STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0192

State of Minnesota,
Respondent,

vs

Christian Douglas Baron,
Appellant.

Filed March 28, 2022
Affirmed
Rodenberg, Judge[*]

Kandiyohi County District Court
File No. 34-CR-20-513

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

Shane D. Baker, Kandiyohi County Attorney, Julianna F. Passe, Assistant County Attorney, Willmar, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Segal, Chief Judge; Slieter, Judge; and Rodenberg, Judge.

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

NONPRECEDENTIAL OPINION

RODENBERG, Judge

Appellant Christian Douglas Baron appeals from his conviction of second-degree assault, arguing that he is entitled to a new trial because plain error affected his substantial rights when (1) the district court allowed the state to constructively amend the complaint during trial, and (2) the prosecutor elicited vouching testimony from two witnesses. We affirm.

FACTS

On June 8, 2020, appellant was living in a camper on the property where his brother, T.B., resided. That day, the two had a confrontation about dirty dishes. Appellant later called police to report verbal abuse from T.B. and told the dispatcher he would "stab [T.B.] if it came down to it." Appellant texted a similar threat to T.B. Later that afternoon, T.B., in an attempt to "make [appellant] mad," unplugged appellant's camper to deprive appellant of utilities.

As T.B. walked away from the camper, he heard the camper door open and then felt a sharp pain, making him think he had been hit in the back. When T.B. reached his hand to the pained area, he discovered that he was bleeding. T.B. pushed appellant away and saw that appellant held a knife. T.B. then called the police and officers were dispatched.

When officers arrived, T.B. stood on the driveway "with blood on his hands and holding his side." Appellant no longer had a knife in his hands and officers arrested and handcuffed appellant before "physically carry[ing] [him] to the squad car." Appellant's father testified that he did not see what occurred but heard an argument, saw T.B. bleeding,

and saw appellant holding a knife. Officers located a knife blade in the garbage can outside the camper. At the jail, appellant spoke with an officer and stated that he did not stab T.B., but expressed that he wished he could. He expressed a belief that T.B. had stabbed himself.

Appellant was initially charged with five counts: (1) second-degree assault with a dangerous weapon; (2) threats of violence; (3) domestic assault; (4) fifth-degree assault; and (5) obstruction of the legal process. Nine days later, the state amended the complaint to eliminate the threats of violence charge and increase the severity of the assault charges. The first count of the amended complaint charged appellant with, "2nd Degree Assault-Fear." (Emphasis in original). The offense description stated that "defendant assaulted another with a dangerous weapon, to-wit: [d]efendant stabbed T.B. with a knife."

At a pretrial hearing on motions in limine, the district court heard arguments about potential evidence concerning appellant's mental state. During this hearing, the district court commented that all of the assault charges "are general intent offenses" and involve "the infliction or [attempt to] inflict bodily harm rather than the more specific intent crime of doing an act with intent to cause fear in another of immediate bodily harm." Appellant's trial counsel did not object to the district court's characterization of the charges.

After the jury was selected for appellant's trial, the district court judge described the first count as "2nd Degree Assault." Appellant challenged the district court's description because the amended complaint by its terms charged assault-fear. The prosecutor clarified that the state's evidence would prove that appellant's actions resulted in "[i]nfliction of bodily harm." The district court judge allowed the state to proceed under an assault-harm

theory and commented that "[t]he jury does not see [the complaint heading] and has not seen it" and that the complaint does not allege "a fear-based offense."

At trial, the prosecution elicited two pieces of testimony that appellant challenges on appeal. First, the prosecutor asked the arresting officer, "Based on your training and experience do you believe [T.B.] to be telling you the truth?" to which the officer answered "Yes." Second, the physician's assistant (PA) who treated T.B. was asked for her opinion about T.B.'s stab wounds. The PA answered that the stab wounds "matched [T.B.'s] story." Appellant did not object to either of these questions or answers. The jury found appellant guilty of the four charged offenses.

This appeal followed.

DECISION

Appellate courts review a claim of error in the absence of any objection at trial under the plain-error test. *State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016). "In order to meet the plain[-]error standard, a criminal defendant must show that (1) there was an error, (2) the error was plain, and (3) the error affected the defendant's substantial rights." *Id.* (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). "An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct." *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotations omitted). "With respect to the substantial-rights requirement, [the defendant] bears the burden of establishing 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). If the three elements of the plain-error test are met,

"the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Griller*, 583 N.W.2d at 740.

