STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1638

State of Minnesota,
Respondent,

vs.

Izell Wright Robinson,
Appellant.

Filed October 7, 2013
Affirmed in part, reversed in part, and remanded
Ross, Judge

Hennepin County District Court
File No. 27-CR-11-23965

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Ross, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

Izell Robinson raped a woman in his car and at his residence and was convicted of two counts of first-degree criminal sexual conduct. He appeals his convictions, arguing

that the district court improperly admitted evidence of a threatening telephone call to the victim and that it failed to instruct the jury not to deliberate during an in-court review of video evidence. He also contends that the district court erred by withholding information from him about its victim-restitution award. Because the district court's admission of evidence about the threatening phone call without providing a limiting instruction to the jury did not affect Robinson's substantial rights and because there is no indication that any improper jury deliberation occurred, we affirm Robinson's convictions. But because the district court denied Robinson restitution-related information to which he was statutorily entitled, we reverse the restitution order and remand for further proceedings.

FACTS

In July 2011, C.W. was living with her brother in North Minneapolis when she left his home late at night after an argument over whether it was safe for C.W. to run or take the bus in the neighborhood late at night. She took her work uniform and a small bag, and she wandered until she sat at a bus stop on Penn Avenue North. She planned to catch the next bus at 3:15 a.m. That's when Izell Robinson drove up in a black sedan with large shirtless images of himself taped to the driver's door. Robinson called out to her in a manner that she interpreted as a sexual advance, which she bluntly rejected. Robinson parked nearby and walked over and sat beside C.W. She felt uncomfortable. He told her he was a stripper and a rapper, and he announced that his girlfriend was not talking to him. He showed C.W. pictures of himself "dancing." She felt fearful, and she asked him to stop, saying, "It's inappropriate. I don't really want to see this. I don't even know you. It's weird." He asked her if she wanted a ride home, and she declined.

Robinson went to his car but returned with his hand wrapped in a purple jacket. He pointed toward C.W. and said, "You need to listen to me. I don't want to hurt you. But you need to come with me." She felt an object wrapped in the jacket and believed it to be a knife. Robinson took C.W. to his car, holding the knife to her back, and he drove her away from the bus stop. Robinson's and C.W.'s movements at the bus stop were captured on a video recording from a surveillance camera of a nearby convenience store. In the car, C.W., frightened, asked Robinson if he intended to rape her. He replied, "I hadn't thought of that."

Robinson pulled the car into an alley. He ordered C.W. into the back seat. She attempted to escape. Robinson grabbed her and punched her in the face. He told her, "I don't want to hurt you." C.W. moved to the back seat. In the back seat, Robinson ordered C.W. to take her pants off and again punched her in the face. C.W. took her pants off. She then tried to stab Robinson with a pen from her bag, and Robinson choked her until she was nearly unconscious. C.W. pleaded with him. She appealed to his supposed religious beliefs. He punched her again, saying, "I told you to stop f---ing talking to me." Robinson had forcible intercourse with C.W.

After he finished, he pondered aloud, "Now, I don't know what to do with you." C.W. asked him to release her, promising not to report the rape. Robinson rejected her request, citing her attempts to escape. He drove her to his house, took her inside and into an attic bedroom, and again raped her. During the forced intercourse, he ordered her to express enjoyment. Afterward, he ordered her to shower, got into the shower with her, and watched her wash. After C.W. promised not to report the rapes, Robinson drove her

to a hotel in downtown Minneapolis. Before he released her, he wrote down her driver's license information and told her that he would "check up on [her] in a few days," that he had "homies and people in this area," and that he knew where she and her family lived. He ordered her to keep the baby if she became pregnant, stating, "I take care of my own."

C.W. immediately called her brother's girlfriend, L.M., for a ride to the police station. L.M. noticed that C.W. sounded uncharacteristically "dull." C.W. gave a statement and, at the direction of the police, went to the hospital for a sexual-assault examination. C.W., who identifies herself as a lesbian, had never before had vaginal intercourse. The examining nurse, who had performed approximately 270 sexual-assault examinations, noted that C.W. had "the most extensive genital injuries [she] had seen," including swelling, bruising, and severe vaginal tearing. C.W. was in so much pain that an internal examination was impossible. Police showed C.W. a photographic lineup, and she identified Robinson as her assailant.

Several days after the rapes, C.W. received an anonymous voicemail message stating C.W.'s full first name and declaring: "You die . . . . You die, Bitch. You die, Bitch."

A police investigator went to Robinson's residence and found his car nearby. The investigator impounded and searched the car pursuant to a warrant and found a purple jacket and the nametag from C.W.'s work uniform in the back seat. Robinson called the investigator to inquire about the car. He denied having picked up any woman at a bus stop or having had sex with anyone the night C.W. was raped.

Police arrested Robinson and obtained a sample of his DNA. His DNA matched sperm-cell DNA found in C.W.'s vagina. The state charged Robinson with two counts of first-degree criminal sexual conduct (force or coercion) and one count of kidnapping.

