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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1722**

State of Minnesota,
Respondent,

vs.

Tia Donene Salamone,
Appellant.

**Filed September 17, 2012
Affirmed
Larkin, Judge**

Lincoln County District Court
File No. 41-CR-10-113

Lori Swanson, Attorney General, John Galus, Assistant Attorney General, St. Paul, Minnesota; and

Glen Petersen, Lincoln County Attorney, Tyler, 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 Wright, Presiding Judge; Schellhas, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges her conviction of third-degree burglary, arguing that the district court erred by denying her motion to present alternative-perpetrator evidence and by admitting improper opinion testimony. Appellant also argues that her trial attorney was ineffective for failing to challenge the fine imposed by the district court. Because the record is inadequate and appellant did not seek relief in the district court, we decline to provide relief on appellant's claim of ineffective assistance of counsel. And because the district court did not abuse its discretion by denying appellant's motion to present alternative-perpetrator evidence and appellant does not establish that the opinion testimony affected her substantial rights, we affirm.

FACTS

On June 17, 2010, K.K., the owner of Brick Manor, a bar in Arco, discovered that ten one-hundred-dollar bills were missing from the safe in Brick Manor. K.K. reviewed video recordings from several surveillance cameras at Brick Manor. The videos showed a woman in a white, hooded sweatshirt in front of Brick Manor at approximately 4:23 a.m. and the same woman inside of Brick Manor moments later. The videos also showed the woman entering an office that contained the safe, pushing a surveillance camera in the office up toward the ceiling, and leaving Brick Manor at approximately 4:26 a.m.

K.K. reported the crime to the Lincoln County Sheriff's department, and Deputy Aaron Struntz arrived at Brick Manor to investigate. K.K. informed Struntz that he had locked Brick Manor the night before but that there had not been a forced entry. Struntz

viewed the surveillance videos, and K.K. provided him with the names of possible suspects. The suspects included appellant Tia Donene Salamone, a former employee who previously had keys to the bar and was responsible for locking the safe.

Struntz interviewed Salamone regarding the burglary. Salamone told Struntz that she was at the Wal-Mart in Marshall during the hours preceding the burglary. Struntz obtained Wal-Mart's surveillance videos from the night in question. The videos showed the following events. Salamone drove a car into the Wal-Mart parking lot at approximately 1:12 a.m., parked the car, and remained in the car for over one minute. Salamone's actions within the car are not clearly visible. Salamone made a purchase at a Wal-Mart cash register from 3:43 to 3:47 a.m. Salamone was not wearing a white, hooded sweatshirt at that time. Salamone drove the vehicle out of the Wal-Mart parking lot at approximately 3:51 a.m.

Struntz and another officer executed a search warrant at Salamone's residence on June 23. They found a white, hooded sweatshirt and a set of keys, which were later found to open a padlock and a deadbolt on a door to Brick Manor. They did not find any one-hundred-dollar bills.

The state charged Salamone with third-degree burglary and three counts of theft. Salamone filed a motion in limine asking the district court to allow her to introduce alternative-perpetrator evidence. In support of the motion, Salamone's trial counsel submitted an affidavit stating, in relevant part:

4. That defense witness [C.P.] will testify at trial that she heard [A.M.J.] state that [A.M.J.] burglarized the Brick

Manor in Arco and that she also burglarized the Sunset Bar & Grill in Ruthton. . . .

5. The manager [P.J.] of the Sunset Bar & Grill states that her restaurant was burglarized on July 26, 2010, and that her description of the event shows that the same modus operandi was used in the burglary: a young woman, at night, sneaking around the premises, wearing a hooded sweatshirt, with no signs of forced entry, and the event was caught on surveillance video. That [P.J.] states that [A.M.J.] worked at the Sunset Bar & Grill prior to the burglary and also that [A.M.J.] worked at the Brick Manor in Arco prior to the burglaries. [P.J.] also heard that a roommate of [A.M.J.], [T.D.], may be responsible for the burglaries, and that [K.K.], owner of the Brick Manor, told her that it was a friend of [A.M.J.'s] named [T.] that did the burglary of the Brick Manor. . . .