Appellant argues that the district court plainly erred by allowing the state to constructively amend its complaint at trial. Appellant further argues that he is entitled to relief because the prosecutor elicited vouching testimony from the arresting officer and because the PA was allowed to testify that T.B.'s injuries were consistent with his statement that appellant had stabbed him. We address these arguments in turn.

A. The district court did not err when it allowed the state to correct a careless clerical error.

"The court may permit an indictment or complaint to be amended at any time before verdict or finding if no additional or different offense is charged and if the defendant's substantial rights are not prejudiced." Minn. R. Crim. P. 17.05. A constructive amendment occurs when "the record demonstrates that a defendant is confronted with [a different or] additional charge after trial has begun." *State v. Guerra*, 562 N.W.2d 10, 13 (Minn. App. 1997).

Appellant argues that the state constructively amended its complaint when the district court permitted the state to amend the first (and most serious) count of the complaint from assault-fear to assault-harm after jury selection, and that the amendment affected appellant's substantial right to have "timely notice and an opportunity to prepare a defense."

In *State v. Fleck*, 810 N.W.2d 303, 308-10 (Minn. 2012), the supreme court discussed the difference between assault-fear and assault-harm under Minn. Stat. §609.02,

subd. 10. It held that assault-fear is a specific-intent crime, and that assault-harm is a general-intent crime. *Id.* at 309-10.

The state's reference to assault-fear in the amended complaint's offense heading appears to have been a careless drafting error. The only reasonable reading of the totality of the amended complaint is that the reference to assault-fear was inadvertent. The probable-cause portion of the complaint clearly alleges a knife attack on T.B. from behind, causing him bodily harm. The facts alleged in the complaint would seemingly fail to support an assault-fear charge, because there is nothing in the complaint from which to believe that T.B. was in fear before bodily harm was inflicted by the stabbing. He was stabbed from behind and did not realize that he had been stabbed until he felt blood when he put his hand to his back.

Appellant cites *State v. Gisege* to support the argument that allowing the state to amend the first count of the complaint from assault-fear to assault-harm violated the principle that a defendant "cannot be held to answer a charge not contained in the indictment brought against him." 561 N.W.2d 152, 156 (Minn. 1997) (quotation omitted). But appellant's argument ignores the charge description in the amended complaint, which specifically describes the criminal act as being that "[d]efendant stabbed T.B. with a knife." In a pretrial hearing on motions in limine, the district court commented that the charges involve an allegation of assault-harm and not the "specific intent crime of doing an act with intent to cause fear in another of immediate bodily harm." It is evident from the record that the district court correctly discerned before trial that the essence of the first count of the complaint was an allegation of assault-harm. We see no error in the district court permitting

the state to correct the obvious—and previously commented-upon—drafting error and try the case under an assault-harm theory.

Even if we were to conclude that the district court erred in allowing the amendment at trial, the error was neither plain nor did it affect appellant's substantial rights. While plain-error appeals always involve claims of error without the alleged error having been brought to the district court's attention, the issue here was discussed before trial and appellant expressed no concern about the district court's pretrial comment on the essence of what the state alleged. Likewise, appellant's counsel expressed no confusion when the district court stated the case involved an allegation of assault-harm. Any error was not plain.

Appellant also argues that his substantial right of having adequate notice to prepare a defense was affected because "[a] defense against assault-fear looks much different than a defense against assault-harm." But this argument ignores that the probable-cause portion of the amended complaint clearly alleged bodily injury caused by stabbing and the complaint also included charges of fifth-degree assault and domestic assault against appellant. Those counts of the complaint clearly alleged general-intent crimes committed in the same course of events described in the second-degree assault charge. Appellant had ample notice of the state's intent to prove that appellant stabbed T.B. with a knife and inflicted bodily harm.

Appellant's substantial rights were not affected by the district court allowing the state to correct the offense description in count one of the complaint so that it conformed to what everyone involved seems to have known: that this is an assault-harm case.

B. Any vouching testimony did not affect the substantial rights of the appellant.

Appellant argues that there were two instances of vouching testimony which were plainly erroneous misconduct by the prosecution which affected appellant's substantial rights. First, appellant argues that the prosecutor plainly erred by asking a police officer if he believed appellant. Second, appellant argues that the PA's testimony was plainly erroneous because by stating that the wounds "matched" T.B.'s story, the PA made a credibility determination of another witness.

