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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-0431**

State of Minnesota,  
Respondent,

vs.

Dwayne Peterson,  
Appellant.

**Filed March 18, 2013  
Affirmed  
Johnson, Chief Judge**

Ramsey County District Court  
File No. 62-CR-11-6151

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

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Minneapolis, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Stoneburner, Judge; and  
Toussaint, Judge.\*

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

## UNPUBLISHED OPINION

**JOHNSON**, Chief Judge

A Ramsey County jury found Dwayne Peterson guilty of third- and fifth-degree assault based on evidence that he punched a man in a park in the city of St. Paul. Peterson argues that the district court erred by denying the jury's request, during its deliberations, to hear testimony from one of the state's witnesses for a second time. We affirm.

### FACTS

On August 4, 2011, at approximately 7:30 p.m., Peterson had an altercation with another man, N.B., in Iris Park. According to the testimony of one of the state's witnesses, Peterson asked N.B. for a drink from a liquor bottle he was holding. N.B. handed him the bottle, and Peterson took a drink. But when N.B. asked him to return the bottle, Peterson became upset. N.B. rose to his feet, and the argument escalated. Peterson punched N.B. in the face and then walked away with the bottle and a red duffel bag. The incident was witnessed by a woman, E.J., who was in the park with her daughter.

Police officers found Peterson a short time later, a few blocks away from Iris Park, while he was boarding a bus. He was carrying a red duffel bag, as E.J. had described to the police. Inside the duffel bag, Officer Todd Ludvik found a gin bottle, which E.J. later identified as the bottle Peterson had taken from N.B. Police escorted E.J. to Peterson's location, where she identified him as the man who punched N.B. and took his gin bottle.

The case was tried for two days in October 2011. The state called N.B., who testified that he was punched in the face but does not remember the specifics of the incident. N.B. recalled sitting in the park, watching ducks and drinking, and being punched. He was unable to identify Peterson as the man who punched him. E.J. testified to her observations of the altercation, and she identified Peterson as the man who punched N.B. Peterson, however, testified that he did not assault N.B. and had never before seen N.B. or E.J. Peterson testified that he had purchased the gin bottle earlier in the day and had not been to Iris Park that day.

Approximately four hours after beginning its deliberations, the jury sent a note to the district court, stating that the jurors wished to hear E.J.'s testimony concerning whether she saw Peterson punch N.B. The district court conferred with counsel:

THE COURT: Counsel, I don't know that we have much choice but to indicate to them there's no transcript or tape that's available to them. And they have to rely on their own recollection of the testimony of [E.J.].

That's what I would propose. Ms. Lamin, what do you think?

THE STATE: I agree, Your Honor.

THE COURT: Mr. Smith.

MR. SMITH: As does the defense.

THE COURT: Okay. All right. Bring the jury in, please.

(Jury present now)

THE COURT: Thank you, everybody. Welcome back.

Members of the jury, we received the following note a few moments ago.

Quote. Judge Rosas, the jury would like to hear [E.J.'s] testimony regarding whether she saw the defendant punch [N.B.] . . . . Close quote.

Members of the jury, there is no tape of the testimony of [E.J.]. And there is no transcript that is available for you to review. So you have to depend on your own recollection of [E.J.'s] testimony. Okay.

So with that, we'll send you back to the jury room. Thank you.

Less than 30 minutes later, the jury returned its verdict, finding Peterson guilty of third- and fifth-degree assault but acquitting him of aggravated robbery. Peterson appeals.

## DECISION

Peterson argues that the district court erred by denying the jury's request to hear again E.J.'s testimony concerning whether she saw Peterson punch N.B.

“If the jury requests review of specific evidence during deliberations, the court may permit review of that evidence after notice to the parties and an opportunity to be heard.” Minn. R. Crim. P. 26.03, subd. 20(2)(a). A district court has broad discretion in deciding whether to grant a jury's request to review testimony. *State v. Young*, 710 N.W.2d 272, 284 (Minn. 2006). A district court may not deny a jury's request to review evidence by applying a “blanket rule,” although a denial made on such a basis is nonetheless not erroneous “if the district court could have denied the request in a proper exercise of discretion.” *Id.* at 284.

Because Peterson’s trial counsel did not object to the district court’s response to the jury’s request (and in fact agreed with the district court’s response), we review for plain error. *See* Minn. R. Crim. P. 31.02. Under the plain-error test, we may not grant appellate relief on an issue to which there was no objection unless (1) there is an error, (2) the error is plain, and (3) the error affects the defendant’s substantial rights. *State v. Griller*, 583 N.W.2d, 736, 740 (Minn. 1998). An error is “plain” if it is clear or obvious, *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002), and an error is clear or obvious if it “contravenes case law, a rule, or a standard of conduct,” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the first three requirements of the plain-error test are satisfied, we then consider the fourth requirement, whether the error “seriously affects the fairness, integrity or public reputation of judicial proceedings.” *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005) (quotation omitted).

