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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1167

State of Minnesota,
Respondent,

vs.

Jamal Haywood,
Appellant.

Filed February 3, 2009
Affirmed
Peterson, Judge

Ramsey County District Court
File No. KX-05-3720

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

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

Considered and decided by Shumaker, Presiding Judge; Peterson, Judge; and Stauber, Judge.

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

PETERSON, Judge

In this appeal from convictions of attempted murder involving multiple victims and first-degree controlled-substance crime, appellant argues that (1) the district court erred by failing to make any contemporaneous record of a jury communication that apparently resulted in the presence of a bailiff in the jury room during deliberations; (2) the district court abused its discretion in denying appellant's motion for a new trial based on newly discovered evidence; and (3) appellant's convictions for attempted first-degree murder while committing a drive-by shooting must be reversed and vacated because appellant cannot be convicted of attempting an unintentional crime. In a pro se brief, appellant argues that the prosecutor committed prejudicial misconduct during cross-examination of appellant. We affirm.

FACTS

During daylight hours, multiple shots were fired at A.F. while she sat in the driver's seat of her parked car. Three shots hit her, leaving her a quadriplegic. L.C., a passenger in A.F.'s car, was not injured in the shooting. Both A.F. and L.C. knew appellant Jamal Haywood, who was a friend of L.C.'s son D.T., and positively identified appellant as the shooter.

At the time of the shooting, D.T. was living with K.T., who is A.F.'s daughter. Earlier that afternoon, K.T. had called L.C. and said she wanted D.T. out of her apartment because he was selling drugs. L.C. and A.F. went to K.T.'s apartment. While they were still outside, D.T. pulled up in a car with appellant. L.C. confronted appellant about

getting D.T. involved in selling drugs. After appellant verbally threatened L.C. and came toward him, L.C. hit appellant, knocking him to the ground. Appellant got up and drove away alone in his vehicle. Between 3:30 and 3:51 p.m., appellant made several threatening calls to A.F.'s cell phone.

The shooting occurred when A.F. and L.C. returned to K.T.'s apartment to drop off a key. A.F. parked the car and called K.T. to come and get the key. While A.F. and L.C. waited, L.C. saw appellant driving toward them. L.C. testified that appellant "stopped, pulled alongside, stopped, said the word 'Bitch' and began to shoot, then began to drive off." The vehicles were very close to each other when the shooting occurred.

J.Y. heard the shots from his house. He looked outside and saw a gray or cream-colored SUV with a single occupant leaving the scene. J.Y. testified that the SUV and school buses were the only traffic in the area. V.G. witnessed the shooting while waiting for her children at a bus stop. V.G. testified that she had an unobstructed view of the vehicle from which the shots were fired and that she did not see anyone other than the driver in it. Her testimony indicated that the shooter used his right hand to fire the gun. S.H. was in his house when he heard the shots. He went outside to investigate and had an unobstructed view of a tan SUV leaving the scene occupied by only the driver.

After the shooting, police set up surveillance at appellant's residence. That evening, a car stopped in front of appellant's house, and a man, later identified as G.T., got out and walked around the side of the house, where he disappeared from the officers' view. About five minutes later, G.T. came back around the side of the house and drove

away in his car. Police stopped G.T.'s car and found 11 plastic baggies containing cocaine.

Later in the evening, appellant turned himself in to the St. Paul Police Department, where he was interviewed by Sergeant Bryant Gaden. Appellant admitted that the cocaine found on G.T.'s person and in his car belonged to appellant. Appellant denied any involvement in the shooting and claimed that bleach on his hands came from washing clothes.

Gunshot residue was found on samples taken from appellant's right hand and from the rim of the opening of the driver's window of appellant's vehicle. The gunshot residue on appellant's hand indicated that he had either discharged a firearm, handled a discharged firearm, or was in close proximity to a discharged firearm. After the shooting, appellant had given a gun to F.B. to hide, who, in turn, gave it to R.R. The next day, police recovered the gun and six spent shell casings from R.R.

