STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0988

State of Minnesota,
Respondent,

vs.

Nakerrick Dierrie Mosby,
Appellant.

Filed June 17, 2013
Affirmed in part, reversed in part, and remanded
Hooten, Judge

Hennepin County District Court
File No. 27-CR-11-29424

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

Michael O Freeman, Hennepin County Attorney, Elizabeth Johnston, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Presiding Judge; Hooten, Judge; and Huspeni, Judge.*

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

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

HOOTEN, Judge

Appellant challenges his convictions of three counts of attempted murder and one count of assault, arguing that the district court committed reversible error by admitting a recorded 911 telephone call and hearsay testimony and closing the courtroom to the public. He also contends that the evidence was insufficient to sustain his convictions of attempted first-degree premeditated murder and attempted first-degree murder committed during a drive-by shooting. Because there is insufficient evidence to support an attempted first-degree murder committed during a drive-by shooting, and the state concedes this issue, we reverse and vacate this conviction and remand for resentencing. We otherwise affirm appellant's remaining convictions.

FACTS

Appellant Nakerrick Mosby stood trial for attempted first-degree premeditated murder (Minn. Stat. §§ 609.17, .185(a)(1) (2010)), attempted first-degree murder committed during a drive-by shooting (Minn. Stat. §§ 609.17, .185(a)(3) (2010)), attempted second-degree intentional murder (Minn. Stat. §§ 609.17, .19, subd. 1(1) (2010)), and first-degree assault (Minn. Stat. § 609.221, subd. 1 (2010)) relative to an incident that occurred in September 2011. Prior to trial, the state moved to admit a recorded 911 telephone call made on the evening of the shooting. Because it was unable to locate the 911 caller, the state argued that the call was admissible pursuant to the excited-utterance hearsay exception. Appellant objected, arguing that the 911 caller

lacked personal knowledge of the matter. The district court ruled that the 911 call was admissible under both the excited-utterance and residual hearsay exceptions.

The jury heard evidence of the following facts at appellant's trial. On the evening of September 16, 2011, T.H. testified that he left his home on the 3600 block of Columbus Avenue in Minneapolis and met his aunt at around 9:30 p.m. near the corner of 36th Street and Columbus Avenue. As they were visiting, a van drove past and its passenger yelled, "What up, Blood?" Shortly after, T.H. and his aunt went their separate ways. As he was walking home, T.H. noticed someone, later identified as appellant, approaching him. They made eye contact, and T.H. observed that appellant was wearing a red shirt and blue jeans, was bald, and had a mustache and goatee. T.H. said, "What's up?" and appellant responded, "What's up?" in return. T.H. continued walking and realized that the van that had driven by earlier was parked further down on Columbus Avenue. As he turned to look back over his shoulder, T.H. saw two sparks from a gun. He went numb and fell to the ground. Appellant was only two or three steps away and continued to fire shots. After being shot a total of five times, T.H. watched appellant walk away and enter the van, which left the scene.

Officer Adam Hakanson responded to the shooting and testified that a witness approached him at the scene who described the shooter, the course of events, and the vehicle involved in the shooting. When the police officer attempted to speak with the witness later that evening, she was uncooperative. At that time, the witness would not provide her name and information, and she denied witnessing the shooting.

The jury heard the 911 recording and was allowed to review its transcript. The caller told the dispatcher that she saw the shooter and the shooting, and relayed details about the van located at the scene and how the appellant left the scene of the shooting. The caller identified herself but hung up before giving the dispatcher her phone number.

A police officer testified that T.H. participated in a sequential-photo lineup two days later. T.H. identified appellant as the person who shot him and the van as the vehicle involved in the shooting. Another police officer testified that the city's ShotSpotter system detected and recorded gunshots on the 3600 block of Columbus Avenue at 10:04 p.m. on September 16, 2011.

Another police officer testified that phone records indicated that appellant used his cell phone within blocks of the shooting near the time of the shooting. A call placed to appellant's phone at 10:04 p.m. went unanswered. Phone records also indicated that appellant was using his phone and traveling northbound shortly after the time of the shooting.

Officers also testified that they recovered the van which appellant entered to flee the scene of the shooting. A forensics expert testified that appellant's DNA was present on two items in the van—a straw in a cup and a piece of red fabric that appeared to be a torn red t-shirt. Officers testified that they stopped a separate vehicle in connection with an unrelated shooting and recovered a revolver. Ballistics testing revealed that the revolver was the weapon used to shoot T.H. DNA evidence belonging to an individual that appellant had spoken with several times prior to the shooting was found on the revolver.

