STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1346

State of Minnesota,
Respondent,

vs.

Samuel Haimah Boimah,
Appellant.

Filed May 30, 2017
Affirmed
Smith, Tracy M., Judge
Dissenting, Randall, Judge

Hennepin County District Court
File No. 27-CR-15-28523

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Wynn Charles Curtiss, Hopkins City Attorney, Chestnut & Cambronne, PA, Minneapolis, Minnesota (for respondent)

Jonathan E. Fruchtman, Minneapolis, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Smith, Tracy M., Judge; and Randall, Judge.*

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

U N P U B L I S H E D O P I N I O N

SMITH, TRACY M., Judge

Appellant Samuel Haimah Boimah was convicted of gross-misdemeanor stalking, based on a threatening voicemail message he left for his former wife. Boimah argues on appeal that the district court plainly erred by allowing his former wife and the investigating police officer to testify about the contents of the voicemail message when the state had neither introduced a recording of the message nor proved an exception to the best-evidence rule. Because we conclude that the district court did not plainly err in admitting the testimony, we affirm.

FACTS

N.T. and Boimah were married from 2004 to 2010. N.T. received a voicemail message at 8:16 p.m. on August 4, 2015, which said, "[N.T.], I'm going to kill you." N.T. recognized Boimah's voice and feared that Boimah might kill her. N.T. went to the Hopkins Police Department on August 18. She played the message for an officer and told him that she recognized Boimah's voice and phone number. Boimah was charged with gross-misdemeanor stalking.

A court trial was held, at which Boimah represented himself. The officer, N.T., and Boimah testified. The officer testified that he heard a male voice on the voicemail message say, "[N.T.], I'm going to kill you," and that N.T. told him the voice was Boimah's. N.T. testified that she recognized Boimah's voice and that the message said, "[N.T.], I'm going to kill you." Boimah did not object to the officer's or N.T.'s testimony. Boimah testified that he called N.T. at 8:16 p.m. on August 4 but denied making any threats. The state did

not produce a recording of the voicemail message. The district court found Boimah guilty of gross-misdemeanor stalking.

Boimah appeals.

D E C I S I O N

Boimah argues that the best-evidence rule required the state to produce the original or a duplicate recording of the voicemail message and that the district court plainly erred by admitting testimony about the contents of the voicemail message.

In the absence of an objection, we review the admission of evidence for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under the plain-error standard, the defendant must show: (1) an error, (2) that was plain, and (3) that the error affected the defendant's substantial rights. *Id.* Generally, an error is plain if it "contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The rules of procedure and evidence apply to all litigants at trial; "[n]o extra benefits will be given to pro se litigants." *See State v. Seifert*, 423 N.W.2d 368, 372 (Minn. 1988).

The best-evidence rule requires that the original recording be produced to prove its contents. Minn. R. Evid. 1002. The "original" means the recording itself or "any counterpart intended to have the same effect by a person executing or issuing it." Minn. R. Evid. 1001(3). But the original is not required if (1) the original is lost or destroyed, (2) the original is not obtainable, (3) the original is in the possession of the opponent, or (4) the original is not closely related to a controlling issue. Minn. R. Evid. 1004. A party seeking to introduce secondary evidence based on the unavailability of the original must "prove that a diligent but unsuccessful search has been made for [the original]." *City of*

St. Paul v. Dahlby, 266 Minn. 304, 315, 123 N.W.2d 586, 592 (1963).[1] Secondary evidence about the contents of the original cannot be admitted where the original is available. *State v. DeGidio*, 277 Minn. 218, 220, 152 N.W.2d 179, 180 (1967). But reasonable discretion is given to the district court in the application of the best-evidence rule; "[t]he rule is not inflexible and must be applied with due regard to all circumstances." *Dix v. Harris Mach. Co.*, 240 Minn. 218, 230, 60 N.W.2d 628, 635 (1953); *see also State v. Dienger*, 286 Minn. 436, 438, 176 N.W.2d 528, 529 (1970).