Appellant was charged with two counts of attempted first-degree premeditated murder, two counts of attempted first-degree murder while committing a drive-by shooting, one count of first-degree sale of a controlled substance, and one count of first-degree possession of a controlled substance.

Appellant testified on his own behalf at trial that G.T. was driving appellant's vehicle and appellant was a passenger. Appellant testified that the gun belonged to G.T. and that G.T. fired the shots into A.F.'s vehicle and then handed the gun to appellant. Appellant admitted giving the gun used in the shooting to F.B. and admitted that the

bleach on his hands on the day of the shooting came from trying to remove gunshot residue. He denied that the cocaine belonged to him.

The jury found appellant guilty as charged. The district court denied appellant's motions for a new trial based on newly discovered evidence and for a downward sentencing departure. On the two counts of attempted first-degree premeditated murder, which involved two victims, the district court sentenced appellant to consecutive prison terms of 216 and 180 months. The district court sentenced appellant to a concurrent term of 134 months for the controlled-substance sale crime.

This appeal followed. Appellant moved this court to stay the appeal to permit him to develop the record regarding alleged communications between the jury and a bailiff. This court denied the motion but permitted appellant to move the district court to supplement the record. The district court conducted a hearing on appellant's motion on January 23, 2008, and ordered that the hearing transcript be included in the record.

D E C I S I O N

I.

Appellant argues that he is entitled to a new trial based on improper communication between the bailiff and jury during deliberations.

After the jury was excused for the day, the district court discussed with counsel the procedure for handling the drugs and gun during deliberations. The district court proposed that if the jury wanted to view those exhibits, the jury should notify the bailiff, who would bring those exhibits into the jury room and stay with the jury until it was done examining them. When the court asked if that procedure was acceptable to both counsel,

the prosecutor agreed to the procedure for the drugs but asked that the disabled gun go into the jury room with all of the other evidence. Defense counsel objected to the gun going into the deliberation room. The district court then stated that the jury had the right to view the gun because it was evidence but that, for safety reasons, the same procedure would be followed for the gun as for the drugs. There were no further objections by counsel. The transcript states that appellant was present at trial that day, and nothing in the transcript indicates that he was not present during this discussion.

The next day, the district court instructed the jury:

> There are several . . . items of evidence; specifically, the gun . . . and the various drugs, . . . ; these will not be provided to you with the other exhibits. But the bailiff will have custody and control over those. If you wish to inspect any of those items, let the bailiff know. The bailiff will bring those items in so you can inspect them, look them over, as long as you need to, or want to, and, then, send them back out with the bailiff. While the bailiff is present, I would ask that you not discuss it or try to conduct deliberations when the bailiff is present.

The bailiff swore to not "make any comments to [the jurors] about the law or facts in this case."

A posttrial hearing was conducted regarding a request by the jury to see the drugs during deliberations. Defense counsel testified that he had agreed to the protocol established for handling a jury request to see the drugs. Two bailiffs were called to testify at the hearing. Neither recalled a jury request to review drug evidence, but both testified that they would have followed standard procedure, which is to notify the district court of the request and to not have any communication with the jury about the case.

Appellant argues that he had a right to be present during the review of the drug evidence and the district court erred in failing to get his personal consent to the procedure for reviewing that evidence and in not conducting the jury into the courtroom and advising the attorneys about the jury's request

"A defendant in a criminal proceeding has a Fourteenth Amendment due process right to be present at all critical stages of trial." *State v. Martin*, 723 N.W.2d 613, 619 (Minn. 2006) (quotation omitted). Generally, a communication with the jury by the district court after deliberations have begun is a critical trial stage at which a defendant has a right to be present. *State v. Sessions*, 621 N.W.2d 751, 755-56 (Minn. 2001); *see State v. Watkins*, 526 N.W.2d 638, 640 (Minn. App. 1995) (stating that bailiff is an officer of the court). But it is an open question under Minnesota law whether the jury's review of the drug evidence was a critical stage of trial at which appellant had a right to be present. *See State v. Wembley*, 728 N.W.2d 243, 245 n.1 (Minn. 2007) (in addressing jury's request to review videotaped interview, supreme court noted that although it had stated that preferable practice was for district courts to replay potentially prejudicial videotaped interviews in open court, it had not addressed whether parties should be present during replay).

