STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2084

State of Minnesota,
Respondent,

vs.

Jon Marvin Manypenny,
Appellant.

Filed November 4, 2019
Affirmed
Jesson, Judge

Becker County District Court
File No. 03-CR-17-2709

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

Brian W. McDonald, Becker County Attorney, Lisa M. Tufts, Assistant County Attorney, Detroit Lakes, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Bjorkman, Judge; and Jesson, Judge.

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

JESSON, Judge

Appellant Jon Marvin Manypenny challenges his conviction of being an ineligible person in possession of a firearm, which stemmed from him carrying guns into an

apartment. Because the district court did not abuse its discretion by admitting a witness's out-of-court statement as a present-sense impression and because any error in admitting a second witness's statement did not affect Manypenny's substantial rights, we affirm.

FACTS

On December 27, 2017, M.N. and T.N. were playing cards and drinking beer at T.N.'s apartment. Later, appellant Jon Marvin Manypenny and two other individuals arrived at the apartment. M.N. saw Manypenny grab latex rubber gloves, talk to T.N., and leave. About 30 minutes later, Manypenny returned with the two individuals, and the group brought four or five guns into the apartment. M.N. saw Manypenny, who was wearing gloves, carrying two guns that looked like rifles.

M.N. sent a text message to her cousin stating, "SOS I'm at [T.N.'s] in the projects and [Manypenny] came in with rubber gloves and many [gun emoji] I didn't [d]o nothing but I'm here and I saw what I saw help." After receiving this message and several others, M.N.'s cousin called the police. About 12 minutes after M.N.'s first message, a police officer arrived at T.N.'s apartment. By the time police arrived, Manypenny had left the apartment.

Once at T.N.'s apartment, an officer asked M.N. and T.N. what happened. Although the two first denied that anything was going on, M.N. eventually told police that Manypenny and two others brought guns to the apartment. M.N. told the officer that the guns were in the bedroom, and after a search, the officer found four firearms. While the officer was recovering and securing the guns, T.N. left the apartment. Another officer

found T.N., and about 30 minutes later, officers interviewed her. T.N. told police that Manypenny and a man named Richard carried the guns into her bedroom.

Police did not locate Manypenny that night. But T.N. identified the other man with Manypenny as Richard Thompson based on a photograph that police showed her. And police found and interviewed Thompson, who was in custody, the next day. Thompson denied carrying any guns himself, but told police that Manypenny carried firearms into T.N.'s apartment.

Based on information from M.N., T.N., and Thompson, the state charged Manypenny with being an ineligible person in possession of a firearm. The case proceeded to a jury trial. Before the trial began, Manypenny's counsel requested that the court prevent the state from introducing any of T.N.'s prior statements to law enforcement, informing the court that T.N. indicated that she had no memory of the event. The district court determined that T.N.'s statement to police qualified as a present-sense impression under rule 801(d)(1)(D) of the Minnesota Rules of Evidence.

At trial, the state presented testimony from M.N., who testified about what happened as described above, including that she observed Manypenny carry firearms into T.N.'s apartment and that he was wearing gloves. M.N. acknowledged that she had been drinking that night, but testified that it did not affect her memory. The state then called T.N. as a witness, but she testified that she had no recollection of the night due to a traumatic brain injury and the fact that she was drunk.[1] According to T.N., she did not remember giving a

[1] T.N. acknowledged that her criminal history made her ineligible to possess a firearm but that the state never charged her with a crime for this incident.

statement to police, although she did not deny doing so. Reviewing a transcript of her statement did not refresh her recollection.

Thompson also testified for the state. He explained that a woman contacted him about selling some firearms, so he asked some people he knew if they wanted to buy any guns. According to Thompson, he and Manypenny are friends, but he never talked to Manypenny about guns. He went to T.N.'s apartment with a woman on December 27 and brought four firearms, but Thompson testified Manypenny was already in the apartment when he arrived. When asked if he remembered giving a statement to police, Thompson responded that he did "not really" remember because he was still high when talking to officers, but that he recalled that he told officers he was not involved in what happened. Thompson explained that his initial statement to police—in which he implicated Manypenny—differed significantly from his testimony because he had "a lot to lose" when he talked to police. But because he pleaded guilty to being a prohibited person in possession of a firearm before Manypenny's trial, Thompson testified—with "nothing to lose" at this point—that his trial testimony that he carried the firearms into T.N.'s apartment was the truth.

