STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1105

State of Minnesota,
Respondent,

vs.

Isaias De La Cruz-Soto,
Appellant.

Filed August 1, 2022
Affirmed
Kirk, Judge[*]

Nobles County District Court
File No. 53-CR-20-929

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

Joseph M. Sanow, Nobles County Attorney, Travis J. Smith, Special Assistant County Attorney, Slayton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

NONPRECEDENTIAL OPINION

KIRK, Judge

In this direct appeal from the judgment of conviction for first-degree criminal sexual conduct, appellant argues (1) that the district court plainly erred by admitting inadmissible hearsay evidence, and (2) that he was denied his right to a unanimous 12-juror verdict. Because the admission of unobjected-to testimonial evidence was not plain error, and because the record shows other safeguards existed to ensure that the jury was properly impaneled and returned a unanimous verdict, we affirm.

FACTS

Appellant Isaias De La Cruz-Soto was charged with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(c) (2020); third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(c) (2020); threats of violence in violation of Minn. Stat. § 609.713, subd. 1 (2020); false imprisonment in violation of Minn. Stat. § 609.255, subd. 2 (2020); interfering with a 911 call in violation of Minn. Stat. § 609.78, subd. 2(1) (2020); and domestic assault in violation of Minn. Stat. § 609.2242, subd. 1(2) (2020). Appellant pleaded not guilty, and there was a three-day jury trial from March 31 through April 2, 2021.

At appellant's trial, LTG testified that appellant sexually assaulted her. In relevant part, LTG testified that appellant got on top of her and put his leg on her like an officer making an arrest. LTG begged appellant to let her go, but he refused and said, "You know what's going to happen to you." Appellant told LTG that if she wanted him to let her go, she needed to let him penetrate her from behind. When LTG refused, appellant tied her

feet with a sheet and tied her hands with an electrical cord. He then put a towel in her mouth to suffocate her and said, "I won't let you live one more [] second. You don't know who you are dealing with." LTG testified that appellant raped her while she was tied up. The prosecutor asked LTG if there was a point at which appellant threatened to kill her. LTG said there was, and it was when appellant said, "you know what's going to happen to you." At one point, LTG untied herself and ran outside naked yelling for help. She slipped on ice and appellant grabbed her neck and pulled her back to the house. She locked herself in the children's bedroom and called 911 from her daughter's tablet. LTG remained in the bedroom until the police arrived.

Officer VanderVeen, one of the responding officers, also testified at trial. In relevant part, his testimony concerned LTG's statement given to him at the scene of the assault. According to VanderVeen's testimony, LTG explained that appellant woke her up by attempting to have sex with her and threatened to kill her and take away her children. LTG told VanderVeen that appellant tied her hands with an electrical cord and raped her. The prosecutor then asked VanderVeen what LTG told him about getting free. In response, VanderVeen testified that LTG mentioned that she broke free from the first restraints and ran outside naked because it was her only opportunity to get away.

At the conclusion of the trial, the jury found appellant guilty of all six charges. Appellant requested that the jury be polled. The record shows that 11 jurors confirmed their guilty verdict on all charges. On June 8, 2021, the district court entered a conviction on count one, first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(c) and sentenced appellant to 172 months in prison. This appeal follows.

DECISION

I. The district court did not plainly err by admitting the victim's out-of-court statement made to a police officer at the scene of the assault.

Appellant challenges the district court's admission of LTG's statement to law enforcement, arguing it constitutes inadmissible hearsay. Because appellant did not object at trial, this court reviews the district court's admission of evidence for plain error. *State v. Vick*, 632 N.W.2d 676, 684-85 (Minn. 2001). The appellant has the burden of showing that there is "(1) error, (2) that is plain, and (3) the error affects the defendant's substantial rights." *Id.* at 685. If these first three prongs are met, we then determine "whether it is necessary to address the error to ensure the fairness and integrity of the judicial proceedings." *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). Only after all of these factors are satisfied may we exercise our discretion to correct an unobjected-to error. *Vick*, 632 N.W.2d at 685.

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). Hearsay is inadmissible at trial unless it falls into one of several exceptions delineated in the rules of evidence. Minn. R. Evid. 801(c), 802. But the rules of evidence categorically exempt some out-of-court statements from being classified as hearsay. Minn. R. Evid. 801(d).

Although there is nothing in the record to indicate under what theory the state introduced LTG's statement, appellant solely challenges its admissibility as a prior consistent statement. A prior consistent out-of-court statement is not hearsay and is

admissible as substantive evidence 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). "[T]rial 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) (quotation omitted). But a prior statement is not reasonably consistent with trial testimony when the inconsistencies affect the elements of the charge so that, if believed by the jury, they would tend to show the commission of a more serious offense. *State v. Bakken*, 604 N.W.2d 106, 110 (Minn. App. 2000), *rev. denied* (Minn. Feb. 24, 2000).

Appellant argues that LTG's statement is not admissible as a prior consistent statement because it is not reasonably consistent with her trial testimony and directly affected two elements of the first-degree criminal sexual conduct charge. He asserts that LTG's testimony indicated that appellant threatened to kill her only after he sexually assaulted her, whereas VanderVeen's testimony indicated that appellant threatened to kill LTG before he sexually assaulted her. A review of the record shows that LTG did not explicitly testify that the threat came after penetration. Thus, appellant's interpretation of LTG's testimony is based on inferences drawn from her testimony, rather than from the testimony itself. Because LTG's testimony is unclear as to when appellant threatened to kill her, appellant cannot show that LTG's prior statement was not "reasonably consistent" with her trial testimony. *Zulu*, 706 N.W.2d at 924 (quotation omitted).

