STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1198

State of Minnesota,
Respondent,

vs.

Jorge Alberto Martinez Reyes,
Appellant.

Filed August 9, 2021
Affirmed
Johnson, Judge

Scott County District Court
File No. 70-CR-19-11155

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

Ronald Hocevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

NONPRECEDENTIAL OPINION

JOHNSON, Judge

A Scott County jury found Jorge Alberto Martinez Reyes guilty of first-degree criminal sexual conduct based on evidence that he sexually abused his girlfriend's daughter on multiple occasions. We conclude that the district court did not err by admitting into

evidence an audio-recording of a police detective's interview of the victim, by not inquiring during the jury's deliberations whether all jurors remained qualified, or by stating in the warrant of commitment that Martinez Reyes was convicted of two charges for which the district court did not impose a sentence. We also conclude that the evidence is sufficient to support the jury's verdicts. Therefore, we affirm.

FACTS

Between 2016 and 2019, Martinez Reyes lived with his girlfriend, her pre-teen daughter, L.A.-D., and his girlfriend's two younger sons. In early 2019, L.A.-D. told her mother that Martinez Reyes had sexually assaulted her on multiple occasions. L.A.-D.'s mother told Martinez Reyes to move out of the house, and he did so. In June 2019, L.A.-D.'s mother contacted law enforcement. L.A.-D. was interviewed twice: initially by the police officer who took the initial report and later by a police detective and a child protection worker. Both interviews were recorded. L.A.-D. told the police that, on multiple occasions between 2016 and early 2019, when her mother was at work, Martinez Reyes touched her vagina and inserted his penis into her vagina. She stated that she did not immediately tell her mother because Martinez Reyes had threatened to harm her family if she did so.

In July 2019, the state charged Martinez Reyes with four counts of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subds. 1(a), (g), (h)(i), (h)(iii) (2018). The case was tried over two days in January 2020. The state called five witnesses: L.A.-D., L.A.-D.'s mother, the elder of L.A.-D.'s two younger brothers, the police officer who conducted the first interview of L.A.-D., and the police detective who

conducted the second interview of L.A.-D. L.A.-D.'s brother testified that Martinez Reyes sometimes acted strangely with L.A.-D. by taking her into a bedroom and closing the door. L.A.-D.'s brother also testified that Martinez Reyes sometimes entered the bedroom that he shared with L.A.-D. during the middle of the night.

Martinez Reyes testified and denied engaging in any sexual conduct with L.A.-D. He testified that L.A.-D. fabricated her story of sexual abuse to deflect her mother's attention away from her relationship with an adult man, about whom Martinez Reyes may have warned L.A.-D.'s mother. Martinez Reyes did not present any other evidence.

The jury found Martinez Reyes guilty on all four counts. The district court imposed consecutive sentences of 144 months of imprisonment each on counts 1 and 2 but did not impose sentences on counts 3 and 4. Martinez Reyes appeals.

DECISION

I. Admissibility of Interview

Martinez Reyes first argues that the district court erred by admitting into evidence an audio-recording of the second police interview of L.A.-D.

Before trial, the state filed a motion *in limine* in which it sought a ruling that it could introduce audio-recordings of both police interviews of L.A.-D. The state argued that the interviews were admissible under either rule 801(d)(1)(B) or rule 807 of the rules of evidence. The district court considered the motion on the first day of trial. Martinez Reyes's attorney opposed the state's motion on the grounds that the interviews were not trustworthy, as required for admission under rule 807, and were cumulative for purposes of rule 801(d)(1)(B) because L.A.-D. "testified consistently with that statement."

The district court reviewed transcripts of the two interviews during a recess. Before the jury returned to the courtroom, the district court ruled that the first interview was inadmissible because it was not consistent with L.A.-D.'s trial testimony and would not be helpful to the jury and because it was not sufficiently trustworthy. With respect to the second interview, the district court discussed with counsel certain logistical issues, such as how the prosecutor intended to play the audio-recording and prepare the transcripts and whether it was necessary for a Spanish-language interpreter to translate the audio-recording. The parties agree that the district court's comments reflect an implicit ruling that the audio-recording would be admitted. Later that day, the prosecutor offered the audio-recording of the second interview into evidence during the testimony of the police detective who conducted the interview. In response, Martinez Reyes's attorney stated, "No objection." The district court admitted the audio-recording into evidence, and it was played for the jury.

On appeal, Martinez Reyes argues that the audio-recording of the second interview is inadmissible under both rule 801(d)(1)(B) and rule 807. Hearsay evidence is defined as an out-of-court statement that is offered to prove the truth of the matter asserted in the statement. Minn. R. Evid. 801(c); *State v. Litzau*, 650 N.W.2d 177, 182-83 (Minn. 2002). Hearsay evidence is inadmissible as substantive evidence unless it is within an exception to the hearsay rule. Minn. R. Evid. 802-807; *State v. Greenleaf*, 591 N.W.2d 488, 502 (Minn. 1999). But some out-of-court statements are not considered hearsay. Minn. R. Evid. 801(d).