After presenting the testimony of these three witnesses who previously gave statements to police, the state called one of the police officers who interviewed M.N., T.N., and Thompson. The officer testified that he responded to T.N.'s apartment and spoke with M.N. and T.N., and his body camera captured M.N. and T.N.'s statements. The district court admitted, without objection, general footage from when the officer arrived, including M.N. and T.N. initially speaking with police. The state then sought to admit T.N.'s

statement to police describing Manypenny's involvement with the firearms, and defense counsel did not object. As a result, the state played T.N.'s statement for the jury. Then, the state offered the recording of Thompson's prior interview with police, and again, defense counsel did not object. Thompson's interview implicating Manypenny was played for the jury.[2]

The jury found Manypenny guilty of being an ineligible person in possession of a firearm.[3] The district court sentenced Manypenny to the mandatory 60 months in prison. Manypenny appeals.

D E C I S I O N

Manypenny argues that the district court erroneously admitted both T.N.'s and Thompson's out-of-court statements to police. According to Manypenny, both statements are inadmissible hearsay and no exception to the rule against hearsay allowed the district court to admit them. We address each statement in turn.

I. The district court did not abuse its discretion by admitting T.N.'s out-of-court statement to police as a present-sense impression.

Manypenny asserts that the district court abused its discretion by admitting T.N.'s out-of-court statement to police because it constituted inadmissible hearsay. We review a

[2] Although Manypenny did not testify, he presented a witness who testified that he saw Manypenny on the night the event occurred, but that Manypenny did not have any guns with him. Manypenny's witness also explained that Manypenny never tried to sell him a gun.

[3] Manypenny stipulated that his prior criminal history made him ineligible to possess a firearm.

district court's evidentiary decisions for an abuse of discretion.[4] *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). A district court abuses its discretion when its decision is against facts in the record or based on an erroneous view of the law. *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019).

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). And hearsay is not admissible at trial unless it falls into one of several exceptions delineated in the rules of evidence. Minn. R. Evid. 802.

But the rules also exempt some prior statements by a witness from being classified as hearsay. Minn. R. Evid. 801(d)(1). One type of statement that is not hearsay is a statement known as a present-sense impression, or as an "unexcited utterance."[5] Minn. R. Evid. 801(d)(1)(D); *State v. Pieschke*, 295 N.W.2d 580, 583 (Minn. 1980). Under that provision, if a declarant testifies at trial and is subject to cross-examination, and the statement is "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter," the statement

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[4] It is not entirely clear from the record whether Manypenny properly maintained his objection to the admission of T.N.'s statement. But both the plain-error and harmless-error standards of review require us to first conclude that the district court erred. Because we conclude that the district court did not err, it is unnecessary for us to determine whether Manypenny properly maintained his objection.

[5] The present-sense impression, which is not hearsay, differs from the hearsay exception known as the excited utterance because it does not require that the declarant be under the "stress of excitement" when making the statement. 11 Peter N. Thompson, *Minnesota Practice* § 801.09 (4th ed. 2012). Further, the present-sense impression has the additional requirements that the declarant actually testify at trial and be subject to cross-examination, whereas the availability of the declarant is immaterial for a statement to be considered an excited utterance. Minn. R. Evid. 801(d)(1)(D); 803(2).

is not hearsay. Minn. R. Evid. 801(d)(1)(D). The purpose of requiring that the statement be "made contemporaneously with the event or immediately thereafter [is] so that there is little time to consciously fabricate a story." *Pieschke*, 295 N.W.2d at 583.

Here, the district court admitted T.N.'s statement as a present-sense impression. In discussing admitting the statement, the district court stated, "I don't know that the rule requires that it be absolutely contemporaneous or immediately after the incident so it's fresh and reliable." The district court then stated that it believed T.N.'s statement was the type of statement that would fit under rule 801(d)(1)(D).

But Manypenny argues that caselaw dictates that too much time elapsed between the event and T.N.'s statement for it to qualify as a present-sense impression. Manypenny draws our attention to *Pieschke*, a case in which the supreme court determined that statements made within a few minutes of an incident were close enough in time to qualify as present-sense impressions, but those made nearly an hour later did not qualify because they were too remote in time. 295 N.W.2d at 582, 584. But *Pieschke* is not as helpful as Manypenny asserts. Rather, *Pieschke* establishes a spectrum of time—ranging from a few minutes to nearly an hour—during which a statement can qualify as a present-sense impression. *Id.* T.N.'s statement to police falls squarely within that time spectrum. Further, *Pieschke* reiterates that the purpose of requiring a statement be "made contemporaneously with the event or immediately thereafter" is so there is not time for the declarant to "consciously fabricate a story." *Id.* at 583; *see also State v. Hogetvedt*, 623 N.W.2d 909, 913 (Minn. App. 2001) (determining that an assault victim's statement given to police at the hospital nearly three hours after the attack could fall under rule 801(d)

of the Minnesota Rules of Evidence), *review denied* (Minn. May 29, 2001). T.N.'s statement to police—given while she asserts she was drunk—occurred in the context of an ongoing police investigation, making it unlikely that she had time to fabricate a story. Accordingly, because the district court's decision to admit T.N.'s statement as a present-sense impression is not contrary to the time spectrum established by caselaw, it was not an abuse of discretion. *See Hallmark*, 927 N.W.2d at 291 (stating that a district court abuses its discretion when it bases its decision on an erroneous view of the law).