6. That the burglary at the Brick Manor was by a young woman, at night, sneaking around the premises, wearing a hooded sweatshirt, with no signs of forced entry and the event was caught on surveillance video.

7. That the affiant has viewed both surveillance videos, and that the perpetrator appears to be the same person in both videos and does not appear to be Tia Salamone.

The district court concluded that A.M.J.'s purported admission is hearsay and that the statement would not be admissible as a statement against interest under Minn. R. Evid. 804(b)(3) unless A.M.J. was unavailable as a witness. The district court observed that “[n]o exception to the hearsay rule has been identified and it is unknown if [A.M.J.] is unavailable.” The district court therefore “provisionally denied” Salamone’s motion to present alternative-perpetrator evidence “[b]ecause the offer of proof without [A.M.J.’s] admission is insufficient foundation for the alternative perpetrator evidence and the admissibility of [A.M.J.’s] purported confession is uncertain.” But the district

court indicated that if “the defense is able to demonstrate that testimony regarding [A.M.J.’s] purported admission is admissible, the defense may request that the Court reconsider this ruling.”

Salamone subsequently filed a motion in limine requesting reconsideration. The motion explained that the defense had spoken to and served a subpoena on A.M.J. and that A.M.J. intended to deny involvement in the burglaries and to “deny any admissions of the same.” Salamone asserted that C.P.’s testimony regarding A.M.J.’s prior admission was admissible under Minn. R. Evid. 613 as impeachment evidence. The district court disagreed, reasoning that C.P.’s testimony was impermissible under *State v. Dexter*, 269 N.W.2d 721 (Minn. 1978).¹ The district court ruled that Salamone had still not made an adequate offer of proof to support admission of the alternative-perpetrator evidence.

At the ensuing jury trial, Struntz testified that based on his viewing of the Wal-Mart surveillance video, he thought Salamone put on or took off a white sweatshirt in her car before entering the store. He also testified that the person shown in the Brick Manor surveillance videos appears to be Salamone. He based his opinion on his observations of Salamone on two occasions during his investigation of the burglary. Salamone did not object to this testimony. Struntz also testified that he used a Rand-McNally product to determine that it would take approximately 28 minutes to drive from the Wal-Mart in Marshall to Brick Manor.

¹ *Dexter* holds that otherwise inadmissible hearsay evidence cannot be presented in the guise of impeachment. *Dexter*, 269 N.W.2d at 721-22.

K.K. testified that he thought that Salamone was the person shown in the Brick Manor surveillance videos. He buttressed his identification by stating, “I’ve known [Salamone] for about twelve years now and you get to know people’s body motions.” S.M., an employee of the Brick Manor bar, also testified that in her opinion, the person shown in the Brick Manor surveillance videos was Salamone. But S.M. admitted that she had never worked with Salamone and had encountered Salamone on only a few occasions. Salamone did not object to the identification testimony of K.K. or S.M.

E.S., a patron of Brick Manor, testified that Salamone told her that she had made an extra set of keys for the bar without K.K.’s knowledge. K.K. testified that aside from his family, approximately 15 other people had keys to the bar.

The jury found Salamone guilty of third-degree burglary. The district court stayed imposition of sentence and imposed a 75-day jail sanction and a \$500 fine. Salamone appeals.

D E C I S I O N

Salamone has raised three claims in her primary brief: (1) the district court erred by denying her motion to present alternative-perpetrator evidence, (2) the district court erred by allowing Struntz and S.M. to testify that she was the person shown in the surveillance videos from the Brick Manor Bar and by allowing Struntz to testify that the Wal-Mart surveillance video showed her changing clothing in her car, and (3) her trial counsel was ineffective for failing to ask the sentencing judge to impose a fine of no more than \$50, based on her eligibility for public-defender representation. Salamone has

also submitted a pro se brief alleging additional errors. We address each of Salamone's claims in turn.

I.

