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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1468**

State of Minnesota,
Respondent,

vs.

Jeffery Lee Oliver,
Appellant.

**Filed July 3, 2017
Affirmed
Larkin, Judge**

Pennington County District Court
File No. 57-CR-15-736

Lori Swanson, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Alan G. Rogalla, Pennington County Attorney, Thief River Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Johnson, Judge; and Reilly, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his ammunition and controlled-substance convictions, arguing that the district court plainly erred by admitting hearsay evidence. Because appellant has not shown that the alleged error affected his substantial rights, we affirm.

FACTS

In September 2015, the State of Minnesota charged appellant Jeffery Lee Oliver with ineligible possession of a firearm, fifth-degree controlled-substance crime (possession of hydrocodone), theft of a motor vehicle, theft of a firearm, and theft of a controlled substance. In January 2016, the state amended the complaint to charge Oliver with ineligible possession of ammunition. The state dismissed the theft charges before trial. The remaining firearm, ammunition, and controlled-substance possession charges were tried to a jury. Oliver stipulated that he was ineligible to possess a firearm and ammunition.

I.H. testified that on September 12, 2015, he and Oliver were at a party at J.D.'s home. After I.H. left the party, he fell from his vehicle and broke his arm. Oliver noticed I.H. on the ground, and I.H. asked Oliver for a ride home. Oliver drove I.H. home in I.H.'s vehicle. I.H. testified that he stored his gun, ammunition, and prescription hydrocodone pills in a lockbox at his home. He did not remove any of those items from the lockbox that evening.

Deputy Kyle Miller of the Pennington County Sheriff's Office testified that on September 12, 2015, police dispatch informed him that an anonymous 911 caller had reported that a male named Jeff Smith planned to rob I.H. at his home. The 911 caller

indicated that a gun might be involved. Deputy Miller radioed State Trooper Anthony Schmidt for backup, and Deputy Miller and Trooper Schmidt met at a convenience store near I.H.'s home. While they were at the convenience store, Deputy Miller observed a vehicle drive past that matched the description of I.H.'s vehicle. Trooper Schmidt followed the vehicle, and Deputy Miller joined him after confirming that I.H.'s vehicle was not at his home. Deputy Miller pulled the vehicle over after observing it cross the center line. Oliver was driving the vehicle, which was otherwise unoccupied.

During the ensuing investigative stop, Trooper Schmidt told Deputy Miller that he saw a box of ammunition on the passenger seat of the vehicle. Deputy Miller removed Oliver from the vehicle, searched him, and found two bottles of hydrocodone pills, which were prescribed to I.H., in his pants pocket. Deputy Miller found a box of ammunition and another bottle of I.H.'s prescription pills on the passenger seat. He also found a loaded gun behind the passenger seat, wedged between the seat and a spare tire.

Trooper Schmidt testified that he approached the vehicle from the passenger side because the 911 call indicated that a gun might be involved. Trooper Schmidt also testified that he saw a box of ammunition "plain as day through the passenger window" and that the ammunition box was not obscured.

Oliver testified that during the drive to I.H.'s house, I.H. asked Oliver to hold his hydrocodone pills. Oliver also testified that he did not know that the gun and ammunition were in the vehicle. Oliver admitted that the dome light turned on when he helped I.H. get out of the vehicle.

The jury found Oliver guilty of ineligible possession of ammunition and fifth-degree controlled-substance possession. The jury acquitted Oliver of the gun-possession charge. Oliver appeals.

D E C I S I O N

Oliver contends that “[t]he district court abused its discretion and committed plain error when it admitted into evidence testimony from law enforcement officers about [the] 911 call they had received concerning a tip that ‘Jeff Smith’ was going to ‘rob’ [I.H.] using a firearm.” He argues that “[b]ecause the statement of the unidentified 911 caller was inadmissible prejudicial hearsay, it was plain error to allow the jury to hear the substance of the 911 call and other references to it.”

Deputy Miller testified:

I was informed by our dispatch center that they’d received an anonymous 911 call from a landline on the eastern edge of the county stating that a male by the name of Jeff, I think Smith it was, was planning to rob [I.H.] at his home in Goodridge.

Deputy Miller also testified that the 911 caller indicated that a gun might be involved. Oliver’s counsel cross-examined Deputy Miller regarding the anonymous call:

Q: You also received information, didn’t you, that the caller said she was calling from Red Lake, Minnesota?

A: The caller said that she was calling from the Red Lake Indian reservation.

Q: And had left [J.D.’s] residence?

A: Yep.

Q: Except that 911 dispatch tells you where the call comes from and it was calling from the [J.D.] residence?

A: Yes, it was a landline that called from the [J.D.] residence.

Q: So clearly that report wasn’t true; that part of it wasn’t true?

A: That she was on the reservation, right.

Trooper Schmidt referred to the 911 call when explaining why he approached the vehicle from the passenger side: “[T]he initial call was that potentially the person was going to be robbed with a handgun, so I wanted to see if I could see any kind of weapon that would harm [D]eputy Miller or myself.”

