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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0128**

State of Minnesota,
Respondent,

vs.

Sandra Kay Kouba,
Appellant.

**Filed December 23, 2019
Affirmed; motion granted
Smith, John, Judge***

Polk County District Court
File No. 60-CR-17-1712

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney,
Crookston, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota (for
appellant); and

Melissa Sheridan, Assistant Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Florey, Judge; and Smith,
John, Judge.

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

UNPUBLISHED OPINION

SMITH, JOHN, Judge

We affirm appellant Sandra Kay Kouba's conviction of felony domestic assault because the district court did not commit plain error by admitting (1) the victim's recorded statements as prior consistent statements, or (2) testimony that appellant did not answer the door when the police came to her residence.

FACTS

T.K. received a phone call from E.H., his grandmother. E.H. was crying, her voice was shaky, and she said "I'm very scared. I don't know what to do. Sand[ra] just tried to kill me." Appellant Sandra Kay Kouba is E.H.'s daughter. T.K. told his wife to call 911 and drove to E.H.'s home. When T.K. arrived, E.H. was still crying and told him that Kouba "just kept hitting me." T.K. observed bruises on E.H. that appeared to be fresh. E.H. told him that Kouba had returned to her home, which was located a few houses down the road.

Polk County Sheriff's Deputy Thomas Brault responded to the scene. Deputy Brault immediately noticed bruising on E.H.'s arms that appeared to be the result of her trying to protect her body with her arms. He asked E.H. what had happened and she responded "[i]t happened so fast that I don't really know," and informed Deputy Brault that she had dementia. When Deputy Brault asked for more details, E.H. stated that she had done something that Kouba didn't like and Kouba started hitting her. When asked if Kouba used closed fists, E.H. responded yes. E.H. also told Deputy Brault that Kouba drinks a lot and

had been drinking, but that she was unsure if that had anything to do with why they were fighting. E.H. was later transported to the hospital for medical treatment.

After speaking with E.H., Deputy Brault walked to Kouba's house. He repeatedly knocked on the door and identified himself as "Sheriff's Office." He could hear a female voice inside the home, but no one answered the door. He then applied for and was granted a search warrant. When he returned to the residence, he again knocked repeatedly and, again, received no answer. Another deputy then knocked down the door and Deputy Brault entered the residence and located Kouba asleep in her bedroom. Deputy Brault indicated that it appeared Kouba had been consuming alcohol and that he could smell a strong odor of alcohol.

Respondent State of Minnesota charged Kouba with one count of felony domestic assault. On September 17-18, 2018, the district court held a jury trial.¹ E.H. testified at trial. She testified that Kouba was her daughter, but could not identify her in the courtroom. E.H. testified that she did "not really" know what she was there to testify about, but later stated that Kouba had asked her for money, and when she said no Kouba "beat [her] up." She indicated that Kouba hit her "with her fists" and that after, Kouba left and went somewhere else. E.H. had difficulty recalling other details about the incident, including whether she went to the hospital or spoke to law enforcement. Deputy Brault also testified. During his testimony, the state played a portion of the recorded statement that E.H. gave to him immediately after the incident.

¹ Prior to trial, Kouba stipulated that she had two previous qualified domestic violence-related offense convictions that enhanced the charge to a felony.

The jury found Kouba guilty. The district court sentenced Kouba to 15 months in prison, stayed execution of the sentence for five years, ordered her to serve 90 days in jail, and placed her on probation.

D E C I S I O N

I. The district court did not commit plain error by admitting E.H.’s prior statement.

Kouba argues that the district court erred by admitting E.H.’s recorded statement as a prior consistent statement under Minn. R. Evid. 801(d)(1)(B). Kouba concedes that she did not object to the admission of the statement at trial and asserts that, therefore, the plain error standard of review applies.

The United States Supreme Court has established a three-prong test for plain error, requiring that before an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights. If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.

State v. Griller, 583 N.W.2d 736, 740 (Minn. 1998). Under the third prong, Kouba bears the burden of establishing that the error had a significant effect on the jury’s verdict. *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016).

Kouba argues that the district court committed plain error by admitting E.H.’s recorded statement to Deputy Brault because it constitutes hearsay. Hearsay, an out-of-court statement offered “to prove the truth of the matter asserted,” is generally inadmissible. Minn. R. Evid. 801(c), 802. But a prior out-of-court statement is not hearsay and is therefore admissible if “[t]he declarant testifies . . . and is subject to cross-

examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility." Minn. R. Evid. 801(d)(1)(B).

In considering whether to admit a prior consistent statement, the district court determines whether the witness's credibility has been challenged and whether the prior statement would "bolster the witness'[s] credibility with respect to that aspect of the witness's credibility that was challenged." *State v. Fields*, 679 N.W.2d 341, 348 (Minn. 2004) (quotation omitted). Trial testimony and prior statements "need not be verbatim" to be considered consistent. *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000). Rather, the prior statements must be "reasonably consistent" with the declarant's trial testimony. *In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998). But when the inconsistencies "directly affect the elements of the criminal charge," a prior statement is not admissible as a prior consistent statement. *Bakken*, 604 N.W.2d at 110.