Finally, we note that even if the district court abused its discretion by admitting T.N.'s statement, any error was harmless. The state presented testimony from M.N. that Manypenny brought guns to T.N.'s apartment, which was corroborated by the text message that she sent her cousin. The jury found M.N. credible and credited her testimony, which is its role. *See State v. Landa*, 642 N.W.2d 720, 725 (Minn. 2002) (noting that it is the jury's role to weigh the credibility of witnesses). Because the jury believed M.N.'s testimony, the admission of T.N.'s statement did not substantially influence the jury's verdict. *State v. Taylor*, 869 N.W.2d 1, 14 (Minn. 2015).

II. Any error in admitting Thompson's out-of-court statement to police did not affect Manypenny's substantial rights.

Manypenny also argues that the district court abused its discretion by admitting Thompson's out-of-court statement to police. But at trial, Manypenny did not object to the admission of Thompson's statement. When a defendant does not object to the admission of evidence, he forfeits appellate review of that evidentiary issue. *State v. Vasquez*, 912 N.W.2d 642, 649 (Minn. 2018). But this court can review forfeited issues for plain

error. *Id.* at 650. Under the plain-error standard of review, "there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If each prong is met, this court then determines whether to address the error "to ensure fairness and the integrity of the judicial proceedings." *Id.*

Thompson's statement to police is hearsay: an out-of-court statement offered for its truth. Minn. R. Evid. 801(c). And hearsay is inadmissible unless an exemption or exception applies. Minn. R. Evid. 802. Here, the state presents no argument justifying the admission of Thompson's statement. In passing, the state suggests that Thompson's statement was not "offered to assert matters of truth," but the state provides no rationale—legal or factual—for its assertion. Accordingly, because Thompson's statement is hearsay and the state has provided no basis for its admission, the district court plainly erred by admitting Thompson's statement.

Having concluded that the district court plainly erred by admitting Thompson's statement, we turn to the question of whether the error affected Manypenny's substantial rights. Manypenny bears the burden of demonstrating that "there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quotation omitted). To evaluate the likelihood that the erroneously admitted evidence significantly affected the verdict, we consider "the persuasiveness of that evidence" and "the manner in which the evidence was presented." *State v. Jackson*, 764 N.W.2d 612, 620 (Minn. App. 2009), *review denied* (Minn. July 22, 2009).

In addition to the erroneously admitted statement, the state presented both M.N.'s testimony that Manypenny carried guns into the apartment and her consistent statement to police the night of the incident. The jury also reviewed M.N.'s text message to her cousin—sent around the time the event occurred—explicitly naming Manypenny as a person who brought guns into the apartment. Given the other evidence that the state presented against Manypenny, the admission of Thompson's statement did not affect Manypenny's substantial rights.

Further, in Thompson's statement to police, he stated that Manypenny carried firearms into T.N.'s apartment. But before the statement was played for the jury, Thompson testified that *he* carried the firearms into the apartment and that he was not truthful in his prior statement to police. And Thompson explained that he had a reason to lie to police in his initial statement—avoiding being charged with a crime himself—but that since he already pleaded guilty, he had no motive to be untruthful in his trial testimony. As a result, Thompson's testimony minimized the persuasiveness of the out-of-court statement. *Jackson*, 764 N.W.2d at 620.

But Manypenny argues that the state's case against him was not strong because the guns were not found in his possession and because no physical or forensic evidence connected him to the firearms. A lack of physical evidence, however, does not necessarily undermine a guilty verdict. *State v. Landin*, 472 N.W.2d 854, 858 (Minn. 1991). And the supreme court has stated "that a conviction can rest on the uncorroborated testimony of a single credible witness." *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004). M.N. testified that Manypenny brought firearms to the apartment, and her testimony *was*

corroborated by her text message to her cousin. And the jury found M.N. credible. *Landa*, 642 N.W.2d at 725. Because the state presented strong evidence of Manypenny's guilt and because Thompson's testimony minimized the persuasiveness of his out-of-court statement, the admission of Thompson's statement to police did not affect Manypenny's substantial rights. *See State v. Sontoya*, 788 N.W.2d 868, 873 (Minn. 2010) (evaluating the strength of the state's case to determine if plain error had a significant effect on the jury's verdict).

Affirmed.