The state argues that the district court properly admitted the second interview pursuant to rule 801(d)(1)(B). That rule provides, "A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing 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 as a witness . . . ." Minn. R. Evid. 801(d)(1)(B). An out-of-court statement may be admitted as non-hearsay pursuant to rule 801(d)(1)(B) if the district court makes a threshold determination that the witness's credibility has been challenged, *State v. Fields*, 679 N.W.2d 341, 348 (Minn. 2004); *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000), and that the statement is consistent with the witness's trial testimony, *State v. Nunn*, 561 N.W.2d 902, 908-09 (Minn. 1997); *Bakken*, 604 N.W.2d at 109.

Martinez Reyes contends that the second interview should not have been admitted on the grounds that he did not challenge L.A.-D.'s credibility at trial and that the interview is not consistent with L.A.-D.'s trial testimony. In response, the state initially contends that the plain-error rule applies because Martinez Reyes did not preserve the two issues he raises on appeal. We agree. Martinez Reyes did not assert an objection in the district court that corresponds to either of the grounds he argues on appeal. *See State v. Rodriguez*, 505 N.W.2d 373, 376 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). In fact, his argument to the district court—that the audio-recording would be cumulative because L.A.-D.'s trial testimony was *consistent* with her interview—is directly contrary to his appellate argument that the interview and the trial testimony are *inconsistent*. Accordingly, we review only for plain error. *See* Minn. R. Crim. P. 31.02. Under the plain-error test,

an appellant is entitled to relief on an issue to which no objection was made at trial only if (1) there is an error, (2) the error is plain, and (3) the error affects the appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If these three requirements are satisfied, the appellant also must satisfy a fourth requirement, that the error "seriously affects the fairness and integrity of the judicial proceedings." *State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014).

With respect to the first part of Martinez Reyes's argument, it is significant that L.A.-D. was cross-examined by Martinez Reyes's trial attorney, who challenged L.A.-D.'s testimony in various ways. For example, Martinez Reyes's attorney asked L.A.-D. about the distance between the bedrooms and the living room and why she did not more often scream to get her siblings' attention when they "were just one room apart." Martinez Reyes's attorney asked why none of her siblings ever said anything about "weird noises coming from the room." Martinez Reyes's attorney asked L.A.-D. about the passage of time between the sexual abuse and when L.A.-D. told her mother about it. All of these questions and others were designed to cast doubt on L.A.-D.'s testimony. That strategy is confirmed by Martinez Reyes's closing argument, in which his attorney stated: "Remember that this entire case begins and ends with [L.A.-D.]. All of the testimony that you heard, statements summarized, and audio played were people reciting, remembering, and replaying something originally told by [L.A.-D.]." Martinez Reyes's attorney also told the jury that "no one else ever saw, suspected, or knew anything about this but for [L.A.-D.]." Thus, L.A.-D.'s credibility was sufficiently challenged to satisfy rule 801(d)(1)(B). *See State v. Manley*, 664 N.W.2d 275, 288 (Minn. 2003) (reasoning that credibility of two child

witnesses was challenged by cross-examination questions asking whether children were confused or had difficulty recalling events).

With respect to the second part of Martinez Reyes's argument, the record shows that L.A.-D.'s interview was consistent with her trial testimony. L.A.-D.'s interview was somewhat broader than her trial testimony. For example, L.A.-D.'s interview includes details about how Martinez Reyes undressed her and touched her and a statement that Martinez Reyes threatened to kill L.A.-D.'s mother and brother if L.A.-D. told anyone about the abuse. Nonetheless, "trial testimony and the prior statement need not be identical" but, rather, need only be "reasonably consistent." *State v. Zulu*, 706 N.W.2d 919, 924 (Minn. App. 2005). Admission of a prior statement under rule 801(d)(1)(B) is inappropriate only if there are "inconsistencies [that] directly affect the elements of the criminal charge." *Bakken*, 604 N.W.2d at 110. In this case, L.A.-D.'s interview was reasonably consistent with her trial testimony. Martinez Reyes purports to identify several inconsistencies between the interview and L.A.-D.'s trial testimony, but most are not inconsistencies but, rather, specific factual issues that were included in the second interview but simply not mentioned at trial. Thus, L.A.-D.'s interview was reasonably consistent with her trial testimony for purposes of rule 801(d)(1)(B).

In sum, the audio-recording of the second police interview of L.A.-D. is admissible as non-hearsay evidence under rule 801(d)(1)(B). In light of that determination, it is unnecessary to consider Martinez Reyes's argument that the interview is inadmissible under rule 807. Therefore, the district court did not plainly err by admitting the audio-recording of the second police interview of L.A.-D.

II. Jurors' Qualifications

Martinez Reyes also argues that the district court erred by not conducting an investigation into the qualifications of one or more jurors after receiving a note from the jury foreperson.

On the second day of the jury's deliberations, the district court received a letter from the foreperson that stated: "We have a juror . . . who feels uncomfortable about comments made to her by another juror . . . yesterday. We are not sure how to proceed with this situation. We are still carrying on with deliberation." The district court consulted with counsel and provided the jury with the following written response: "The court has received your note. Try to keep the conversation focused on the evidence and allow all jurors to voice their positions to the group." Later that day, the jury returned its verdicts.