After closing arguments, the district court locked the courtroom doors and instructed that no one may leave or enter during the reading of jury instructions. After deliberating, the jury returned guilty verdicts on all counts. Appellant was later sentenced to 220 months in prison. This appeal follows.

D E C I S I O N

I.

Appellant challenges the admission of the 911 recording and Hakanson's testimony regarding his discussion with the on-scene witness, claiming that both are inadmissible because the declarant witnesses lacked personal knowledge of the shooting. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Minn. R. Evid. 602. This rule also applies to declarants of hearsay statements. *See State v. Richardson*, 670 N.W.2d 267, 282 (Minn. 2003).

A. 911 recording.[1]

"Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). We will only reverse a conviction if the erroneous admission of evidence significantly affected the verdict. *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995).

[1] Appellant's failure to object to the admission of the 911 recording at trial does not subject him to plain-error review because the district court, in a pretrial order, definitively ruled that the evidence should come in. *See* Minn. R. Evid. 103(a) ("Once the court makes a definitive ruling on the record admitting . . . evidence, either at or before trial, a party need not renew an objection . . . to preserve a claim of error."); *c.f. State v. Word*, 755 N.W.2d 776, 782–83 (Minn. App. 2008) (holding that Minn. R. Evid. 103(a) requires evidentiary objections to be renewed at trial when an in limine ruling is not definitive).

The district court did not abuse its discretion when it admitted the 911 recording and transcript. The caller stated that she "was sitting outside" at her "grandma's," which was near the scene of the shooting. She described the shooter: "[h]e got a red shirt on with some black pants," "[h]e a big dude," "[h]e weigh at least like 170, 175," "[h]e black. . . . African American dude," he was "[y]oung. . . . like 26, 24, 25," "[h]e taller than me . . . . like 5'8 or something," and "he fat, he big." She also recalled the course of events: "I seen him jump out the van just shoot this man. . . . He jumped in the passenger side" of the van when it left the scene. The dispatcher asked the caller to describe the vehicle involved in the shooting:

> DISPATCH: Was it, it was a van or truck?
> CALLER: He in a, a truck, [*Speaking to someone else—that was a truck y'all, wasn't it?*]
> . . .
> OTHER: It was a van.
> CALLER: A van, it was a van.
> . . .
> DISPATCH: Okay. What color was it?
> CALLER: It was um, grey, it was dark, I don't know.
> DISPATCH: [Inaudible]
> CALLER [*Speaking to someone else—What, what color was the van?*]
> OTHER: It was uh. . . .
> CALLER: Grey? Was that blue?
> OTHER: It was purple.
> CALLER: It was purple.

Despite the caller's reliance on others regarding certain details about the vehicle, sufficient evidence exists to support a finding that the caller had personal knowledge of the shooting. The caller was able to describe the shooter and the course of events. She

also informed the dispatcher of her location, which was near the scene of the shooting. And the caller's account was corroborated by T.H.'s testimony.

Moreover, the statements from others relating to the description of the vehicle qualify as "hearsay within hearsay." *See* Minn. R. Evid. 805. "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." *Id.* It is evident that the other individuals' statements related to the shooting and were made under the stress caused by the shooting. *See State v. Bauer*, 598 N.W.2d 352, 366 (Minn. 1999) (stating that an excited utterance is admissible if it "relat[es] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" (quotation omitted)).

Even if the district court erred by admitting the evidence, the 911 recording did not significantly affect the jury's verdict. Other evidence strongly pointed toward guilt, including T.H.'s account of the shooting, T.H.'s identification of the van and appellant as the shooter, appellant's cell-phone use, appellant's DNA found on items in the van, and the DNA found on the weapon used to shoot T.H. belonging to an individual that appellant conversed with before the shooting.

B. Officer Hakanson's testimony.

Appellant did not object to Officer Hakanson's testimony regarding his discussion with a witness at the scene of the shooting. Generally, an evidentiary issue is not preserved for appeal if an attorney fails to object to its admission. *State v. Brown*, 792 N.W.2d 815, 820 (Minn. 2011); *see also* Minn. R. Evid. 103(a)(1) (stating that error may

not be predicated upon a ruling that admits evidence unless an objection appears of record). Nevertheless, this court may review unobjected-to evidentiary errors for plain error. *See Brown*, 792 N.W.2d at 820; *see also* Minn. R. Crim. P. 31.02 (instructing that we may review for plain error affecting substantial rights even if not brought to the district court's attention). Before this court reviews unobjected-to error, there must be (1) error; (2); that is plain; and (3) that affects substantial rights. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