Salamone argues that the district court erroneously concluded that A.M.J.'s statement was inadmissible hearsay and as a result, erroneously excluded evidence that A.M.J. was an alternative perpetrator. Alternative-perpetrator evidence is admissible only if it has an inherent tendency to connect the alternative party with the commission of the crime. *State v. Jones*, 678 N.W.2d 1, 16 (Minn. 2004).

Once a foundation is laid with evidence having an inherent tendency to connect the alleged alternative perpetrator to the commission of the crime, it is permissible to introduce evidence of a motive of the third person to commit the crime, threats by the third person, or other miscellaneous facts which would tend to prove the third person committed the act, in order to cast a reasonable doubt on the state's case.

Id. (quotation omitted).

A defendant may also present evidence of other crimes, wrongs, or bad acts committed by the alleged alternative perpetrator to cast reasonable doubt on the identification of the defendant as the perpetrator of the crime. *Id.* This type of alternative-perpetrator evidence has been referred to as "reverse-*Spreigl* evidence." *Id.* (quotation omitted). But such evidence is not admissible unless the defendant meets the threshold requirement of connecting the alternative perpetrator to the commission of the charged crime. *Id.*

Alternative-perpetrator evidence must also be evaluated under the ordinary evidentiary rules, including the rules governing the admission of hearsay. *Id.* at 16-17. A

district court's exclusion of alternative-perpetrator evidence is reviewed for an abuse of discretion. *See Huff v. State*, 698 N.W.2d 430, 435 (Minn. 2005) (stating that alternative-perpetrator "[e]videntiary rulings lie within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion").

"Where a defendant complains that the exclusion of evidence was error, an offer of proof provides the evidentiary basis for a trial court's decision." *State v. Richardson*, 670 N.W.2d 267, 277 (Minn. 2003). "An objection must be specific as to the grounds for challenge." *State v. Rodriguez*, 505 N.W.2d 373, 376 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). Generally, an issue cannot be raised for the first time on appeal. *State v. Anderson*, 733 N.W.2d 128, 134 (Minn. 2007). Nevertheless, an appellate court can review an issue not raised in the district court if there was plain error affecting substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "[B]efore an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." *Id.* If these prongs are met, then the appellate court assesses whether the court should address the error to ensure fairness and the integrity of the judicial proceedings. *Id.*

The district court concluded that Salamone's alternative-perpetrator offer of proof was insufficient only after it determined that A.M.J.'s statement was inadmissible hearsay. Salamone argues, for the first time on appeal, that A.M.J.'s statement was admissible under Minn. R. Evid. 807, which sets forth the residual exception to the hearsay rule. Because Salamone did not ask the district court to admit A.M.J.'s statement

under the residual exception, this court reviews the district court's failure to do so for plain error.

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 not admissible except as provided by [rules 803, 804, 807,] or by other rules prescribed by the Supreme Court or by the Legislature." Minn. R. Evid. 802; *see* Minn. R. Evid. 803 (providing exceptions to hearsay exclusion even though the declarant is available as a witness); *see also* Minn. R. Evid. 804 (providing exceptions to hearsay exclusion when the declarant is unavailable as a witness). Rule 807 contains the residual exception to the hearsay rule and states:

A statement not specifically covered by rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Minn. R. Evid. 807.

Courts consider the totality of the circumstances when determining whether a statement has "sufficient guarantees of trustworthiness." *State v. Martinez*, 725 N.W.2d 733, 737-38 (Minn. 2007). For example, in *State v. Ortlepp*, the supreme court relied on the following factors in concluding that a recanting witness's prior inconsistent statement had circumstantial guarantees of trustworthiness: (1) the witness was available for cross-

examination, (2) the witness admitted making the statement, (3) the statement was against the witness's penal interest, and (4) the statement was consistent with other evidence introduced by the state. 363 N.W.2d 39, 44 (Minn. 1985).

