STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1097

State of Minnesota,
Respondent,

vs.

Deangelo Shaheed Bey,
Appellant.

Filed July 6, 2021
Affirmed
Worke, Judge

Stearns County District Court
File No. 73-CR-19-7535

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

Janelle P. Kendall, Stearns County Attorney, River D. Thelen, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Worke, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant argues that the district court violated his right to a unanimous verdict of a 12-person jury and erroneously admitted irrelevant and prejudicial evidence. We affirm.

FACTS

A jury found appellant Deangelo Shaheed Bey guilty of two counts of first-degree burglary (assault) pursuant to Minn. Stat. § 609.582, subd. 1(c) (2018), and two counts of second-degree assault with a dangerous weapon pursuant to Minn. Stat. § 609.222, subd. 1 (2018). These convictions resulted from Bey's forcible entrance into an apartment and taking his children away from their mother, Bey's estranged wife. The district court sentenced Bey to 57 months in prison for one first-degree burglary conviction, a concurrent 36 months for one second-degree assault conviction, and a consecutive 36 months for the other second-degree assault conviction. This appeal followed.

DECISION

Unanimous verdict

Bey first argues that the district court violated his right to a unanimous 12-juror verdict because "only 11 jurors found him guilty of the charged offenses." Our review of the record does not support Bey's assertion of a verdict returned by fewer than 12 jurors.

Criminal defendants have a constitutional right to be tried by 12 jurors. Minn. Const. art. I, § 6. A defendant can waive this right if the waiver is "personal, explicit," and in accordance with the rules. *State v. Fluker*, 781 N.W.2d 397, 400 (Minn. App. 2010). Neither party contends that Bey waived this right. A corollary right is a defendant's right to a unanimous verdict and to have the jury polled. *Burns v. State*, 621 N.W.2d 55, 61-62 (Minn. App. 2001), *review denied* (Minn. Feb. 21, 2001). "The purpose of jury polling is to ensure that each of the jurors approves of the verdict as returned [and] that no one has

been coerced or induced to sign a verdict to which he does not fully assent." *Id.* at 62 (quotation omitted). Notably, Bey does not raise any of these concerns on appeal.

Here, the record shows that the only irregularity is with the polling. Before deliberations, the district court excused the alternate juror because "the law dictates how many jurors can deliberate." The district court's comment strongly suggests that 12 jurors participated in deliberations. But the transcript shows that only 11 jurors were polled after the verdicts. After the clerk finished polling, the district court stated, "All right. I think that's everyone." No one indicated that a juror was missed.

We have previously addressed this identical argument. *State v. Mohamud*, No. A09-843, 2010 WL 1963434 (Minn. App. May 18, 2010), *review denied* (Minn. Aug. 10, 2010). In *Mohamud*, we affirmed the district court after noting that "it is not reasonable that the judge, all of the lawyers, the court reporter, the judicial clerks, the other jurors and deputy sheriffs present in the courtroom would fail to realize the jury was only comprised of 11 people." *Id.* at *4. Instead, "the much more likely explanation . . . is either a recording error (the reporter failed to record the question to and response from the juror) or a transcription error (the reporter failed to transcribe from her notes the polling of the juror)." *Id.* The same is true here.

Bey relies solely on the polling transcript to argue that 11 jurors reached his verdict. But the transcript indicates that 12 jurors deliberated, and it is unlikely that only 11 jurors returned to the courtroom to read their verdicts or that only 11 jurors were polled. Rather, we believe that, for an unknown reason, the transcript does not accurately reflect what occurred in the courtroom when the district court polled the jury. Bey has failed to establish

that only 11 jurors found him guilty. Therefore, the omission of one juror from the transcript of the jury polling does not establish a constitutional violation.

Admission of evidence

Bey next argues that the district court plainly erred by admitting five pictures of firearms from his cellphone because the pictures were not relevant and, "even if they were marginally relevant, that relevance was substantially outweighed by the danger of unfair prejudice."

Bey did not object to the admission of the evidence at trial. We therefore review the district court's admission of the evidence under the plain-error standard. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). We may overturn the district court if there is (1) error, (2) that is plain, and (3) that affected the appellant's substantial rights. *Id.*

The first issue is whether the admission of the five pictures was an error. Evidence that is relevant is generally admissible. Minn. R. Evid. 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Even if the evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403. We review the district court's admission of evidence under the first prong of the plain-error analysis for an abuse of discretion. *State v. Hayes*, 826 N.W.2d 799, 807 (Minn. 2013).

Bey was convicted of two counts of second-degree assault with a dangerous weapon. A dangerous weapon includes "any firearm." Minn. Stat. § 609.02, subd. 6 (2018).

Three of the pictures that Bey challenges show Bey holding a firearm. The other two pictures show firearms on what looks like a bed. An officer testified that the firearms were identified as a black World-War-II-style Luger, a black Hi-Point, and a black Smith & Wesson with a silver barrel. All three firearms are handguns.

Several witnesses testified about Bey's use of a firearm during the assaults. Bey's estranged wife testified that the firearm "looked like a black handled type of gun. . . . . Like a pistol." Her boyfriend, who was also a victim of the assault, testified, "The gun was black, and it had a silver barrel in it." One of Bey's children testified that Bey had a gun, and she drew a picture of a rough outline of a handgun. Finally, the surveillance footage from the apartment shows Bey leaving with what looks to be a handgun in his hand. The state did not admit evidence of the firearm itself. Bey testified that the object in his hand was his son's toy gun that he grabbed when picking up his son. The pictures are relevant in corroborating the witnesses' testimonies that Bey had a firearm and not a toy like Bey testified.

Bey argues that the pictures are not relevant because witnesses who saw the firearm did not testify about the pictures. But the testimony describing the firearm matches the firearms in the pictures. Bey also argues that the pictures are not relevant because they were taken before the incident. But Bey testified that he was wearing the same hat in the pictures that he wore on the day of the incident. Also, the fact that the pictures predate the

incident does not remove the relevance. It may go to the weight of the evidence, but that was for the jury to decide. Bey has not met his burden of showing that the pictures are not relevant or that the relevance is substantially outweighed by the risk of unfair prejudice.

Because we conclude that the district court did not err by admitting the evidence, we do not need to analyze the other prongs of the plain-error analysis. *See Hayes*, 826 N.W.2d at 808 (concluding the plain-error analysis after appellant failed to meet the first prong).

Affirmed.