The voicemail message is an original recording subject to the best-evidence rule. Absent a showing of an exception, the state was required to produce the original recording of the voicemail message. *See* Minn. R. Evid. 1001(3), 1002. The state introduced no evidence that the voicemail message was unavailable or that the state had made a diligent but unsuccessful search for the original. *See Dahlby*, 266 Minn. at 315, 123 N.W.2d at 592. And no other exception explains the state's failure to produce a recording of the voicemail message. *See* Minn. R. Evid. 1004. The state thus did not establish that an exception justified the admission of secondary evidence about the contents of the voicemail message.

But, absent an objection, it was not plainly erroneous for the district court to admit the testimony about the contents of the voicemail message. In *Manthey*, the Minnesota

[1] While the Minnesota Rules of Evidence became effective in 1977, the comments to rule 1004 make it clear that "[t]his rule is a codification of the common law." *See* Minn. R. Evid. 1004 1977 comm. cmt. Thus, pre-1977 cases that apply the best-evidence rule in a manner consistent with the language of Minn. R. Evid. 1004 are instructive. *See Angus v. State*, 695 N.W.2d 109, 119 (Minn. 2005) (discussing common-law rules of evidence in conjunction with the Minnesota Rules of Evidence).

Supreme Court considered the narrowness of the plain-error standard with respect to hearsay evidence. *Manthey*, 711 N.W.2d at 504. The supreme court stated that "[t]he number and variety of exceptions to the hearsay exclusion make objections to such testimony particularly important to the creation of a record of the trial court's decision-making process in either admitting or excluding a given statement." *Id.* The hearsay rule's numerous exceptions "make it particularly important that a full discussion of admissibility be conducted at trial." *Id.* "In the absence of an objection, the state was not given the opportunity to establish that some or all of the statements were admissible under one of the numerous exceptions to the hearsay rule." *Id.* The supreme court therefore concluded that evidence was not "clearly or obviously inadmissible hearsay." *Id.*

We apply the analysis of *Manthey* to this case. There are a number of exceptions to the best-evidence rule. Minn. R. Evid. 1004; *see Manthey*, 711 N.W.2d at 504. Boimah's failure to object deprived the state of the opportunity to argue that an exception to the best-evidence rule applied. *See Manthey*, 711 N.W.2d at 504. Moreover, the best-evidence rule is "not inflexible," and the district court has reasonable discretion in deciding whether to admit secondary evidence. *Dix*, 240 Minn. at 230, 60 N.W.2d at 635. In light of Boimah's failure to object and the district court's inherent discretion, the testimony about contents of the voicemail message was not clearly or obviously inadmissible. *See Manthey*, 711 N.W.2d at 504. We therefore conclude that it was not plainly erroneous for the district court to admit the testimony about the contents of the voicemail message.

Because the district court did not plainly err in allowing N.T. and the officer to testify about the contents of the voicemail message, we affirm.

Affirmed.

RANDALL, Judge (dissenting)

I respectfully dissent. On the issue of "best evidence," I conclude that the district court plainly erred in admitting oral testimony about the contents of a voicemail message that was not received in evidence. I also conclude that the plain error affected appellant's substantial rights and that fairness requires reversal because the voicemail message was the only credible evidence that appellant left a threatening message. Instead of reversing and remanding for a new trial, I would reverse outright, because the absence of the voicemail message meant the state did not prove the crime of stalking.

Appellant was charged with stalking for a single phone call to his former wife in which he purportedly threatened to kill her. *See* Minn. Stat. § 609.749, subd. 2(1) (2016) (providing a person stalks another by directly or indirectly manifesting a purpose or intent to injure the person, property, or rights of another). Appellant admitted making a phone call to his former wife, but he denied threatening her. The police officer who listened to the call was not familiar with appellant's voice.