In this case, defense witness C.P. apparently was willing to testify that she had heard A.M.J. state that A.M.J. had burglarized Brick Manor and the Sunset Bar & Grill. But Salamone advised the district court that if called to testify, "[A.M.J.] would deny involvement in either burglary and deny any admissions of the same." Because A.M.J. did not admit making the statement, one of the fundamental circumstantial guarantees of trustworthiness is absent and the statement does not fall within the residual exception to the hearsay rule. *See State v. Robinson*, 699 N.W.2d 790, 798 (Minn. App. 2005) (explaining that a statement is not admissible under the residual exception unless "there [is] no dispute as to whether the declarant actually made the statement"), *aff'd*, 718 N.W.2d 400 (Minn. 2006). The district court therefore did not err by failing to admit the statement, *sua sponte*, under the residual exception.

Moreover, the district court appropriately reasoned that without A.M.J.'s alleged admission, "the offer of proof in this case consisted only of evidence of two burglaries committed more than one month apart in different counties by individuals whose appearance, at least by the [c]ourt's view, cannot be said to be similar or dissimilar." The district court's subsequent conclusion that Salamone failed to meet the threshold requirement of connecting A.M.J. to the Brick Manor burglary was within the district court's sound discretion. In sum, the district court did not err by excluding the alternative-perpetrator evidence.

II.

Salamone next argues that the district court erred by allowing Struntz and S.M. to testify that Salamone was the person shown in the Brick Manor surveillance videos and by allowing Struntz to testify that the Wal-Mart surveillance video shows Salamone changing her clothes in her car. Salamone argues that the testimony constituted impermissible opinion testimony under Minn. R. Evid. 701 and 702. *See* Minn. R. Evid. 701 (stating that “[i]f the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue”); Minn. R. Evid. 702 (stating that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise”).

Because Salamone did not object to the testimony, we apply the plain-error standard of review. To obtain relief under the plain-error standard, Salamone must show that there was error, the error was plain, and the error affected her substantial rights. *See Griller*, 583 N.W.2d at 740. An error affects substantial rights “if the error was prejudicial and affected the outcome of the case. The defendant bears the burden of persuasion on this third prong. We consider this to be a heavy burden.” *Id.* at 741. Plain error is prejudicial if there is a “reasonable likelihood that the [error] in question would have had a significant effect on the verdict of the jury.” *Id.* (quotation omitted).

Assuming, for the sake of argument, that the district court plainly erred by allowing the opinion testimony, for the reasons that follow, Salamone does not establish that the claimed error affected her substantial rights. *See State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007) (“If a defendant fails to establish that the claimed error affected his substantial rights, we need not consider the other [plain-error] factors.”).

S.M.’s testimony showed that she had limited contact with Salamone before she identified Salamone in the Brick Manor surveillance videos. For example, S.M. testified that she had never worked with Salamone. When asked if she knew Salamone prior to her employment at the Brick Manor bar, S.M. testified: “[j]ust from a couple of times I had stopped into the Brick.” And S.M.’s testimony was not forceful. Although S.M. testified that she was able to identify the person in the Brick Manor surveillance video, she qualified her identification, stating “[i]n my opinion, it looks like Tia.”

After this testimony, and at Salamone’s request, the district court gave the jury a cautionary instruction as follows:

Again, ladies and gentlemen, testimony has been introduced tending to identify the [d]efendant as the person observed at the time of the alleged offense. You should carefully evaluate this testimony. In doing so you should consider such factors as the opportunity of the witness to see the person at the time of the alleged offense, the length of time the person was in the witness’s view, the circumstances of that view, including light conditions and the distance involved, the stress the witness was under at the time, and the lapse of time between the alleged offense and the identification. If the witness has seen and identified the person before trial and after the alleged offense, you should also consider the circumstances of that earlier identification, and you should consider whether in this trial the witness’s memory is affected by that earlier identification.

During cross-examination, S.M. testified that she viewed the video one or two times after the burglary. When asked if she identified Salamone as the person in the Brick Manor surveillance video, S.M. did not say, unequivocally, that it was Salamone in the video. Rather, S.M. testified, “[t]hat looks like her, yes.”