Oliver did not object to the testimony regarding the 911 call. Generally, failure to object to the admission of evidence constitutes a waiver of the issue on appeal. *State v. Tscheu*, 758 N.W.2d 849, 863 (Minn. 2008). But an appellate court may review an unobjected-to error if (1) there was error, (2) the error was plain, and (3) the error affected the defendant’s substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). To satisfy the third prong, a defendant must show a reasonable likelihood that the error substantially affected the verdict. *State v. Robertson*, 884 N.W.2d 864, 876 (Minn. 2016). “The defendant bears the heavy burden of proving prejudice.” *State v. Wenthe*, 865 N.W.2d 293, 299 (Minn. 2015) (quotation omitted), *cert. denied*, 136 S. Ct. 595 (2015). If the first three prongs are satisfied, this court determines whether it should address the error “to ensure fairness and the integrity of judicial proceedings.” *Griller*, 583 N.W.2d at 742. If any prong of the plain-error test is not met, this court need not address the remaining prongs. *Robertson*, 884 N.W.2d at 875; *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

“‘Hearsay’ is 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). Hearsay is inadmissible unless an exception applies. Minn. R. Evid. 802; *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). There are numerous exceptions to

the hearsay rule. *E.g.*, Minn. R. Evid. 803 (setting forth 22 exceptions to the hearsay rule); Minn. R. Evid. 804 (setting forth five exceptions to the hearsay rule); *see also* Minn. R. Evid. 801(d) (setting forth nine hearsay exemptions).

In *State v. Manthey*, the Minnesota Supreme Court explained:

The 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. The complexity and subtlety of the operation of the hearsay rule and its exceptions make it particularly important that a full discussion of admissibility be conducted at trial.

. . . In the absence of an objection, the state [is] 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.

711 N.W.2d at 504.

We need not determine whether the district court plainly erred by allowing testimony regarding the content of the 911 call because Oliver does not meet his heavy burden to show that this evidence affected his substantial rights. *See Robertson*, 884 N.W.2d at 876 (declining to “consider the first two steps of the plain error analysis because [defendant] has not shown that the alleged error affected his substantial rights”).

To return a guilty verdict on the charged offenses, the jury had to find that Oliver possessed a firearm and ammunition while ineligible to do so and that he unlawfully possessed a controlled substance, in this case, hydrocodone. *See* Minn. Stat. § 624.713, subd. 1 (Supp. 2015) (defining the crimes of ineligible possession of a firearm and ineligible possession of ammunition); Minn. Stat. § 152.025, subd. 2 (2014) (defining the offense of fifth-degree controlled-substance crime); Minn. Stat. § 152.02, subd. 3 (Supp.

2015) (listing hydrocodone as a controlled substance). Oliver stipulated that he was ineligible to possess a firearm and ammunition. But Oliver testified that he did not know the gun and ammunition were in the vehicle and that he had permission to hold I.H.'s prescribed hydrocodone.

The testimony regarding the 911 call indicated that "Jeff Smith" was planning to rob I.H. and that the robbery might involve a gun. Oliver argues that "the inadmissible tip buttressed the State's theory that [Oliver] took the items (gun, ammunition, and pills) from [I.H.'s] lock box without [I.H.'s] consent." Oliver further argues that "[i]f the jury was looking for some concrete fact to attempt to show that . . . [he] was not truthful, the jury well might have utilized [the] 911 statement or [it] might have used it to fill in the gaps in the trial record."

Our analysis is influenced by the jury's acquittal on the firearm-possession charge. An acquittal on one count and convictions on others indicates that the jury was not improperly influenced. *Cf. State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994) (stating principle in context of prosecutorial-misconduct claim). Unlike the hydrocodone pills in Oliver's pants pocket and the box of ammunition on the seat next to him, the gun was concealed between the front passenger seat and a spare tire. Although the 911 call provided a basis to conclude that Oliver was nonetheless aware of the gun, Oliver's attorney established reason to doubt the credibility of the 911 caller during Deputy Miller's cross-examination. And the jury's acquittal on the firearm-possession charge suggests that the jury did not rely on the 911 call in reaching its verdict. If the jury had relied on the 911 call, it likely would have found Oliver guilty of the firearm-possession charge. In sum,

Oliver has not met his heavy burden to show that the admission of testimony regarding the 911 call affected his substantial rights.

Even if the first three prongs of the plain-error test were met, we would not address the error because it is not necessary to ensure fairness and the integrity of the proceedings. The supreme court has explained that an error does not affect the fairness and integrity of judicial proceedings if a reversal “would allow a party to choose to try a case on one theory while holding a second theory in reserve for a possible appeal,” noting that such action “would adversely impact the integrity of the judicial proceedings.” *Frazier v. Burlington N. Santa Fe Corp.*, 811 N.W.2d 618, 626-28 (Minn. 2012) (applying the *Griller* criminal plain-error test in a civil case).

Instead of objecting to the testimony regarding the 911 call and arguing that the jury should not hear the content of the call, Oliver used the 911 call to show that the state’s case was not trustworthy. Oliver’s cross-examination of Deputy Miller established that a portion of the caller’s statement—and, by implication, the state’s case—was unreliable. Given Oliver’s choice to use the 911 call in his defense, granting him a new trial and allowing him to retry the case on a theory that does not include the content of the 911 call would compromise the integrity of the proceedings.

In conclusion, Oliver is not entitled to relief under the plain-error standard.

Affirmed.