"To constitute plain error, the trial error must have been so clear under applicable law at the time of conviction, and so prejudicial to the defendant's right to a fair trial, the defendant's failure to object and thereby present the trial court with an opportunity to avoid prejudice, should not forfeit his right to a remedy." *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006) (quotation omitted). An error affects a defendant's substantial rights if there is a reasonable likelihood that the error substantially affected the jury's verdict. *Brown*, 792 N.W.2d at 824. A defendant bears a "heavy burden" of persuasion when demonstrating that error affected substantial rights. *State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001). If these factors are met, and this court determines that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, a defendant is entitled to a new trial. *Brown*, 792 N.W.2d at 821.

Appellant argues that the district court's failure to exclude Officer Hakanson's testimony about his conversation with the witness at the scene of the crime constituted plain error because the witness later told him that she did not see the shooting, demonstrating that she lacked personal knowledge of the matter. Officer Hankason

testified that a witness approached him at the scene shortly after the incident. She described the shooter as "a black male in his 20s, wearing a red T-shirt" who "had gotten out of a minivan and approached the victim who was standing on the street, or on the sidewalk." The witness told him that she heard "approximately three to four" gunshots fired at point-blank or close-up range. She stated that she was at "3548 Columbus Ave" at the time of the shooting, which was near the scene of the crime, and could "identify [the shooter] if she saw him again." But when Officer Hakanson attempted to speak with the witness later that evening, she was uncooperative, claiming that she had not seen the shooting and refusing to answer any further questions.

The district court's failure to exclude this testimony based upon purported lack of knowledge of the witness does not constitute plain error. Officer Hakanson's testimony illustrated the witness's knowledge of the crime and familiarity with it. The witness's later denial does not render her initial detailed account void. And, in criminal cases, it is well settled that judging the credibility of witnesses and the weight given to their testimony rests within the province of the fact finder. *State v. Johnson*, 568 N.W.2d 426, 435 (Minn. 1997). The jury, here, was in the best position to find Officer Hakanson's recitation of the witness's statements either credible or incredible and make a determination of whether the witness had or did not have knowledge of the shooting[2].

[2] We also recognize appellant's failure to object to the statements of the witness as hearsay. *See* Minn. R. Evid. 801(c) ("'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."). Appellant's failure to raise this issue on appeal renders it waived. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). However, even if this issue had not been waived, it is unclear on

Appellant has also failed to show that the admission of these witness statements affected his substantial rights or that there is a reasonable likelihood that the error substantially affected the jury's verdict. These witness statements, which consisted of only four pages within a 500-page jury-trial transcript, constituted only a small part of the trial. The most compelling trial evidence of the shooting came from T.H.'s own testimony, and other evidence which strongly supported appellant's guilt.

II.

Appellant contends that his conviction of attempted first-degree premeditated murder must be reversed because the evidence was insufficient to prove premeditation. The state presented circumstantial evidence of premeditation, as opposed to direct evidence. When reviewing sufficiency-of-the-evidence claims, this court analyzes the record to determine whether the evidence, considered in the light most favorable to the conviction, is sufficient to support the jury's guilty verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). A conviction based on circumstantial evidence merits higher scrutiny as compared to convictions based on direct evidence. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). We utilize a two-step process to determine whether circumstantial evidence is sufficient to sustain a guilty verdict. *State v. Andersen*, 784 N.W.2d 320, 329–30 (Minn. 2010).

---

this record whether the statements of the witness, taken within minutes after the victim had been shot, qualified as an excited utterance or fell within another hearsay exception. *See* Minn. R. Evid. 803 (listing hearsay exceptions). For this reason, any error by the district court in admitting such statements was not plain. *See Manthey*, 711 N.W.2d at 504 (noting the number and variety of exceptions to the hearsay rule and the complexity and subtlety of the hearsay rule's operation make it particularly important for objections to be made and a discussion conducted at trial).

First, we identify the circumstances proved at trial, *Al-Naseer*, 788 N.W.2d at 473, deferring to the jury's acceptance of the proof of the circumstances proved as well as the jury's rejection of conflicting evidence, *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011). Second, we independently examine the reasonableness of all inferences drawn from the circumstances proved, including those consistent with a hypothesis other than guilt. *Andersen*, 784 N.W.2d at 329. "[T]he circumstances proved must be consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* at 330. No deference is given to the jury's choice between reasonable inferences. *Id.* at 329–30.