Even if appellant had the right to be present during the jury's review of evidence, a defendant can waive his right to be present at a critical trial stage. *Martin*, 723 N.W.2d at 619-20. "[T]he decision to waive the right is not for counsel to make but a personal decision for defendant to make after consultation with counsel." *Id.* at 620. Although the preferred procedure is to obtain a defendant's waiver on the record, waiver can be

inferred from a defendant's failure to object. *Id.* at 621. When a defendant claims that he did not waive his right to be present, the defendant bears the burden of showing that his absence from trial was involuntary, which is a heavy burden to meet. *Id.* at 620.

The transcript indicates, and appellant does not dispute, that he was present during the discussion regarding the procedure for handling the drug evidence and when the district court instructed the jury the following day. Defense counsel agreed to the procedure, and appellant made no objection. Under these circumstances, waiver of the right to be present can be inferred from appellant's conduct. *See id.* at 618, 621 (holding that district court did not abuse its discretion in concluding that defendant waived right to be present for communications with the jury that fell within the scope of agreement when defendant was present when agreement was made and there was no evidence that he objected to agreement).

Appellant argues that even if he did not have a right to be present, the district court erred by failing to comply with the procedure required under Minn. R. Crim. P. 26.03, subd. 19(2)(1).

> If the jury, after retiring for deliberation, requests a review of certain testimony or other evidence, the jurors shall be conducted to the courtroom. The court, after notice to the prosecutor and defense counsel, may have the requested parts of the testimony read to the jury and permit the jury to re-examine the requested materials admitted into evidence.

Minn. R. Crim. P. 26.03, subd. 19(2)(1). While the supreme court has stated that this is the preferred practice, it has not held that these requirements cannot be waived. *See, e.g.*, *Martin*, 723 N.W.2d at 625-26; *Sessions*, 621 N.W.2d at 756 (Minn. 2001) ("We caution

district courts to make a contemporaneous record of each stage of trial, particularly a stage as delicate as communications with the jury and with counsel during deliberations.").

Because appellant did not object to the procedure for handling a jury request to review the drug evidence, the plain-error test applies. *See State v. Wembley*, 712 N.W.2d 783, 787 (applying plain-error test when defendant failed to object to court's procedure for reviewing videotape evidence), *aff'd* 728 N.W.2d 243 (Minn. 2007). For an appellate court to review an unobjected-to error, defendant must show (1) error; (2) that is plain; and (3) that affected 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. Jones*, 753 N.W.2d 677, 694 (Minn. 2008). Generally, this degree of error "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). "[A]n error affects substantial rights if there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007).

Appellant has not established any of the prongs of the plain-error test. Because it is an open question whether a jury request to review evidence is a critical trial stage at which a defendant has a right to be present and because there is no authority holding that the requirements of Minn. R. Crim. P. 26.03, subd. 19(2)(1), cannot be waived, the procedure for handling the jury request to review drug evidence is not plain error. Regarding prejudice, there is no evidence of any communication between the jury and a

bailiff about the case. The district court specifically instructed the jury to not deliberate while a bailiff was present. "It is presumed that the jury follows the [district] court's instructions." *State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005). Although neither bailiff recalled a jury request to review drug evidence, both testified that they would have followed standard procedure, which is to notify the district court of the request and to not have any communication with the jury about the case.