#### A.

Peterson contends that the district court erred because the jury’s request was not unreasonable, burdensome, or impractical. Peterson’s characterization is not supported by the record. The jury wanted to listen to E.J.’s testimony, but there is no indication that the district court possessed an audio-recording of her testimony that could have been played back, and there is no indication that any of the trial testimony had been transcribed so that it could be read back to the jury. The district court denied the request for those reasons, informing the jury that “there is no tape of the testimony of [E.J.]” and “there is no transcript that is available for you to review.”

Even if we accept Peterson's position that the jury's request was not unreasonable, burdensome, or impractical, he still does not prevail. A district court does not err by denying a jury's request to review evidence simply because the request is not unreasonable. On the contrary, "the fact that a request is reasonable does not necessarily mean that the trial court has no discretion to deny the request." *State v. Rean*, 421 N.W.2d 303, 307 (Minn. 1988). There are other reasons why a district court would not want to grant a jury's request, including the reason that granting the jury's request might give one witness's testimony undue prominence over other witnesses' testimony. *See Young*, 710 N.W.2d at 284; *State v. Lane*, 582 N.W.2d 256, 260 (Minn. 1998).

Peterson also contends that the district court erred because the jury's request sought crucial testimony. He asserts that no one but E.J. connected Peterson to the incident. But Officer Ludvik testified that he stopped Peterson approximately half a mile from the park while Peterson was boarding a bus and carrying a red duffel bag, as E.J. had described. Officer Ludvik further testified that, inside the bag, "[r]ight at the very top was a small gin bottle." This evidence connects Peterson to the scene of the crime, even without E.J.'s testimony concerning whether she saw Peterson punch N.B.

Peterson further contends that the district court erred because it applied a blanket rule. For this contention, Peterson relies on *State v. Spaulding*, 296 N.W.2d 870 (Minn. 1980). But in *Spaulding*, the district court told the jury before deliberations began that no testimony would be read again and reiterated that "blanket rule" even after the jury indicated that it was deadlocked and was seeking clarification concerning the defendant's

testimony. *Id.* at 877. The supreme court deemed the district court's actions to be prejudicial error "in such a close case." *Id.* at 878.

This case is distinguishable for a few reasons. First and most importantly, the district court in this case never made a categorical statement to the jury that it would not be allowed to review evidence, unlike the district court in *Spaulding*. *See id.* at 877. Second, the jury in this case gave no indication that it was deadlocked, unlike the jury in *Spaulding*. *See id.* Third, the jury in this case asked to listen to the testimony of a state's witness, unlike the jury in *Spaulding*, which sought to review testimony of the defendant. *See id.*

This case is more similar to *State v. Smith*, 582 N.W.2d 894 (Minn. 1998), in which the jury requested a transcript of an informant's testimony, and the district court denied the request with a statement similar to the statement given in this case. *See id.* at 895-96. The supreme court concluded that *Smith* was not a close case "in which the requested testimony supported the defendant's theory of the case; rather, the jury had to find [the informant's] testimony incredible in order to find Smith not guilty." *Id.* at 897. The *Smith* court found no plain error, reasoning that there was no indication that the jury was deadlocked, and noting that the jury returned with a verdict 13 minutes after the request for a transcript was denied. *Id.*

Likewise, this was not a close case. The jury gave no indication that it was deadlocked, requested testimony adverse to Peterson, and returned its verdict within 30 minutes. Thus, the district court did not err by denying the jury's request to hear again

E.J.’s testimony concerning whether she saw Peterson punch N.B. Because the district court did not err, we need not consider whether any error was plain.

**B.**

In addition, and in the alternative, even if we were to conclude that the district court plainly erred by denying the jury’s request to hear again E.J.’s testimony concerning whether she saw Peterson punch N.B., Peterson still would be required to satisfy the third requirement of the plain-error test by showing that the error affected his substantial rights. *See Strommen*, 648 N.W.2d at 688. “[A]n error affects substantial rights where there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury’s verdict.” *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) (citation and quotation marks omitted). To satisfy the fourth requirement, appellant must show that, but for the plain error, the result of the trial would have been better for him, not worse. *State v. Pearson*, 775 N.W.2d 155, 163-64 (Minn. 2009).

Peterson’s brief focuses on the question whether the district court erred; the brief does not focus on the question whether allowing the jury to listen to the requested testimony in some manner would have altered the result of the trial. At oral argument, we asked Peterson’s appellate counsel why the jury’s review of E.J.’s testimony would have helped his client, but counsel was unable to identify anything in the record that might satisfy the third requirement of the plain error test. It appears that Peterson is relying on mere speculation.

In fact, the transcript reveals that E.J. repeatedly stated that she saw Peterson punch N.B. She testified in detail about the altercation between Peterson and N.B.; she

stated that Peterson “got an attitude” after N.B. asked him to return the bottle, and she provided direct quotations of Peterson’s profanities. She further described how the argument escalated and stated, “The next thing you know [Peterson] punched him.”

Thus, Peterson has not established that, even if the district court plainly erred by denying the jury’s request, there is a “reasonable likelihood that the absence of the error would have had a significant effect on the jury’s verdict.” *Reed*, 737 N.W.2d at 583 (citation and quotation marks omitted).

**Affirmed.**