Robinson pleaded not guilty and stood trial. During trial, he argued that the intercourse was consensual and objected to testimony about the threatening phone call on relevancy and other grounds. The prosecutor argued that she could introduce the testimony to show that C.W. felt threatened. The district court allowed the testimony, but it instructed the prosecutor to avoid alleging that Robinson made the call. Robinson's counsel acquiesced, saying, "That's fine." And the prosecutor did not mention the call in her closing argument.

During its deliberations, the jury twice asked the district court to replay the video recording of Robinson and C.W.'s movements at the bus stop. Robinson was present with his counsel while the video was replayed to the jury both times. During the second replaying, the jury foreman asked the prosecutor to pause and reverse the video at various points, and each request and response was noted on the trial record. After several similar interactions between the jury and district court staff, the district court instructed the jury, "Jurors, if I could ask you please not to discuss this here in the courtroom."

The jury found Robinson guilty on both sexual-assault charges and the kidnapping charge, and the district court sentenced him to 202 months' imprisonment. It also ordered him to pay $1,180.20 in victim restitution, based on a prior disbursement to C.W. from the Minnesota Department of Public Safety Crime Victims Reparation Board. It issued a restitution order outlining payment terms and stating, "In the absence of an objection

filed in accordance with Minn. Stat. § 611A.045 (objection due within 30 days after receipt of this Order), this Order shall become effective 40 days from the date [of the Order].'' Robinson objected to the state's restitution request at the sentencing hearing, arguing that he was entitled to an affidavit detailing the reparations board's disbursements and its justifications.

Robinson appeals his conviction and the restitution order.

D E C I S I O N

I

Robinson argues that his conviction should be reversed because evidence of the threatening telephone call to C.W. unduly prejudiced him and should have been excluded. Robinson's argument has initial appeal, but on close review, we are not persuaded to reverse. Robinson objected to testimony about the threatening phone call based on relevance and hearsay. On appeal, he relies on a different theory, arguing that the evidence was more prejudicial than probative and that it constituted improper evidence of bad character. Where a defendant objects to evidence during trial on one basis and appeals on a different basis, we review only for plain error. *See State v. Carroll*, 639 N.W.2d 623, 629 n.3 (Minn. App. 2002) ("A party may not obtain review by raising the same issue under a different theory."), *review denied* (Minn. May 15, 2002). *But see also* Minn. R. Crim. P. 31.02 ("Plain error affecting a substantial right can be considered by the court . . . on appeal even if it was not brought to the trial court's attention."). A claimed evidentiary error raised for the first time on appeal warrants reversal only if it was actually an error, the error was plain, and the error affected the defendant's

substantial rights. *State v. Hull*, 788 N.W.2d 91, 100 (Minn. 2010). If those three criteria are met, we may, at our discretion, reverse in order to protect the "fairness, integrity, or public reputation of the judicial proceeding." *Id.* (quotation omitted).

We have some concerns about revealing the threatening phone call made to the victim with no evidence that Robinson made or orchestrated the call. Evidence of a threat to a victim should not be admitted if it "allow[s] the inference, where there [is] no evidence, that [the defendant] was the source" of the threat. *State v. Harris*, 521 N.W.2d 348, 353 (Minn. 1994). To guard against this inference, "the trial court must give the jury explicit instructions as to the use of the evidence" and "must also strictly control the use of the evidence by the prosecution to prevent its exploitation." *Id.* at 352. The district court did strictly limit the prosecutor's use of the evidence when it ordered her to avoid eliciting any testimony identifying Robinson as the source of the threat. And the prosecutor correctly observed that the evidence is relevant only to demonstrate a basis for C.W.'s fear as it bears on her credibility. But Robinson did not request a limiting instruction, the district court did not provide one, and the prosecutor did not emphasize the limited purpose of the evidence during closing argument.

This tempts us to declare error. We need not decide, however, whether the partial compliance with the precautions constitutes an error because it is clear that it did not affect Robinson's substantial rights. *State v. Davis*, 735 N.W.2d 674, 682 ("[w]e consider the strength of the evidence against the defendant, the pervasiveness of the [misconduct], and whether the defendant had an opportunity to (or made efforts to) rebut the [misconduct]."). The record does not suggest that the threat influenced the jury's guilty

verdict. The prosecutor did not mention the threat in her closing argument and focused instead on the other evidence against Robinson, which was overwhelming. Among that evidence is the following. Robinson had told police that he never picked up a woman at the bus stop, but his lie was exposed by video evidence. He also told police that he never had sex with C.W., but his lie was exposed by the DNA evidence. And he told police that his girlfriend knew C.W., but his lie was exposed by a recorded jailhouse phone call in which it was clear the two had never met. C.W. suffered sexual-assault injuries to her genitalia that a veteran nurse described as the worst she had ever seen. C.W. testified, along with other witnesses, that she was homosexual and never had heterosexual intercourse, undermining Robinson's revised claim that although he had lied about not having sex with C.W., the intercourse was consensual. C.W. gave a detailed account and immediately reported the incident as rape. Her demeanor soured noticeably after the encounter. Taken together, these facts render Robinson's consent defense wholly implausible, leaving no room to suppose that the telephone threat had any bearing on the verdict. Any error in the district court's admission of the threat evidence without a cautionary jury instruction was therefore harmless and did not affect Robinson's substantial rights.