Also, the evidence against appellant was extremely strong. Both A.F. and L.C. positively identified appellant as the shooter. Three eyewitnesses testified that there was only one person in appellant's vehicle. The gunshot residue on appellant's right hand was consistent with V.G.'s description of the shooting. After the shooting, appellant gave the gun to a friend to hide. Appellant's trial testimony (that G.T. was the shooter and appellant was a passenger, that he did not own the cocaine, and that he used bleach to attempt to remove gunshot residue from his hands) was inconsistent with his statement to police the day of the shooting.

II.

This court will not disturb the decision to deny a new trial on the ground of newly discovered evidence absent an abuse of discretion. *State v. Rhodes*, 657 N.W.2d 823, 845 (Minn. 2003). To obtain a new trial based upon newly discovered evidence, a defendant must show "that the evidence is not cumulative, impeaching, or doubtful" and "that the evidence would probably produce an acquittal or a more favorable result." *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997).

At the hearing on appellant's new-trial motion, E.K. testified that he had been appellant's cellmate for three or four weeks at the Ramsey County Jail. Previously, he had been in a cell near G.T.'s cell. E.K. testified that G.T. said that he was in jail because he "shot up some people for my boy" and described the shooting to E.K. Later, when E.K. became appellant's cellmate, appellant told E.K. the same story.

The district court found that G.T.'s statements were doubtful and also inadmissible hearsay. Appellant argues that the district court erred in finding G.T.'s statements to be inadmissible hearsay. "A statement which . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true [is not excluded by the hearsay rule]." Minn. R. Evid. 804(b)(3).

> Evidentiary rulings on hearsay statements against penal interest are reviewed for clear abuse of discretion. When a hearsay statement against penal interest is offered to show an alternative perpetrator or to exculpate the accused, corroborating circumstances must clearly indicate its trustworthiness. However, to ensure due process, a hearsay rule may not be applied mechanistically to exclude evidence of an alternative perpetrator.

State v. Burrell, 697 N.W.2d 579, 602 (Minn. 2005) (citations and quotations omitted).

In determining that G.T.'s statements were inadmissible, the district court considered the timing of the statements, after G.T. knew appellant had been convicted, so G.T. was unlikely to suffer any adverse consequences; and the persons to whom G.T. made the statements, jail inmates rather than persons in authority. Also, appellant produced only one witness, E.K., who testified about G.T.'s statements; the state

impeached E.K.'s credibility with evidence of prior convictions; and E.K.'s testimony about G.T.'s statement that L.C. and G.T. got out of their cars before the shooting is inconsistent with the evidence at trial. The district court did not abuse its discretion in finding that E.K.'s testimony was inadmissible hearsay and doubtful.

Because the district court did not err in finding that G.T.'s statements are inadmissible hearsay and because the evidence against appellant was extremely strong, appellant has failed to meet his burden to show that G.T.'s statements would probably produce a more favorable result for him.

Appellant argues that the state committed a discovery violation by failing to disclose a pretrial meeting with G.T. and that the violation caused prejudice to appellant. Because appellant failed to raise this issue before the district court, the state did not have the opportunity to make a record of what occurred. The issue, therefore, is waived. *See State v. Busse*, 644 N.W.2d 79, 89 (Minn. 2002) (stating general rule against deciding issues not raised before district court).

III.

Appellant argues that his convictions of attempted first-degree murder while committing a drive-by shooting must be reversed and vacated[1] because the recklessness element of the drive-by shooting statute does not furnish a mental state consistent with the specific intent required for an attempt and, therefore, there is no such crime as attempted first-degree murder while committing a drive-by shooting. We disagree.

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[1] Appellant was not sentenced on these convictions.

A person is guilty of first-degree murder if he "causes the death of a human being with intent to effect the death of the person or another, while committing or attempting to commit . . . a drive-by shooting." Minn. Stat. § 609.185(a)(3) (Supp. 2005). A person is guilty of felony drive-by shooting if he "recklessly discharges a firearm at or toward another motor vehicle" while in a motor vehicle. Minn. Stat. § 609.66, subd. 1e(a) (2004). "Whoever, with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime is guilty of an attempt to commit that crime." Minn. Stat. § 609.17, subd. 1 (2004).

