STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0719

State of Minnesota,
Respondent,

vs.

Jermaine Kershawn Perry,
Appellant.

Filed March 25, 2013
Affirmed
Larkin, Judge

Ramsey County District Court
File No. 62-CR-11-8054

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Rodenberg, Judge.

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

LARKIN, Judge

Appellant challenges his convictions of terroristic threats, false imprisonment, and domestic assault by strangulation. He argues that the district court plainly erred in admitting hearsay statements as substantive evidence and that the prosecutor engaged in misconduct by eliciting improper vouching testimony. We affirm.

FACTS

Respondent State of Minnesota charged appellant Jermaine Kershawn Perry with terroristic threats, false imprisonment, and domestic assault by strangulation based on allegations arising from an incident involving Perry and his girlfriend, L.A. The case was tried to a jury.

At trial, Saint Paul Police Officer Michael McNeill testified that he responded to a report of a domestic assault and interviewed L.A. McNeill testified that L.A. had blood on her face, a fat lip, a cut lip, several knots on her head, and puffiness around her eyes. McNeill testified that L.A. reported that she had been in Perry's vehicle and that Perry told her he had been with a friend earlier that evening. L.A. did not believe Perry, so she grabbed his cellular telephone and called his friend, who denied being with Perry.

McNeill testified that L.A. said that she tried to get out of the vehicle because Perry became very angry. When she tried to get out, Perry "stopped her and then started assaulting her," by "grabb[ing] her around the neck with his right arm and pull[ing] her in towards himself, where he was punching her in the face several times." L.A. was not able to breathe for approximately 10 to 15 seconds. McNeill testified that L.A. told him

that Perry said "he was going to f-cking kill her" and "b-tch, you're a dead woman if you call the police." McNeill also testified that L.A. said that at one point, Perry pulled the vehicle over, got out, ran a short distance, turned around, came back, grabbed her hair, and started punching her in the face again. L.A. told McNeill that Perry once again said, "if you called the police I'm going to f-cking kill you." Perry did not object to any of that testimony.

During the course of McNeill's testimony, the prosecutor asked McNeill "to describe for the jury what [L.A.'s] demeanor was when she was telling you all these things. How was she behaving?" This exchange followed:

> MCNEILL: Like someone that had just been assaulted. And she was very terrified. It was clear to me she was not lying. She wasn't making it up. She continued to cry through the time she was telling me about the incident. She had concerns of what he was going to do to her in the future. She actually went through charging and whatnot. Just a lot of fear.
> PROSECUTOR: You've dealt with people before who have been afraid.
> MCNEILL: Yep. Yes, ma'am.
> PROSECUTOR: You have experience with that?
> MCNEILL: Yes.
> PROSECUTOR: This isn't the first time you've seen somebody exhibit those characteristics?
> MCNEILL: No.
> PROSECUTOR: How certain were you that she was afraid?
> MCNEILL: 100 percent.

Perry did not object to that testimony.

Saint Paul Police Officer Michael Dollerschell also testified at trial. Dollerschell testified that he met with L.A. several days after the incident and read McNeill's police report to her. Dollerschell testified that as he read the details of the report,

> from like one assault to another, or a different location, [he] would look up to see if what [he was] saying, you know, and asked her is this what's happening. She didn't respond yes or no. But she would nod her head . . . up and down. Like yes, that's what happened.

Dollerschell further testified that L.A. told him that "the assaults did happen," but that it was her fault because she "provoked him by grabbing the phone" and by pulling the steering wheel. Dollerschell also testified that L.A. never denied that Perry hit her, strangled her, or threatened her. Perry did not object to this portion of Dollerschell's testimony.

L.A. testified that Perry picked her up in his truck. L.A. and Perry got into an argument because L.A. suspected Perry of spending time with another woman earlier that day. Motivated by this suspicion, L.A. began to look through Perry's cell phone. Perry snatched the phone from L.A.'s hand. L.A. became upset, grabbed the steering wheel, and tried to crash the truck. L.A. further testified that Perry lost control of the vehicle, causing L.A. to fall forward and hit her head on the dashboard. Although L.A. acknowledged that Perry pushed her to keep her away from the steering wheel, she denied that Perry hit her, strangled her, threatened her, or prevented her from getting out of the vehicle.