Further, absent an objection, it was not plainly erroneous for the district court to admit LTG's prior statement to the police. In *Manthey*, the Minnesota Supreme Court addressed the narrowness of the plain-error standard with respect to hearsay evidence. 711 N.W.2d at 504. There, the supreme court stated that "[t]he number and variety of exceptions to the hearsay exclusion make objections to such testimony particularly important to the creation of a record of the trial court's decision-making process in either admitting or excluding a given statement." *Id.* The hearsay rule's numerous exceptions "make it particularly important that a full discussion of admissibility be conducted at trial." *Id.* "In the absence of an objection, the state was not given the opportunity to establish that some or all of the statements were admissible under one of the numerous exceptions to the hearsay rule." *Id.* The supreme court therefore concluded that evidence was not "clearly or obviously inadmissible hearsay." *Id.*

The analysis in *Manthey* applies to this case. Appellant's failure to object to the admission of the evidence deprived the state of the opportunity to argue that the challenged statement was admissible under one of the numerous hearsay-rule exceptions. Accordingly, we decline to assign plain error to the admission of LTG's statement. *See id.* at 504-05 (expressing reluctance to conclude that the admission of hearsay evidence is plain error); *see also State v. Smith*, 825 N.W.2d 131, 138-39 (Minn. App. 2012) (concluding that a district court did not commit plain error by admitting potential hearsay testimony "because [the defendant's] counsel failed to object at trial and, as a result, the prosecutor did not have the opportunity to argue for the admissibility of the statements under several hearsay exceptions."), *rev. denied* (Minn. Mar. 19, 2013).

II. The district court did not violate appellant's right to a 12-juror unanimous verdict.

Criminal defendants have a constitutional right to be tried by 12 jurors. Minn. Const. art. I, § 6.[1] Criminal defendants also have the constitutional right to a unanimous verdict. *Burns v. State*, 621 N.W.2d 55, 61-2 (Minn. App. 2001)*, rev. denied* (Minn. Feb. 21, 2001). Corollary to the right to a unanimous verdict is a criminal defendant's right to have the jury polled "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 [they do] not fully assent." *Id.* (quotation omitted). Appellant argues that he was denied his constitutional right to a unanimous 12-juror verdict because the transcript reflects that only 11 jurors were polled after the jury returned its guilty verdicts. He asserts that the violation of his constitutional right is a structural error requiring automatic reversal of his convictions.

The Minnesota Supreme Court recently considered the effect of an error during jury polling in *State v. Bey*, where the transcript of the jury poll reflected responses from only 11 jurors. 975 N.W.2d 511, 516 (Minn. 2022). There, the supreme court held that "[a]n error in jury polling does not violate the constitutional right to a unanimous jury when the record sufficiently demonstrates the existence of other safeguards ensuring that the jury was properly impaneled and returned a unanimous verdict free of coercion or pressure." *Id.* at 519.

[1] A defendant can waive this right if their 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 appellant waived his right to a trial by 12 jurors.

Like in *Bey*, the record in this case "amply demonstrates other safeguards that the jury was properly impaneled and returned a unanimous verdict." *Id.* The record shows that fourteen jurors, consisting of twelve panel members and two alternates, were initially selected to be on the jury and sworn in. One juror was excused on the second day of trial. Then, immediately before deliberations, the district court dismissed the remaining alternate and explicitly commented on the proper number of jury members. It is unlikely that the district court dismissed an alternate juror when there were only eleven jurors present, and it is unlikely that the district court judge, the clerk, the attorneys, the defendant, and all the jurors missed that one juror was not present. *See id.* (stating that "[i]t is not reasonable to presume that one of the jurors simply vanished without anyone noticing"). The record further shows that the jury was instructed that the verdict must be unanimous, and "[w]e presume that a jury follows the instructions it is given." *Id.* And after the verdict was read, the jurors confirmed as a group that it was the true and correct verdict.

Because the record demonstrates the existence of sufficient safeguards to ensure the jury was properly constituted and acted unanimously, and because there is no evidence of coercion or pressure, we conclude that the error in the jury polling here does not give rise to a violation of appellant's constitutional right to a unanimous 12-juror verdict. *See id.* at 518 (concluding that "jury polling is but one mechanism to ensure a unanimous jury verdict, such that an error in polling the jury does not categorically create a violation of the constitutional right to a unanimous jury.")

Alternatively, appellant asserts that he is entitled to relief under the plain-error doctrine. Minn. R. Crim. P. 31.02. We therefore must determine whether the unobjected-

to error was "(1) an error, (2) that was plain, (3) that affected [appellant's] substantial rights." *State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014). An error affects substantial rights if it was prejudicial and affected the outcome of the case. *Id.* Even if a plain error affected appellant's substantial rights, we will reverse only if the error seriously affected the fairness and integrity of the trial. *Id.*

Appellant has not established that there is a reasonable likelihood that the jury would have reached a different result had the twelfth juror been polled. The jury heard LTG's testimony describing how appellant tied her up, gagged her, threatened to kill her, and raped her. The jury also saw the sheet appellant used to tie LTG's hands and feet and the towel that appellant used to suffocate her. Further, the jury saw photographs of the house that corroborated LTG's testimony and heard corroborating testimony from witnesses. As a result, appellant is not entitled to relief under the plain-error doctrine.

Affirmed.