Martinez Reyes contends that the district court erred because it did not inquire into whether either of the jurors at issue remained able to serve as a juror. He concedes that the plain-error test applies on appeal because his trial attorney did not ask the district court to conduct an investigation.

Martinez Reyes relies on a rule providing that jurors must be able to "try the case impartially and without prejudice to the substantial rights" of either party. Minn. R. Crim. P. 26.02, subd. 5(1). He asserts that a district court has a duty to ensure that a juror who was deemed qualified at the commencement of trial remains qualified. In support of that principle, he cites *State v. Varner*, 643 N.W.2d 298 (Minn. 2002), in which a juror was overheard making a potentially racially prejudicial comment to other jurors during a break in the trial. *Id.* at 302. The district court questioned the juror and dismissed him but did

not question other jurors, as requested by the defendant, to determine whether the comment had a prejudicial effect on them. *Id.* at 302-03. The district court also denied the defendant's request for a mistrial. *Id.* at 302. On appeal, the supreme court reversed and ordered a new trial. *Id.* at 303-07.

This case is different from *Varner* because the jury foreperson's note did not disclose the nature or content of the comment that made a juror uncomfortable. Accordingly, there is nothing that would call into question any juror's ability to be impartial and without prejudice. Given the complete absence of information about the comment itself or the reason why one juror was uncomfortable, the district court did not have a duty to inquire into the matter. Thus, the district court did not err, let alone plainly err, by not *sua sponte* questioning one or more jurors about the comment. And even if Martinez Reyes could establish a plain error, it would be only a matter of speculation as to whether the alleged error affected his substantial rights.

Thus, the district court did not err by not conducting an investigation into the jurors' qualifications after receiving a note from the jury foreperson.

III. Warrant of Commitment

Martinez Reyes last argues that the district court erred by filing a warrant of commitment that, in his view, does not accurately reflect the district court's pronouncements at the sentencing hearing concerning counts 3 and 4.

At sentencing, the district court first imposed a sentence of 144 months of imprisonment on count 2. The district court then stated, "Counts 3 and 4 will merge for the purposes of sentencing." The district court then imposed a sentence of 144 months of

imprisonment on count 1 and ordered that it be served consecutively to the sentence on count 2.

The district court filed a warrant of commitment later that same day. The warrant of commitment describes the sentences imposed on counts 1 and 2. The warrant of commitment states the dispositions of count 3 and count 4 as "Convicted." In the space provided for a description of the sentences on counts 3 and 4, the warrant of commitment states, "None."

Martinez Reyes asks this court to "remand for correction of the warrant of commitment so that it reflects no adjudication was imposed for counts 3 and 4." He does not explain why the warrant of commitment is incorrect or why a correction is necessary. The state contends that the warrant of commitment accurately reflects the fact that Martinez Reyes was found guilty on all four counts and was sentenced on only counts 1 and 2.

The jury found Martinez Reyes guilty of the charges in counts 3 and 4. A jury's verdict of guilt becomes a conviction if the verdict is "accepted and recorded by the court." Minn. Stat. § 609.02, subd. 5(2) (2020). A district court typically records a conviction by making a "separate entry in the file," in writing, *State v. Pflepsen*, 590 N.W.2d 759, 767 (Minn. 1999), or, stated slightly differently, by making the conviction "appear in a judgment entered in the file," *State v. Hoelzel*, 639 N.W.2d 605, 609 (Minn. 2002). In this case, the district court recorded Martinez Reyes's convictions on counts 3 and 4 by filing a warrant of commitment that states that Martinez Reyes was "convicted" of those two charges. The warrant of commitment is not inaccurate in that respect. The district court did *not* state at the sentencing hearing that adjudication on either count 3 or count 4 was

being stayed. *See* Minn. Stat. § 609.095(b) (2018). Rather, the district court stated that counts 3 and 4 would "merge." In doing so, the district court did not use proper terminology. In *State v. Walker*, 913 N.W.2d 463 (Minn. App. 2018), we stated that such a term does not "describe dispositions recognized by the law." *Id.* at 467. Nonetheless, the district court's warrant of commitment is not inaccurate.

Thus, the district court did not err by filing a warrant of commitment that states that Martinez Reyes was convicted of the charges in counts 3 and 4.

IV. Sufficiency of Evidence

Martinez Reyes filed a *pro se* supplemental brief in which he denies that he engaged in sexual conduct with L.A.-D. and asks this court to set aside his conviction. If a defendant challenges the sufficiency of the evidence supporting a conviction, our standard of appellate review requires us to view the evidence in the light most favorable to the conviction. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012). In other words, we must "assume that the factfinder disbelieved any testimony conflicting with that verdict." *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011) (quotation omitted). We will not disturb a verdict if the fact-finder, "acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense." *Ortega*, 813 N.W.2d at 100.

In this case, the state introduced abundant direct evidence of Martinez Reyes's guilt through L.A.-D.'s testimony, which the jury apparently credited. This court may not

second-guess the credibility of the state's witnesses or reweigh conflicting evidence. Thus, we conclude that the evidence is sufficient to support the convictions.

Affirmed.