 S.W.3d 201, 210 (Mo. App. E.D. 2019). And it is not proper for any witness to directly comment that he thinks the defendant

is innocent or guilty. *State v. Link*, 25 S.W.3d 136, 145 (Mo. banc 2000). When Richie testified that she believed Defendant shot and killed Victim, that was a direct comment that she believed Defendant was guilty of this crime. Ayers and Ayers-Adams testified that they believed Defendant was telling the truth when he said he had shot and killed Victim, which were also tantamount to direct comments that they thought Defendant was guilty of the crime. The personal observation exception on which the State relies is not so broad as to permit these direct comments on Defendant's guilt. They were clearly inadmissible.

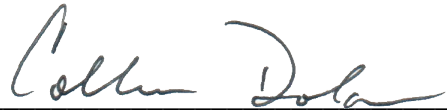
To warrant reversal, the plain error must have had a "decisive effect on the outcome of the proceedings to amount to manifest injustice or a miscarriage of justice." *Schelsky*, 597 S.W.3d at 211; *see also State v. Presberry*, 128 S.W.3d 80, 85 (Mo. App. E.D. 2003) (stating that manifest injustice or miscarriage of justice exists where the error is "outcome determinative"). Defendant's statements were, as the State repeatedly said at trial, the "key" to this case. There was no other evidence connecting Defendant to Victim's murder. Though the State argued with regard to its admissibility that the testimony of these people familiar with Defendant was necessary to help the jury determine whether Defendant's statements were true, now it changes tack and contends the truth of the statements was not at issue in this case. Rather, it argues, the thrust of the defense theory at trial was that Defendant never made the statements, not that the statements were untrue. First, the truth of the statements was squarely at issue given the evidence and arguments around whether Ayers-Adams actually believed Defendant did it. Moreover, the truth of the statements was inherently at issue in this case, even though the defense focused more on the unlikelihood that he made the statements in the first place. To convict him of murder, it would not have been enough that the jury believed Defendant *said* he shot and killed Victim, the jury had to believe Defendant was telling the truth and *actually had* shot and killed Victim. That

Defendant's family believed he was guilty--evidence that was highlighted by the State in the rebuttal portion of closing argument, just before the jury retired to deliberate--likely had a decisive impact on the verdict. The admission of these improper comments on Defendant's guilt undermines our confidence in the fairness of this trial and this verdict.

Defendant has met his burden of proving that an evident, obvious, and clear error occurred here resulting in a manifest injustice or miscarriage of justice. Points I, II, and III are granted.

V. Conclusion

The judgment is reversed, and the case is remanded for a new trial.



Colleen Dolan, J.

Robert M. Clayton III, J., concurs.
Kelly C. Broniec, J., concurs.