Attempted first-degree premeditated murder requires proof that appellant attempted to kill T.H. with (1) premeditation and (2) with the intent to effect his death. Minn. Stat. § 609.185(a)(1). Premeditation means "to consider, plan or prepare for, or determine to commit, the act referred to prior to its commission." Minn. Stat. § 609.18 (2010). Although premeditation does not require "proof of extensive planning or preparation to kill," the state must show that some appreciable time passed after the defendant formed the intent to kill during which the consideration, planning, preparation or determination required by Minn. Stat. § 609.18 took place. *State v. Hurd*, 819 N.W.2d 591, 599 (Minn. 2012) (quotation omitted). "The existence of premeditation is generally inferred from the totality of the circumstances surrounding the crime." *Hawes v. State*, 826 N.W.2d 775, 783 (Minn. 2013) (quotation omitted). We consider evidence relating to planning activity, the nature of the killing, and motive. *Id.*

Planning activity consists of facts regarding how and what the defendant did prior to the actual killing. *State v. Hughes*, 749 N.W.2d 307, 313 (Minn. 2008). Evidence of

planning activity includes appellant (1) had prior possession of the murder weapon, *see id.*; (2) had an escape plan, *State v. Moua*, 678 N.W.2d 29, 40 (Minn. 2004); (3) waited for the victim, *State v. Palmer*, 803 N.W.2d 727, 735 (Minn. 2011); and (4) ensured that the victim was alone, *Andersen*, 784 N.W.2d at 332.

Appellant asserts that the record does not show whether appellant loaded the gun prior to the shooting and that this lack of evidence negates an inference of premeditation. But the circumstances proved at trial relating to planning activity include (1) the van driving past T.H. prior to the shooting; (2) T.H.'s aunt leaving before T.H. was shot, leaving T.H. alone; (3) appellant shooting T.H. only after T.H. passed him on the sidewalk and T.H.'s back was toward him; (4) appellant possessing a loaded weapon when approaching and then shooting T.H.; and (5) appellant fleeing the scene in the van, which was parked near the scene of the shooting.

Nature-of-the-killing evidence consists of facts "from which it may be inferred that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design." *State v. Moore*, 481 N.W.2d 355, 361 (Minn. 1992) (quotation omitted). We consider the number of times the defendant used the weapon, the number of wounds inflicted, the period of time that the wounds were inflicted, and whether the defendant left the victim without a means to seek help and prevent his death. *Hurd*, 819 N.W.2d at 601.

Appellant argues that T.H.'s observation that appellant appeared "fidgety" immediately prior to the shooting, the number of wounds, and the fact that the offense occurred over a short period of time prove that appellant did not premeditate the

shooting. *See* 10 *Minnesota Practice*, CRIMJIG 11.02 (2006) ("[A]n unconsidered or rash impulse, even though it includes an intent to kill, is not premeditated."). But the circumstances proved relating to the nature of the shooting establish that appellant (1) waited until T.H. was alone to shoot T.H.; (2) shot T.H. in the back after passing him on the sidewalk; (3) continued to shoot T.H. after he fell to the ground; (4) shot T.H. five times; and (5) abandoned T.H. on the sidewalk.

"Evidence of motive includes prior threats by the defendant, plans or desires of the defendant that would have been advanced by the victim's death, and prior conduct by the victim known to have angered the defendant." *Clark*, 739 N.W.2d at 423 (quotation omitted). We agree with appellant that there is no evidence of motive in this case. While proof of a motive may strengthen a conclusion that the defendant acted with premeditation, it is not necessary. *State v. Anderson*, 789 N.W.2d 227, 242 (Minn. 2010).

Based on the circumstances proved relating to planning activity and the nature of the killing, the only rational inference to be drawn is that appellant premeditated the shooting. Appellant's arguments fail to create a rational inference inconsistent with premeditation when viewed in light of all of the circumstances proved.

III.

Appellant contends that the district court committed reversible error by locking the courtroom doors before reading the jury instructions.[3] Both the United States and

[3] Appellant did not object to the courtroom closure, but a violation of the Sixth Amendment right to a public trial "is considered a structural error that is not subject to a harmless error analysis." *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009). A

Minnesota Constitutions provide that "the accused shall enjoy the right to a . . . public trial." U.S. Const., amend. VI; Minn. Const. art. I, § 6.