To be guilty of an attempt to commit a crime that is defined in terms of a particular result, a person must specifically intend to accomplish that result. *State v. Zupetz*, 322 N.W.2d 730, 735 (Minn. 1982). Thus, for example, one cannot commit attempted second-degree manslaughter because manslaughter involves killing another negligently or recklessly, not with specific intent. *Id.* at 735-36; *see also State v. Schmitz*, 559 N.W.2d 701, 704 (Minn. App. 1997) (reversing defendant's conviction of attempted first-degree domestic-abuse murder because one could not specifically intend to kill another by "being extremely indifferent to human life"), *review denied* (Minn. Apr. 15, 1997).

This case is distinguishable from *Zupetz* and *Schmitz* because the crime of first-degree murder while committing a drive-by shooting does contain a specific intent element, the intent to effect a person's death. The recklessness element refers to the manner in which the firearm was discharged. *See State v. Engle*, 743 N.W.2d 592, 595 (Minn. 2008) (stating that when the term "recklessly" is used in context of reckless

discharge of firearm, it "requires the creation of a substantial and unjustifiable risk that the actor is aware of and disregards"). A finding of recklessness "does not preclude the possibility that a higher level of intent may be present." *State v. Bradford*, 618 N.W.2d 782, 800 (Minn. 2000); *see also State v. Cole*, 542 N.W.2d 43, 51-52 (Minn. 1996) (explaining that recklessness and intent are not mutually exclusive terms). The term "'reckless' refers to the risk created, not the mental intent which resulted in an act which produced fear or injury." *Cole*, 542 N.W.2d at 52. Under *Bradford* and *Cole*, the crime of attempted first-degree murder while committing a drive-by shooting is not legally inconsistent.[2]

IV.

Appellant argues that the prosecutor committed misconduct by asking appellant on cross-examination questions about the credibility of police statements regarding the cocaine found on G.T.'s person and whether L.C. and A.F. were lying about their identification of appellant and their suspicion that L.C.'s son was dealing drugs for appellant. Because appellant did not object to the questions, to obtain review, he must show plain error. *Griller*, 583 N.W.2d at 740. Upon a showing of plain error, the burden

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[2] Appellant relies on an unpublished opinion, *State v. Padilla*, 2007 WL 1746746 (Minn. App. June 19, 2007). Unpublished opinions are of limited value in deciding an appeal. *See* Minn. Stat. § 480A.08, subd. 3(c) (2004) (stating "[u]npublished opinions of the Court of Appeals *are not precedential*") (emphasis added); *Vlahos v. R & I Constr., Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004) ("stress[ing] that unpublished opinions of the court of appeals are not precedential" and noting that "[t]he danger of miscitation [of unpublished opinions] is great because unpublished opinions rarely contain a full recitation of the facts"). Also, *Padilla* is distinguishable because it involved the crime of second-degree drive-by shooting, which does not contain a specific-intent element, and the state conceded that the verdict was legally inconsistent.

shifts to the state to show that the misconduct did not affect appellant's substantial rights. *Ramey*, 721 N.W.2d at 302.

Generally, questions designed to elicit testimony from one witness about the credibility of another have no probative value and are considered improper and argumentative. *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999) (stating that in general, "were they lying" questions are improper). But the prosecutor may ask these questions "when the defendant holds the issue of the credibility of the state's witnesses in central focus." *State v. Morton*, 701 N.W.2d 225, 233 (Minn. 2005) (quotation omitted).

Appellant's defense that he was not the shooter placed the credibility of A.F.'s and L.C.'s identifications of him in central focus. Even if the questions relating to police credibility were improper, there is no reasonable likelihood that the questions had a significant effect on the jury's verdict. The questions about police credibility were few, isolated, and not emphasized, and, as already discussed, the evidence against appellant was extremely strong.

Affirmed.