Kouba argues that the district court committed plain error by determining that the recorded statement was consistent with E.H.'s trial testimony. Specifically, she argues that two statements in the recorded statement are inconsistent with the trial testimony. First, she notes that at trial E.H. testified that Kouba became upset and hit her after E.H. refused to give Kouba money, whereas in the recorded statement E.H. said that they were fighting and Kouba hit her because E.H. did something she did not like. While these are not identical statements, they are not inconsistent. The statements "need not be verbatim," but rather need be reasonably consistent. *Id.* at 109. In both statements E.H. indicates that

Kouba became upset with her and hit her, causing the injuries. Her statement at trial specified why Kouba became upset—because E.H. refused to give her money—but this additional detail does not render the statements materially different.

Kouba next asserts that E.H.’s statement in the recording that Kouba had been drinking and drinks a lot is inconsistent with her trial testimony. At trial, E.H. did not testify as to whether Kouba had been drinking. But as noted above, an important consideration is whether the inconsistencies “directly affect the elements of the criminal charge.” *Id.* Here, that did not occur. And Deputy Brault testified that when he encountered Kouba it appeared she had been drinking and that he detected a strong odor of alcohol, so any prejudice resulting from the statement would be minimal because the jury properly heard that information from Deputy Brault.

On this record, the district court did not commit plain error by admitting the recorded statement. The recorded statement and E.H.’s trial testimony were reasonably consistent, and the differences in the statements did not directly affect the elements of the charged crime. The information that directly affected the elements of the charge of domestic assault, namely that Kouba was the individual who assaulted E.H., was consistent in the statements. We therefore discern no plain error.

II. The district court did not commit plain error by admitting testimony that Kouba did not answer the door for law enforcement.

Kouba argues that the district court committed plain error by admitting evidence that she “refused to allow the police to enter her home without a warrant.” Kouba did not object to the testimony at trial, and therefore the plain-error test applies and Kouba must

show error, that is plain, and affects her substantial rights. *Griller*, 583 N.W.2d at 740. An error is plain if it “contravenes caselaw, a rule, or a standard of conduct.” *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted).

Kouba argues that the district court plainly erred by allowing Deputy Brault to testify that she “refused to allow the police to enter her home without a warrant.” It is a due-process violation to comment on a “defendant’s failure to consent to a warrantless search.” *State v. Jones*, 753 N.W.2d 677, 687 (Minn. 2008). But Deputy Brault did not testify that Kouba failed to consent to a warrantless search. Rather, Deputy Brault testified that he repeatedly knocked on Kouba’s door and that he could hear a female voice inside the residence but no one answered the door. The prosecutor similarly stated during closing arguments that she did not answer the door when Deputy Brault knocked. Neither statement involves law enforcement requesting to perform a search or Kouba refusing to consent to a search.

Moreover, Deputy Brault made the statement while providing a general narrative of events. He stated that no one answered the door, but he did not suggest that Kouba was actively refusing to do so. Indeed, he stated that it sounded like the female inside the home was talking to someone on the phone. The statement does not suggest that Kouba was intentionally refusing to speak with the police. Deputy Brault therefore did not impermissibly comment on Kouba’s failure to consent to a warrantless search because no search was ever requested. Accordingly, the district court did not commit plain error by admitting the statement.

III. Kouba's pro se arguments do not entitle her to relief.

Kouba filed a pro se supplemental brief that contains nine claims for relief and includes an eighty-three page addendum. On July 17, 2019, the state filed a motion to strike appellant's pro se supplemental brief and addendum on the grounds that it was too long, did not comply with applicable procedural rules, and contained information outside the record. After reviewing the record, we grant the state's motion to strike the addendum. The addendum contains documents that were not filed with the district court and are therefore not part of the record on appeal. *See* Minn. R. Civ. App. P. 110.01 (stating that the "documents filed in the trial court, the exhibits, and the transcripts of the proceedings, if any, shall constitute the record on appeal").

Finally, none of the nine issues raised entitle Kouba to relief. The first four claims relate to her assertion that there is "no support" for various testimony from E.H. and Deputy Brault. But the jury evaluated the credibility of the witness testimony, and we defer to the jury's credibility determinations. *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013). Four other claims relate to the exclusion of her testimony and evidence, but she waived her right to testify and does not argue that the waiver was invalid. And the evidence that she claims was excluded was never offered for admission to the district court. Kouba's final assertion is that she received an inadequate defense because her attorney did not notify her of a possible plea deal prior to trial, but there is no evidence in the record to support this argument. We therefore conclude that Kouba is not entitled to relief.

Affirmed; motion granted.