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 2215 (1984) (quotation omitted). But "[n]ot all courtroom restrictions implicate a defendant's right to a public trial." *State v. Brown*, 815 N.W.2d 609, 617 (Minn. 2012). "[T]he 'values sought to be protected by a public trial' are protected when not all spectators are excluded from the courtroom." *State v. Caldwell*, 803 N.W.2d 373, 390 (Minn. 2011) (quoting *State v. Lindsey*, 632 N.W.2d 652, 661 (Minn. 2001)). Whether the right to a public trial has been violated is a constitutional issue reviewed de novo. *Brown*, 815 N.W.2d at 616.

Generally, the party seeking to close the courtroom in a criminal trial must advance an overriding interest that is likely to be prejudiced, closure must be no broader than necessary to protect that interest, the district court must consider reasonable alternatives to closure, and the district court must make findings adequate to support closure. *See Lindsey*, 632 N.W.2d at 660. This analysis is not necessary when the unjustified closure is too trivial to amount to a Sixth Amendment violation. *Brown*, 815 N.W.2d at 617. We consider several factors, including whether (1) the courtroom was cleared of all spectators; (2) the trial remained open to the public and press; (3) the

---

defendant need not timely object to preserve a structural error for appeal. *State v. Everson*, 749 N.W.2d 340, 347–48 (Minn. 2008).

district court ordered removal of members of the public, press, or defendant's family; and (4) the jury instructions comprised a disproportionately large portion of the trial proceedings. *Id.* at 617–18.

Although the district court failed to engage in any analysis regarding the closure, the failure to do so does not amount to a Sixth Amendment violation. Prior to closing the courtroom, the district court instructed,

> Ladies and gentlemen of the jury, counsel, Mr. Mosby, and to anyone in the courtroom, the court is going to give the charge to the jury. The courtroom will be locked. You may not leave or enter the courtroom during this information. If that is any difficulty for you, I would ask you to leave at this time.

The district court communicated to individuals already in the courtroom that they were welcome to stay. The courtroom was never cleared of spectators during appellant's trial. And the jury-instruction portion of the trial constituted only thirteen pages within an over 500-page transcript. Moreover, the values of a public trial were not violated. The public was afforded the opportunity to see that appellant was fairly dealt with and not unjustly condemned, and interested spectators remained, keeping the jury apprised of their sense of responsibility and the importance of their functions.

Appellant also raises a First Amendment claim, arguing that the constitutional right of access to criminal trials was violated. *See Globe Newspaper Co. v. Superior Court for Norfolk Cnty.*, 457 U.S. 596, 603, 102 S. Ct. 2613, 2618 (1982) (recognizing that "the press and general public have a constitutional right of access to criminal trials"). But appellant does not have standing to raise a First Amendment claim because he does

not allege a direct or personal harm. *See City of Minneapolis v. Wurtele*, 291 N.W.2d 386, 393 (Minn. 1980) (explaining that standing requires "a direct and personal harm resulting from the alleged denial of constitutional rights"). And even if the district court's closure of the courtroom constituted a First Amendment violation, appellant cites no authority for the proposition that this results in a remedy to appellant. *See State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006) (noting that an assignment of error based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection), *aff'd*, 728 N.W.2d 243 (Minn. 2007). We see no obvious prejudice resulting from this error.

IV.

Appellant contends, and the state concedes, that his conviction for attempted first-degree murder during a drive-by shooting must be reversed and vacated based on the Minnesota Supreme Court's recent decision in *State v. Hayes*, 826 N.W.2d 799 (Minn. 2013). We agree.

The drive-by shooting statute states that

> (a) Whoever, while in or having just exited from a motor vehicle, recklessly discharges a firearm at or toward another motor vehicle or a building is guilty of a felony and may be sentenced to imprisonment for not more than three years or to payment of a fine of not more than $6,000, or both.
>
> (b) Any person who violates this subdivision by firing at or toward a person, or an occupied building or motor vehicle, may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than $20,000, or both.

Minn. Stat. § 609.66, subd. 1e (2010). Subdivision 1e(a) defines the offense of a drive-by shooting, and subdivision 1e(b) is a sentence-enhancement provision. *Hayes*, 826 N.W.2d at 805. "[A] person who recklessly shoots at or toward another person while in or having just exited a motor vehicle, without also shooting at or toward a building or another motor vehicle, has not committed the offense of drive-by shooting." *Id.* at n.1.

The evidence is insufficient to sustain appellant's conviction of attempted first-degree murder during a drive-by shooting. No evidence indicates that appellant shot at or toward a building or another motor vehicle. We reverse and vacate appellant's conviction for attempted first-degree murder while committing a drive-by shooting and remand to the district court for resentencing consistent with this court's opinion.

Affirmed in part, reversed in part, and remanded.