Struntz also had limited contact with Salamone, and his testimony was not compelling. When asked his opinion regarding whether the person depicted in the Brick Manor surveillance videos was Salamone, Struntz testified, “[i]t would appear that it would be her, yes.” The district court then gave another cautionary instruction regarding the identification. During cross-examination, Struntz was asked if the person in the Brick Manor video was Salamone. Struntz testified, “[i]t appears so, yes.” But Struntz went on to testify that his only two contacts with Salamone occurred when he took a statement from her and when he executed the search warrant at her residence.

In sum, S.M. and Struntz conceded that their contact with Salamone was limited, and they qualified their identifications. Also, the district court provided a cautionary instruction after each witness’s identification. The instructions enabled the jury to determine the appropriate weight, if any, to give to the opinion testimony. Under the circumstances, it is unlikely that the jury heavily weighed the testimony in the state’s favor. Even if the jury found the testimony credible, it is not likely that the testimony affected the outcome of the case. We observe that Salamone states that she “is not challenging [K.K.’s] testimony that [she] was the person in the surveillance video from the Brick Manor bar.” Unlike S.M. and Struntz, K.K. had extensive contact with Salamone. He was her employer and had known her for about 12 years. Based on this

record, which also includes evidence that a set of keys to the Brick Manor and a white, hooded sweatshirt were found in Salamone's residence after the burglary, we conclude that there is no reasonable likelihood that the opinion testimony of S.M. and Struntz had a significant effect on the jury's verdict.

Likewise, we conclude that Struntz's testimony regarding the Wal-Mart surveillance video was not prejudicial. Struntz's testimony regarding Salamone's actions in her car was brief and equivocal. Struntz said that he had examined the video closely, but that he could "not clearly" tell what the person was doing inside of the vehicle. He said it "appears" that "maybe" the person was "taking off or putting on a sweatshirt." We discern no reason to believe that this brief, uncertain testimony affected Salamone's substantial rights. *See Griller*, 583 N.W.2d at 741 (explaining that substantial rights are affected "if the error was prejudicial and affected the outcome of the case").

In conclusion, because the challenged testimony did not affect Salamone's substantial rights, she is not entitled to relief under the plain-error standard.

III.

Salamone argues that a remand is necessary to determine whether her trial attorney should have requested that the district court impose a fine of no more than \$50. Salamone relies on Minn. Stat. § 609.101, subd. 5(b) (2010), which provides that if a defendant qualifies for the services of the public defender, "the court may reduce the amount of the minimum fine to not less than \$50." The district court imposed a fine of \$500. Even though Salamone was represented by a public defender, the attorney did not object to the fine and did not request a limited fine under section 609.101, subdivision

5(b). Salamone therefore asserts that her trial attorney was ineffective. Salamone concedes that additional fact finding on this issue is necessary because the record is unclear regarding why her trial attorney did not request a limited fine. In the alternative, Salamone argues that “if this Court determines that the record is sufficient to reach this issue, defense counsel was ineffective for failing to request the \$50 public defender eligible fine.”

For the reasons that follow, we decline to provide relief on this claim. First, to establish ineffective assistance of counsel, the “defendant must affirmatively prove that his counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quotation omitted). As Salamone concedes, the current record is inadequate to establish a claim of ineffective assistance of counsel. Second, we discern no basis to remand this case to the district court for a hearing on a *yet-to-be-filed* postconviction petition for relief.

IV.

Salamone has filed a pro se brief that appears to challenge Deputy Struntz’s credibility as a witness, K.K.’s request for restitution, and the questions posed to the venire members during voir dire. But, Salamone does not cite to any legal authority or offer any legal argument in her pro se brief. An assignment of error in a brief based on “mere assertion” and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770,

772 (Minn. App. 1997) (quotation omitted). Because we discern no obvious prejudicial error, the issues in Salamone's pro se brief are waived. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (stating that claims in a pro se supplemental brief are waived if the brief contains no argument or citation to legal authority supporting the claims).

Affirmed.