The jury found Perry guilty of all three offenses, and the district court sentenced Perry to 33 months in prison. Perry appeals his convictions.

D E C I S I O N

I.

Perry argues that L.A.'s statements to McNeill and Dollerschell were inadmissible as substantive evidence because the statements were hearsay and the statements did not fall under an exception to the hearsay rule. He further argues that the prosecutor impermissibly called L.A. solely for the purpose of impeaching her with her inadmissible hearsay statements. *See State v. Dexter*, 269 N.W.2d 721, 721-22 (Minn. 1978) (holding that hearsay evidence that is otherwise inadmissible cannot be presented under the guise of impeachment). Perry acknowledges that those issues were not raised in the district court.

Generally, an issue cannot be raised for the first time on appeal. *State v. Anderson*, 733 N.W.2d 128, 134 (Minn. 2007). Moreover, "[a]n 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). Nevertheless, an appellate court may 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). Under this standard, we consider (1) whether there was an error, (2) whether such error was plain, and (3) whether it affected the defendant's substantial rights. *Id.* An error is plain if it is "clear" or "obvious," *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (quotation omitted). "Usually this is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the three plain-error factors are established, this court considers whether the error seriously affected the

fairness and integrity of the judicial proceedings. *See Griller*, 583 N.W.2d at 740, 742 (explaining that a court may exercise its discretion to correct a plain error only if such error seriously affected fairness, integrity, or public reputation of judicial proceedings).

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). Out-of-court statements that are not offered for the purpose of proving the truth of the matter asserted are not hearsay. *State v. Campion*, 353 N.W.2d 573, 580 (Minn. App. 1984). Hearsay is admissible only when specifically provided by the rules of evidence "or by other rules prescribed by the Supreme Court or by the Legislature." Minn. R. Evid. 802. The exceptions to the hearsay rule are numerous. *See* Minn. R. Evid. 803 (listing 22 exceptions to hearsay exclusion), 807 (stating residual exception to hearsay exclusion).

Perry contends that L.A.'s statements to McNeill and Dollerschell are hearsay and that they do not fall under any of the exceptions to the hearsay rule, including the excited-utterance and residual exceptions. *See* Minn. R. Evid. 803(2), 807. Perry and the state offer detailed, fact-specific arguments regarding whether or not L.A.'s statement to McNeill falls under the excited-utterance exception, which provides that a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible under the hearsay rule. Minn. R. Evid. 803(2).

> The basic elements of an "excited utterance" under Minn. R. Evid. 803(2) . . . are (a) that there be a startling event or condition, (b) that the statement relates to the event

> or condition, and (c) that the statement is made under the stress caused by the event or condition. It is for the [district] court, in the exercise of its discretion in making evidentiary rulings, to determine whether the declarant was sufficiently under the aura of excitement.

State v. Edwards, 485 N.W.2d 911, 914 (Minn. 1992) (citation and quotation omitted).

Perry argues that "[b]y the time [L.A.] gave her statement to McNeill, a period of time had elapsed and she had managed to compose herself . . . so she was no longer under the 'aura of excitement' from the incident." The state points out that McNeill described L.A. as "terrified" and "crying uncontrollably" while she gave her statement. Thus, the state argues, the district court "would have acted well within [its] discretion to allow the statements in as excited utterances." We agree.

Although McNeill acknowledged that L.A. was already in a bathroom "cleaning herself up" when he arrived at the scene, the passage of time between the incident and the statement is not necessarily dispositive. *See State v. Martin*, 614 N.W.2d 214, 223 (Minn. 2000) ("There are no strict temporal guidelines for admitting an excited utterance." (quotation omitted)). Moreover, McNeill testified that L.A. "continued to cry through the time she was telling me about the incident." If there had been an objection, admission of L.A.'s statement to McNeill as substantive evidence under the excited-utterance exception would have been well within the district court's discretion. *See State v. Bauer*, 598 N.W.2d 352, 366 (Minn. 1999) (holding that statement fell within the excited-utterance exception to the hearsay rule because "[the witness's] description of her condition—extremely agitated, upset, and afraid—indicates that at the time she made the statement, [the declarant] was still under the stress caused by the threat"). Thus, the

district court's failure, sua sponte, to exclude the statement, was not error, much less plain error.

