STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0079

State of Minnesota,
Respondent,

vs.

Pedro Orlando Gonzalez Mejia,
Appellant.

Filed May 13, 2008
Affirmed
Schellhas, Judge

Watonwan County District Court
File No. CR-06-283

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101-2134; and

Lamar Piper, Watonwan County Attorney, Watonwan County Courthouse, 710 Second Avenue South, St. James, MN 56081 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Klaphake, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

On appeal from his convictions of first- and second-degree assault, appellant argues that the district court allowed testimonial hearsay evidence in violation of his right to confrontation and improperly allowed expert testimony. Because we conclude that the admission of the testimonial hearsay evidence was not prejudicial and that the admission of the expert testimony was a proper exercise of the district court's discretion, we affirm.

FACTS

Appellant Pedro Orlando Gonzalez Mejia was charged with one count of first-degree assault and one count of second-degree assault as a result of an altercation that occurred on March 9, 2006, between appellant and two other men, after all had consumed appreciable quantities of alcoholic beverages. Appellant does not dispute that he had a knife and stabbed A.G. When A.G. was treated at a hospital, the doctor noted three separate stab wounds. A CT scan confirmed that one of A.G.'s kidneys was lacerated as a result of the assault. At trial, A.G.'s hospital records were admitted into evidence without objection by appellant.

Prior to trial, appellant admitted stabbing A.G. Two knives were recovered from the scene of the crime and were submitted to the Minnesota Bureau of Criminal Apprehension (BCA) for analysis. BCA analysts prepared reports, identifying the substances on the knives as blood, and concluding that the DNA profile of the blood matched the DNA profile of A.G.'s blood. Because appellant had refused at a pretrial to stipulate to the introduction of the BCA reports, the respondent secured the analysts'

presence at trial. Although the analysts came to trial, because their reports were admitted without their testimony and without objection by appellant, the prosecutor told them that their presence was no longer required.

At trial, on the basis of A.G.'s hospital records, James Eiselt, M.D., testified that, if not treated properly, A.G.'s kidney laceration could have caused "significant hemorrhage and death." Dr. Eiselt testified that A.G.'s kidney had been "bivalved" and that such an injury would be considered a serious bodily injury. Dr. Eiselt also opined that a stab wound to A.G.'s chest was a serious injury and that any injury in the area of the heart could be considered a serious injury. Appellant raised no objections to this testimony. But when the prosecutor attempted to read the jury-instruction definition of "substantial bodily harm" to Dr. Eiselt and to elicit testimony about whether A.G.'s injuries met that definition, appellant objected, and the objection was sustained.

D E C I S I O N

I.

Appellant argues that the district court committed plain error in admitting BCA reports when the analysts who prepared the reports did not testify. Testimonial hearsay may be admitted only upon a showing that the declarant is unavailable and that the defendant had a prior opportunity to cross-examine the declarant. U.S. Const. amends. VI, XIV; Minn. Const. art. I, § 6; *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004). Whether the admission of evidence violates a criminal defendant's rights under the Confrontation Clause is a question of law that this court reviews de novo. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

Citing *State v. Litzau*, 650 N.W.2d 177 (Minn. 2002), appellant argues that his pretrial refusal to stipulate to the admission of the BCA reports without the analysts' testimony preserved his evidentiary objection for appellate review.[1] But the *Litzau* court did not address a refusal by a defendant to stipulate to the admission of evidence; the *Litzau* court considered a district court's evidentiary ruling pursuant to a defense motion in limine before trial. 650 N.W.2d at 183. Appellant made no motion in limine before trial and the holding in *Litzau* does not excuse the lack of an objection at trial.

Relying upon *State v. Blom*, 682 N.W.2d 578, 617 (Minn. 2004), and *State v. Hamilton*, 268 N.W.2d 56, 63 (Minn. 1978), respondent argues that appellant's failure to object to the admission of the BCA reports constitutes a waiver of his right to confront the BCA analysts and a waiver of the issue on appeal. *See also State v. Martinez*, 725 N.W.2d 733, 738 (Minn. 2007) (applying waiver rule post-*Crawford* to nontestimonial hearsay). But the failure to object to the admission of testimonial hearsay under *Crawford* is not subject to the same legal analysis as unobjected-to evidentiary hearsay. In *Crawford*, the United States Supreme Court stated, "[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." 541 U.S. at 51, 124 S. Ct. at 1364. The Supreme Court concluded that the Confrontation Clause applies to witnesses who bear testimony and that testimony is a statement made "for the purpose of establishing or proving some fact." *Id.* "Where testimonial evidence is at issue, . . . the

[1] When he refused to stipulate to the admission of the reports, appellant requested the testimony of the BCA analysts at trial pursuant to Minn. Stat. § 634.15, subd. 2 (2006).

Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68, 124 S. Ct at 1374.

This court may exercise its discretion to consider appellant's claim if it constitutes plain error or a defect affecting substantial rights of the appellant, even if the claim was not brought to the attention of the district court. Minn. R. Crim. P. 31.02 (2005); *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citing *Griller*, 583 N.W.2d at 740 (citing *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S. Ct. 1544 (1997))). "If those three prongs are met, we may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation omitted). The burden is on appellant to show that the district court committed a "plain error" that prejudiced his case by admitting the BCA reports. *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1778 (1993) (noting that the appellant has the burden of showing that he or she was prejudiced by the plain error committed at trial).

The Minnesota Supreme Court has held that a BCA report admitted without supporting testimony is testimonial hearsay. *Caulfield*, 722 N.W.2d at 309 (finding that "[t]he report functioned as the equivalent of testimony on the identification of the substance seized from Caulfield."). "*Crawford* mandated that all testimonial statements be excluded unless the declarant is unavailable to testify at trial and the defendant has had a prior opportunity to cross-examine the declarant." 722 N.W.2d at 308. The state has the burden to prove that a report is not testimonial. *Id.* BCA reports are "the types of

statements about which the Court in *Crawford* expressed concern—affidavits and similar documents admitted in lieu of present testimony at trial." *Id.* at 309.

Here, the BCA reports were prepared for litigation and were introduced by the state for the purpose of proving, beyond a reasonable doubt, the identity of the substance on the knives, as well as the DNA profile match. The BCA reports were testimonial hearsay. *Id.* Because the district court admitted the reports without testimony from the BCA analysts, the analysts who prepared the reports were not unavailable, and appellant had not had a prior opportunity for cross-examination, appellant's right to confrontation was violated. *Crawford*, 541 U.S. at 68, 124 S. Ct. at 1374; *Caulfield*, 722 N.W.2d at 312.

Applying the plain-error analysis, the admission of the reports was error, and that error was plain. *Caulfield*, 722 N.W.2d at 310;[2] *see also State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002) (holding that to satisfy the second prong, the error must be plain at the time of the appeal); *Griller*, 583 N.W.2d at 741 (noting that error was plain when at the time of trial the district court correctly stated the law, but later that same law became incorrect based on a case decided during appeal).

Appellant has failed to satisfy the third prong of the plain-error test. The third prong is satisfied if "the error was prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741. Plain error is prejudicial if there is a "reasonable likelihood" that the error "had a significant effect" on the jury's verdict. *Id.* The appellant bears the "heavy burden" of showing that an error was prejudicial. *State v. Vance*, 734 N.W.2d

[2] *Caulfield* was decided before this appeal was filed.

650, 659 (Minn. 2007). In this case, appellant testified and made statements that he stabbed A.G. He also testified about what he did with the knife after the stabbing. The BCA reports did not establish any of the essential elements of the crimes for which appellant was convicted[3] and were essentially cumulative. Because we conclude that there is no reasonable likelihood that the error had a substantial effect on the jury's verdict, we find that the error is not prejudicial.

II.

Appellant argues that the district court abused its discretion when it allowed Dr. Eiselt to offer expert testimony based on medical records he did not prepare but that were admitted into evidence without objection. "The admission of expert testimony is within the broad discretion accorded a [district] court, and rulings regarding materiality, foundation, remoteness, relevancy, or the cumulative nature of the evidence may be reversed only if the [district] court clearly abused its discretion." *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999) (quotation and citations omitted); *see also State v. Grecinger*, 569 N.W.2d 189, 194 (Minn. 1997) (holding reversal requires "apparent error"). Appellate courts defer to the fact-finder's determination of weight and credibility of expert witnesses. *State v. Triplett*, 435 N.W.2d 38, 44 (Minn. 1989).