II

Robinson also alleges that the district court erred by allowing the jury to deliberate in the courtroom while watching a replay of the bus stop video. Because Robinson did not object during the video replay, we again review for plain error only. *See State v. Everson*, 749 N.W.2d 340, 348–49 (Minn. 2008). We find plain error where "error

contravenes case law, a rule, or a standard of conduct." *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) (quotation omitted). We recognize that it is a "cardinal principle that the deliberations of the jury shall remain private and secret in every case" and that "[t]he presence of any person other than the jurors . . . impinges upon that privacy and secrecy." *State v. Crandall*, 452 N.W.2d 708, 710 (Minn. App. 1990) (quotation omitted). Consistent with these principles, Minnesota Rule of Criminal Procedure 26.03, subdivision 20(2)(b), requires the district court to "instruct the jury to suspend deliberations during the review" of evidence.

The district court here did instruct the jury to avoid deliberating on the case, but it did so after the replay had already begun. Undermining Robinson's argument, the record does not indicate that any deliberations occurred before the instruction. Robinson only speculates that the jury deliberated in the courtroom, relying on a portion of the transcript where the prosecutor apparently struggled with technical difficulties pausing, reversing, and replaying the video recording. He identifies no statements by jurors that constitute in-court deliberations or any statements by the prosecutor that related in any way to the substance of the case. One statement in the record could conceivably be deliberative, as an "unidentified female voice" said, "Here, you can tell the time." If the unidentified voice was a juror, and if the statement was directed towards other jurors, it might be characterized as in-court deliberations. But the immediate response from the prosecutor indicates that the statement was directed toward the prosecutor, not jurors, and the context suggests that it was intended to assist her with her technical struggles, not to comment on the substance of the evidence. We conclude that no evidence establishes that

any improper in-court jury deliberation occurred. And even if it did, we also have been given no reason to believe that Robinson might have been prejudiced by it.

Robinson suggests that we should respond to this dearth of evidence by remanding for further development of the record to determine if any impermissible in-court jury deliberations occurred. The suggestion has three obstacles. First, the record is complete. The transcript details what was said in the courtroom, and it contains no indication of improper jury deliberations. Second, we have no reason to suspect that the transcript fails to reflect any statements said in the courtroom. Both Robinson and his counsel were present and presumably would have, and certainly could have, objected if any improper deliberations occurred. And third, plain-error review requires that we survey the record for errors that appear *plainly*; if we must remand for the parties to scavenge for an error absent from the record, the alleged error is certainly not plain. So we decline the request to remand.

III

Robinson also challenges the district court's restitution order, arguing that he was entitled to an affidavit detailing the disbursements from the Minnesota Crime Victim Reparations Board upon which the order was based. His argument is persuasive. A district court has broad discretion in determining a restitution award. *State v. Tenerelli*, 598 N.W.2d 668, 671 (Minn. 1979). But "the record must provide a factual basis for the amount awarded by showing the nature and amount of the losses with reasonable specificity." *State v. Thole*, 614 N.W.2d 231, 234 (Minn. App. 2000); *see also* Minn. Stat. §§ 611A.04, subd. 1 (2010) (requiring detailed request for restitution from victim and

requiring copies of that request be provided to defendant before sentencing), 611A.045, subds. 1, 2 (2010) (requiring that the presentence report contain "information pertaining to the factors" used as the basis for a restitution award). At his sentencing hearing, Robinson requested the details outlining the bases for the board's restitution disbursements, but the district court did not provide them. The report also is not included in the record.

The state contends that Robinson is procedurally barred from appealing the restitution award because he missed the statutory deadline to file an affidavit challenging the award. A defendant bears the burden of production when challenging a restitution award and must file a "detailed sworn affidavit . . . setting forth all challenges to the restitution or items of restitution, and specifying all reasons justifying dollar amounts of restitution which differ from the amounts requested by the victim" and must request a hearing within 30 days of the restitution award. Minn. Stat. § 611A.045, subd. 3. More precisely, he has 30 days after he has received written notice of the restitution amount or 30 days after sentencing—whichever is later—to object. *See id.* subd. 3(b). But Robinson lacked the very information he needed to file such an affidavit because he had no way to contest specific restitution charges without a list of specific restitution charges. We hold that the district court exceeded its discretion by starting the 30-day clock too early or by ignoring Robinson's request for information to which he was statutorily entitled. We reverse the district court's restitution order and remand for it to provide Robinson with the factual basis for its restitution award and allow him an opportunity to challenge it.

Robinson submits additional arguments in a pro se supplemental brief. We have carefully considered his arguments, and we conclude that they do not warrant further discussion.

Affirmed in part, reversed in part, and remanded.