Perry argues that L.A.'s statement to Dollerschell was inadmissible under the residual exception to the hearsay rule. We do not decide whether or not admission of the statement violated the hearsay rule because Perry does not establish that the claimed error affected his 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."). Perry acknowledges that L.A.'s statement to Dollerschell was "largely exculpatory." And although L.A. told Dollerschell that "the assaults did happen," the jury had already heard McNeill testify that L.A. reported that Perry "grabbed her around the neck with his right arm and pulled her in towards himself, where he was punching her in the face several times," and that he told her "he was going to f-cking kill her." When viewed in the context of the state's case as a whole—including L.A.'s far more detailed and incriminating statement to McNeill—admission of L.A.'s statement to Dollerschell did not prejudicially affect the outcome of the case. *See Griller*, 583 N.W.2d at 741 (explaining that the defendant bears the burden of persuasion to show that "the error was prejudicial and affected the outcome of the case").

In sum, the district court did not plainly err by failing, sua sponte, to exclude L.A.'s statements to McNeill and Dollerschell under the hearsay rule. And, because Perry does not establish that L.A.'s statements were inadmissible as substantive evidence, we reject his argument under *Dexter*. *See State v. Ortlepp*, 363 N.W.2d 39, 44 (Minn.

1985) (explaining that if hearsay is admissible as substantive evidence, there is no *Dexter* violation).

II.

Perry argues that "the prosecutor committed reversible misconduct by eliciting improper vouching testimony" when she asked McNeill to describe "what [L.A.'s] demeanor was when she was telling you all these things," to which McNeill responded: "It was clear to me she was not lying. She wasn't making it up." Perry further argues that the prosecutor's follow-up questions "demonstrate that McNeill's statements were not unanticipated spontaneous remarks, but rather an intentional decision by the state to put an official stamp of credibility to [L.A.'s] initial version of events." Perry did not object to the testimony at trial.

A defendant who fails to object to prosecutorial misconduct ordinarily forfeits the right to appellate review. *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984). However, this court has discretion to review unobjected-to prosecutorial misconduct if plain error is established. Minn. R. Crim. P. 31.02; *Ramey*, 721 N.W.2d at 299. To establish plain error based on a claim of prosecutorial misconduct, the prosecutor's unobjected-to act must be erroneous, the error must be plain, and the error must affect the defendant's substantial rights. *Ramey*, 721 N.W.2d at 302 (citing *Griller*, 583 N.W.2d at 740). The burden rests with the defendant to demonstrate that plain error occurred. *Id*. If plain error is established, the burden shifts to the state to demonstrate that the plain error did not affect the defendant's substantial rights. *Id*.

"The credibility of a witness is for the jury to decide." *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998) (quotation omitted). "Therefore, one witness cannot vouch for or against the credibility of another witness." *Id.* It is improper for a prosecutor to intentionally elicit vouching testimony during trial. *Van Buren v. State*, 556 N.W.2d 548, 551 (Minn. 1996).

In this case, McNeill impermissibly vouched for the credibility of L.A. when he testified that "[i]t was clear to me she was not lying" and that "[s]he wasn't making it up." However, McNeill provided the vouching testimony in response to the prosecutor's question about L.A.'s demeanor. Because it does not appear that the prosecutor's question was designed to elicit vouching testimony, there was no misconduct. *Cf. State v. Wren*, 738 N.W.2d 378, 391 (Minn. 2007) (finding prosecutorial misconduct because the prosecutor's question "seem[ed] designed to elicit testimony from one witness . . . about the credibility of another"). The follow-up questions regarding McNeill's perception of L.A.'s fear were relevant to the element of intent. *See Sykes v. State*, 578 N.W.2d 807, 811 (Minn. App. 1998) ("The effect of a terroristic threat is not an essential element of the offense, but the victim's reaction to the threat is circumstantial evidence relevant to the element of intent."), *review denied* (Minn. July 16, 1998). In sum, Perry has not established prosecutorial misconduct.

Affirmed.