[3] Minn. Stat. § 609.221, subd. 1 (2004), provides: "Great bodily harm. Whoever assaults another and inflicts great bodily harm may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than $30,000, or both." Minn. Stat. § 609.222, subd. 2 (2004), provides: "Dangerous weapon; substantial bodily harm. Whoever assaults another with a dangerous weapon and inflicts substantial bodily harm 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."

Appellant argues that the district court impermissibly allowed Dr. Eiselt to offer expert testimony about the extent and severity of the injuries A.G. suffered, that his testimony involved mixed questions of law and fact that invaded the jury's fact-finding role, and that the error was compounded when the district court allowed Dr. Eiselt to opine based on records prepared by another doctor who treated A.G.

A.G. failed to object to the admission of the hospital records, to Dr. Eiselt's testimony that the injury to A.G.'s kidney could have caused significant hemorrhage and death if not treated properly, and to Dr. Eiselt's testimony that the injury to A.G.'s kidney was a serious bodily injury and the injury to his chest was a serious injury. "Failure to object to the admission of evidence generally constitutes a waiver of the right to appeal on that basis . . . ." *Martinez*, 725 N.W.2d at 738 (citing *State v. Taylor*, 650 N.W.2d 190, 205 (Minn. 2002)). By failing to object at trial, appellant waived his right to have this issue considered on appeal.

However, this court has discretion to consider an error not objected to at trial if it is plain error that affects substantial rights. *Griller*, 583 N.W.2d at 740. In order to constitute plain error, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. *Id.* "If any one of these prongs is not met, the claim fails and will not be considered." *Martinez*, 725 N.W.2d at 738 (citing *Griller*, 583 N.W.2d at 740). The burden of proof is on appellant. *Olano*, 507 U.S. at 734, 113 S. Ct. at 1778. Appellant has not demonstrated that the admission of Dr. Eiselt's testimony constituted a plain error that affected his substantial rights.

Appellant first argues that Dr. Eiselt impermissibly testified about an ultimate issue, but this argument fails. "Minnesota's rules of evidence permit expert opinion testimony on ultimate issues if such testimony is helpful to the factfinder." *State v. Moore*, 699 N.W.2d 733, 740 (Minn. 2005); *see also* Minn. R. Evid. 704 ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."). In any event, Dr. Eiselt was not allowed to testify on the ultimate issue of whether A.G.'s injuries constituted great bodily harm or substantial bodily harm.

Appellant also argues that Dr. Eiselt's testimony was admitted in error because the jury was capable of evaluating the nature and severity of A.G.'s injuries. "Expert opinion testimony is not helpful if the subject of the testimony is within the knowledge and experience of a lay jury and the testimony of the expert will not add precision or depth to the jury's ability to reach conclusions about that subject which is within their experience." *Moore*, 699 N.W.2d at 740. Dr. Eiselt's testimony added precision and depth to the lay jury's understanding because conclusions regarding the nature and severity of A.G.'s injury would not be within the knowledge and experience of a lay jury relying simply upon its own review of A.G.'s medical records.

Appellant next argues that it was error for the district court to allow Dr. Eiselt to testify based, in part, on medical records that he did not prepare. An expert witness is allowed to draw upon facts and data made known to the expert at or before the hearing. Minn. R. Evid. 703(a). It is not an abuse of discretion for the district court to allow an expert witness to base an opinion on medical records properly received into evidence,

even if he was not the treating doctor. *See State v. Dick*, 419 N.W.2d 828, 831 (Minn. App. 1988) (holding that an expert may base his opinion on facts made known to him at the trial or hearing, including reliable hearsay), *review denied* (Minn. Apr. 15, 1988).

The district court did not abuse its discretion by allowing Dr. Eiselt's testimony.

III.

In his pro se supplemental brief, appellant raises additional issues but none has merit or warrants relief. Appellant appears to challenge the fact-finder's reliance on certain testimony by witnesses. Assessing the credibility of a witness is exclusively the jury's function. *State v. Tovar*, 605 N.W.2d 717, 726 (Minn. 2000). Appellant also appears to challenge the length of his sentence. Only in a "rare" case will a reviewing court reverse a district court's imposition of the presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Appellant received a presumptive sentence and has provided no authority to support his challenge to the sentence. Similarly, while appellant appears to challenge the restitution ordered by the district court, he provides no basis for his argument that this court should reverse the order for restitution.

Affirmed.