The only evidence that appellant threatened to kill his former wife was her testimony. The state did not offer the original recording of the phone call into evidence to prove the content of the recording, which is required by Minn. R. Evid. 1002. The majority concedes the state introduced no evidence that the voicemail message was unavailable or that the state attempted to find it and bring it to the court's attention, or at least that they tried to find it but could not. Because the state did not establish that the original recording was lost or destroyed, that it was not obtainable by other means, and the recording was clearly not in appellant's possession, the state did not establish an exception to the "best

evidence" requirement. Minn. R. Evid. 1004. The voicemail recording was not collateral. It was the *only* evidence of the issue in the case: whether appellant threatened to kill his former wife. *See id.* (providing exception to offering the original if "[t]he writing, recording, or photograph is not closely related to a controlling issue"). The state also made no attempt to have a qualified person listen carefully to the message and then retype it in a transcript and swear that the transcript was exactly what it purported to be. *See State v. Olkon*, 299 N.W.2d 89, 103 (Minn. 1980) (providing that transcript of recording should not ordinarily be admitted into evidence unless both sides stipulate to its accuracy and agree to its use as evidence). There is nothing in the record to show that the state attempted to find the voice message and bring it into the court or find an expert. No exception to offering the original voicemail recording applies. Appellant has established error.

Appellant did not qualify for a public defender, and to his detriment attempted to represent himself at trial. Once the state learned that appellant was proceeding pro se, it apparently lost interest in producing the recorded voicemail message. Appellant did not object to the state's failure to produce the recorded voicemail message. Under the plain-error standard, appellant has established that the error was plain, because the state did not comply with Minnesota Rule of Evidence 1002 and 1004. *See State v. Davis*, 735 N.W.2d 674, 681 (Minn. 2007) ("An error is plain if it is clear or obvious, and usually this is shown if the error contravenes case law, a rule, or a standard of conduct.").

The state did not bother to submit a respondent's brief on appeal, or even appear at oral argument. Under the facts of this case, the state failed to introduce "real" evidence that appellant made the purported threat. It is clear that appellant has met his burden of

establishing a reasonable likelihood that the error substantially affected the verdict. *See State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). I conclude that the lack of this evidence affected the fairness and integrity of the judicial proceedings. Instead of reversing and remanding for a new trial, I would dismiss the case outright for lack of evidence. There are times when that happens. At the close of the state's case, the judge can make a finding on the record that the state did not produce enough evidence to even send it to the jury to determine if all of the essential elements of the charged crime were proven by proof beyond a reasonable doubt. *See* Minn. R. Crim. 26.03, subd. 18(1)(a) (permitting defendant to move for judgment of acquittal at the close of state's evidence). The same criteria applies here. If appellant had moved for judgment of acquittal at the close of the state's case, the trial judge would have been required to rule on the motion. *See State v. Slaughter*, 6901 N.W.2d 70, 75 (Minn. 2005) (concluding court is to apply same standard for deciding a motion for judgment of acquittal in a bench trial as in a jury trial). I find the state's evidence, even when viewed in the light most favorable to the state, was insufficient to sustain the conviction.

Break it down. A witness testifies, not as to a personal phone call she received, but what she recalls a voice message said. She makes no showing to produce that phone. She has law enforcement listen to the voice message and testify as to his recollection, but law enforcement makes no attempt to bring the phone into court or locate it if it is missing.

Appellant agreed he made the phone call but denied making a threat. There is no evidence other than the complainant's second-hand testimony that appellant threatened her. (Not directly, not a phone call she heard, but a voicemail message she recalls.) With the

human voice, inflection and intonation can mean everything. *See State v. Olson*, 887 N.W.2d 692, 698-99 (Minn. App. 2016) (noting that question of whether a statement constitutes a threat depends on the context in which it is used). We have none of that here. If the Minnesota Twins are in a funk and a game they should win is going south, some fan in the stands might mutter, "I could kill that SOB for missing that play" (referring possibly to a player or an umpire). Or, "I could kill for a cold beer because this game is dragging on." And so on and so forth. Something valuable is lost when somebody tells me that somebody else said something, but I do not get to hear for myself that other person's voicemail and their inflection or tone of voice and have to rely on a non-neutral interested party.

Stalking is a serious gross misdemeanor. Conviction for "stalking" will be an anchor around appellant's leg for the rest of his life. It will affect his ability to rent, to find a job, perhaps to go on to higher education, and it will certainly cut him out of civil service jobs for a city, county, state, or the federal government. It will adversely affect any attempt to go into the military or law enforcement. It is just one of those crimes that after conviction haunts a defendant.

I do not find anything in the record to sustain the trial court's finding that the charge was proved beyond a reasonable doubt.

I dissent and would reverse outright.