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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-687**

Michael Adams, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed January 4, 2011
Affirmed
Hudson, Judge**

Ramsey County District Court
File No. 62-CR-08-705

Mark D. Nyvold, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

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

UNPUBLISHED OPINION

HUDSON, Judge

This is an appeal from the partial denial of postconviction relief. Specifically,
appellant seeks postconviction relief from his conviction of burglary in the second

degree, contending that the postconviction court erred in determining that the admission of a 911 call at trial was not plain error. We affirm.

FACTS

On April 24, 2008, a man living in St. Paul returned to his apartment and observed that his door was partially broken and ajar. The victim observed two men, one of whom he identified as Adams, run out of the apartment and down the stairwell. The victim followed the men outside and called 911 once he was in the parking lot. The victim testified that while he was speaking to the 911 dispatcher, Adams pulled out a knife and threatened him.

The 911 dispatcher testified at trial and authenticated the recording of the call. Adams's trial counsel objected to the introduction of the recording as hearsay, but not for lack of authentication. The district court overruled the hearsay objection and allowed the jury to hear the 911 call.

The recording captures a conversation between the 911 dispatcher and the victim. The victim reports that between two and four black men broke into his apartment and that one of the men is threatening him with a knife "right now." The victim also states that he does not know the man's name, but he knows that the man lives in his building.

A third person can be heard in the background, but it is difficult to make out what that person is saying. But at one point, the third person clearly says "Mother f-----. (Inaudible.) Mother f-----." No one specifically identified the third person's voice as Adams's on the recording or at trial.

Two witnesses who live in adjacent buildings also testified about the altercation. Both witnesses testified to seeing the victim and Adams arguing in the parking lot and observing Adams pull out a knife. But the witnesses disagreed about the order of the events. One witness testified that the victim took out his telephone and Adams pulled out a knife thereafter. The other witness testified that Adams pulled out a knife before the victim took out his telephone and that Adams put away the knife once he saw the telephone.

Adams testified and denied breaking into the victim's apartment. He testified that he was in the stairwell when the victim and several men ran past him. Adams testified that he followed them outside, where the victim "started coming at [him]." Adams further testified that he pulled out a knife because the victim looked like he was reaching for a weapon and that he put away the knife when he saw that the victim only had a telephone. On cross-examination, Adams denied having the knife out while the victim was on the telephone with the police dispatcher, and he stated that he did not remember using any profanity toward the victim.

During the state's closing argument, the prosecutor played the 911 recording a second time. The prosecutor argued that Adams was the third person on the recording, stating:

Does this tape that can't lie to you sound more consistent with what [the victim]'s telling you? That as he's on the phone this defendant pulls a knife, threatens him with it, is swearing at him, threatening him?

Adams objected to the prosecutor being allowed to play the recording a second time, and the district court overruled the objection. Adams did not object to the argument made by the prosecutor based on the recording. During their deliberations, the jury asked to listen to the recording a third time. The district court denied the request. The jury subsequently returned a guilty verdict on both the terroristic-threats and burglary charges.

Adams initially filed a direct appeal but voluntarily dismissed it. Adams subsequently filed a petition for postconviction relief, contending that the district court plainly erred in (1) admitting the 911 call without authentication, and (2) sentencing Adams on the terroristic-threats conviction even though Adams committed the terroristic-threats and burglary offenses substantially contemporaneously. The postconviction court vacated Adams's conviction for terroristic threats but determined that there was no error in admitting the 911 call. Adams appeals this determination, and he also raises several other alleged errors in a pro se supplemental brief.

DECISION

This court reviews the postconviction court's findings to determine whether they are supported by sufficient evidence. *Pippitt v. State*, 737 N.W.2d 221, 226 (Minn. 2007). This court will not overturn the postconviction court's decision unless the court abused its discretion. *Id.* Factual findings will not be set aside unless they are clearly erroneous, but legal determinations are reviewed de novo. *Id.* Adams bears the burden of establishing that he is entitled to relief. *See id.* (stating that postconviction petitioner bears burden of proving he is entitled to relief).

Adams contends that the district court committed plain error by admitting the victim's 911 call without adequate authentication, even though he did not object to the admission of the 911 call on that basis at trial. "Failure to object to the admission of evidence generally constitutes waiver of the right to appeal on that basis." *State v. Vick*, 632 N.W.2d 676, 684 (Minn. 2001). But this court may consider an issue that was waived at trial "if there is (1) error, (2) that is plain, and (3) the error affects the defendant's substantial rights." *Id.* at 685.

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Minn. R. Evid. 901(a). A voice, "whether heard firsthand or through mechanical or electronic transmission or recording," can be authenticated "by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." Minn. R. Evid. 901(b). Adams contends that because no witness specifically identified the third person's voice on the 911 call as his, the recording was inadmissible for lack of authentication.

Our decision in *State v. Washington*, 725 N.W.2d 125 (Minn. App. 2007), *review denied* (Minn. Mar. 20, 2007), is instructive. In *Washington*, the appellant was convicted of two counts of fifth-degree domestic assault based in part on a 911 call made by the victim, who did not testify. *Id.* at 131. The appellant objected to the admission of the 911 call on several grounds, including that no one had authenticated the voice on the recording as that of the victim. *See id.* at 137. The district court allowed the recording into evidence. *Id.* at 131. We affirmed, concluding that the district court had not abused

its discretion in admitting the 911 call because there was other testimony indicating that the victim had placed the 911 call. *Id.* at 137.

Here, the testimony authenticating the 911 call is even stronger than in *Washington* because the victim testified to the events captured on the 911 call. *See id.* at 131. The victim testified that Adams pulled out a knife and threatened him while he was speaking to the 911 dispatcher; at least one other witness corroborated the victim's testimony. This testimony is adequate to establish that the third person on the 911 call was Adams. Thus, Adams cannot establish that the district court committed error—let alone plain error—by admitting the 911 call.

In his pro se supplemental brief, Adams also argues that his burglary conviction should be overturned based on the insufficiency of the evidence, ineffective assistance of trial counsel, and prosecutorial misconduct. Adams has cited no legal authority in support of these arguments. We have nonetheless considered them carefully and conclude that they lack merit.

Affirmed.