The modified plain-error standard applies to the testimony elicited from the officer. *State. v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the "nonobjecting defendant" demonstrates "that [an] error occurred and that the error was plain," then the burden shifts to the state "to demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights." *Id.* "Error is prejudicial if there is a reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *State v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005) (quotation omitted). Appellate courts also consider "the strength of evidence against the defendant, the pervasiveness of improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions. *State v. Cao*, 788 N.W.2d 710, 717 (Minn. 2010).

Credibility of a witness is "to be determined by the jury." *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984). "One witness may not vouch for or against the credibility of another witness." *State v. Vick*, 632 N.W.2d 676, 689 (Minn. 2001) (quotation omitted). A

prosecutor elicits improper vouching testimony if they ask one witness if they believe another witness. *Van Buren v. State*, 556 N.W.2d 548, 550-52 (Minn. 1996).

The state concedes that it was error that is plain for the prosecutor to have asked if the officer believed T.B. Therefore, the burden shifts to the state to show that the error did not affect appellant's substantial rights. The state argues the error did not affect appellant's substantial rights because "the [s]tate's evidence here was strong" and "the prosecutor did not refer to the relevant part of the officer's testimony during closing argument." Appellant contends his substantial rights were impacted because appellant's theory of the case was that T.B. stabbed himself to "get [appellant] out of the house," making "credibility [] central in this trial."

The state's evidence against appellant was substantial. Beyond T.B.'s testimony, appellant's father testified that he saw appellant holding a knife immediately after T.B. was stabbed, the blade of a knife was found in a garbage can near appellant's camper, and appellant communicated twice before the stabbing that he intended to stab his brother. As the state argues, "a few lines of more than 200 pages of testimony" likely did not have "a significant effect on the verdict of the jury." *See MacLennan*, 702 N.W.2d at 236 (quotation omitted). We agree. The state has met its burden of demonstrating that appellant's substantial rights were not affected by the officer's improper vouching testimony.

Appellant also contends that the testimony from the PA constitutes plain error because it is inappropriate vouching testimony. The plain-error test applies to this unobjected-to testimony. *See Myhre*, 875 N.W.2d at 804.

Appellant cites *State v. Blanche*, 696 N.W.2d 351, 374 (Minn. 2005) in support of his argument that the PA's testimony that T.B.'s injuries were consistent with T.B.'s claim of having been stabbed by appellant from behind was plain error. In *Blanche*, a gang expert testified that he "never had experience with gang members falsely accusing their own gang members of crimes." *Id.* at 362. The supreme court noted it was "especially troubled" by this testimony and that it "bordered on" vouching testimony. *Id.* at 374.

This case is not like that one. Here, the testimony from the PA was limited to her opinion as a treating health-care professional concerning the source of the injuries for which she was treating T.B.

As the state argues, the PA "did not testify as to who inflicted the injuries or the circumstances under which the wounds were inflicted." The state needed to prove T.B.'s wounds were caused by stabbing and not by some other force or mechanism, and the PA expressed her medical opinion that T.B.'s wounds were consistent with being stabbed from behind. This type of testimony is typical in cases involving bodily injury. The district court did not err in admitting the PA's testimony.

Moreover, even if we were to conclude that admission of the PA's testimony was error, such error was not plain. Unlike *Blanche*, where a gang expert opined that a gang member would not testify against a fellow gang member, this case involved a PA giving an opinion as a health-care provider that T.B.'s injuries were consistent with being stabbed.

And, finally, even if appellant could clear the hurdles of demonstrating error and that the error is plain, any such error did not affect appellant's substantial rights for the reasons already discussed. Police arrived at the scene to find appellant—who had made

threats that very day to stab his brother—near a knife in a garbage can. And appellant's father saw appellant holding a knife immediately after the stabbing. The case against appellant was a strong one and the jury's verdict was surely unattributable to the PA's brief testimony.

In sum, the district court did not err in either allowing the state to correct its careless use of an incorrect offense description in count one of the amended complaint or in allowing the medical testimony of the PA describing T.B.'s wounds and their apparent cause. The state's having improperly elicited vouching testimony from a police officer was error that is plain, but it is not grounds for reversal because appellant's substantial rights were not affected by the brief impropriety that surely had no significant effect on the jury's verdict.

Affirmed.