STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0530

State of Minnesota,
Respondent,

vs.

Derrick Forbes,
Appellant.

Filed May 5, 2009
Reversed and remanded
Schellhas, Judge

Ramsey County District Court
File No. K1-07-3142

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

John J. Choi, St. Paul City Attorney, Kyle A. Lundgren, Assistant City Attorney, 15 West Kellogg Boulevard, Suite 500, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Lansing, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellant challenges his conviction of third-degree criminal damage to property on the grounds that: (1) a written repair estimate, as the primary evidence of the value of property damage, was inadmissible without the testimony of the person who prepared it; (2) the jury was improperly instructed on an element of the charged offense; and (3) the prosecutor committed misconduct. Because we conclude that the jury instructions constituted reversible error, we reverse and remand for a new trial.

FACTS

Appellant Derrick Lamont Forbes was charged with third-degree criminal damage to property in violation of Minn. Stat. § 609.595, subd. 2 (2006), a gross misdemeanor, for throwing a rock through his neighbor's window. St. Paul Police Sergeant Parsons asked the victim, R.L., to obtain a repair estimate for the broken window. Because R.L. had to work, she asked a friend, R.J., to obtain an estimate. R.J., who did not testify at trial, obtained a written estimate from a glass service company of $843.75 to repair the broken window. The repair estimate was introduced as Exhibit 9 through the testimony of St. Paul Police Sergeant Toupal with no objection by appellant even though no one from the glass services company testified.

The district court instructed the jury that if it found the defendant guilty, it had "an additional issue to determine" that would be put in the form of a question: "Did the damage reduce the value of the plate glass window by more than $250 as measured by the cost of repair and replacement? Unless you find beyond a reasonable doubt that the

answer is 'yes,' you should answer the question 'no.'" During closing argument, the prosecutor stated that "[m]ost of the elements of the offense the Judge talked to you about were proven through [R.L.'s] testimony." The prosecutor summarized the testimony and then said:

> And we've also heard testimony that the value of the window was over $250. The estimate that was obtained that's an exhibit in this case does indicate—and you will get to look at this more closely in the jury room—that the value of replacing/repairing the window is approximately—I believe the total estimate is $843.75. Again, I don't think there's any dispute here about that particular element.
>
> The only issue, Ladies and Gentlemen, is did Mr. Forbes do this?

Defense counsel did not mention the value of the damage, cost of repair, or Exhibit 9 during his closing argument. The jury found appellant guilty and he was convicted. This appeal follows.

D E C I S I O N

I

"Evidentiary rulings are committed to the trial court's discretion and will not be reversed absent a clear abuse of discretion." *State v. Litzau*, 650 N.W.2d 177, 182 (Minn. 2002). "Appellate courts largely defer to the trial court's exercise of discretion in evidentiary matters and will not lightly overturn a trial court's evidentiary ruling." *State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 2006) (quotation omitted). Appellant argues that the admission of the repair estimate (Exhibit 9) constituted inadmissible hearsay. Respondent does not dispute that the estimate is hearsay but argues that the evidence was

admissible under the business-records exception. Rule 803(6) excepts from the hearsay rule records kept in the course of regularly conducted business activity, provided that a qualified witness testifies that it was the regular practice of the business to create that record. Minn. R. Evid. 803(6); *see also National Tea Co. v. Tyler Refrigeration Co.*, 339 N.W.2d 59, 62 (Minn. 1983) (stating that the business records exception requires foundational testimony by a qualified witness). Appellant argues that the estimate does not fall within the business-records exception because the state did not call a qualified witness to provide foundational testimony.[1]

But appellant did not object to the admission of the estimate at trial. Generally, the failure to object to the admission of evidence constitutes a waiver of the right to appeal on that issue. *State v. Williams*, 525 N.W.2d 538, 544 (Minn. 1994); *see also State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980) (stating that failure to make an objection to the foundation for admitting an out-of-court statement under a hearsay exclusion waives the issue on appeal). While this court may review error not objected to at trial under a plain-error standard, *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998), the rule that failure to object to the admissibility of evidence waives the right to an appeal has an important purpose:

> The purpose is simply to require objection to evidence offered at the trial to be made at the time so clearly that the objection may be obviated or if not, then the testimony excluded, without the cumbersome necessity of a new trial. If a new

[1] The business-records exception does not apply to records created for the purpose of litigation. Minn. R. Evid. 803(6). Appellant does not argue that the estimate in this case was prepared for the purpose of litigation. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that issues not briefed on appeal are deemed to be waived).

> trial is . . . granted because of the reception of . . . evidence it will mean that objection to evidence may be made for the first time in [a reviewing] court. The vice of this rule is apparent and far-reaching. The adoption of such a rule will mean that an attorney for the defendant may sit back and permit the reception of any evidence offered, assured that if incompetent evidence gets into the case, [a reviewing court] will set aside any adverse verdict. It will mean that if a verdict of guilty is to stand, the court and county attorney must try the defendant's case. Any such rule is wrong in principle. . . . Objections which counsel do not see fit to urge should be deemed waived.

State v. Pearson, 153 Minn. 32, 35-36, 189 N.W. 404, 405 (1922). Accordingly, we decline to address on appeal whether Exhibit 9 was inadmissible hearsay.

II

Appellant also argues that the district court erred in instructing the jury. The district court has "considerable latitude in the selection of the language of a jury charge" but "jury instructions must not materially misstate the law." *State v. Edwards*, 717 N.W.2d 405, 411 (Minn. 2006) (quotation omitted). A defendant is "entitled to have all the elements of the offense with which he is charged" submitted to the jury "even if the evidence relating to these elements is uncontradicted." *State v. Carlson*, 268 N.W.2d 553, 560 (Minn. 1978) (quotation omitted). But even where a district court fails to give the jury an instruction it was obligated to give, an appellate court reviews for plain error. *State v. Reed* 737 N.W.2d 572, 584 (Minn. 2007). Plain error is (1) error (2) that is plain and (3) affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). The failure to properly instruct the jury on all elements of the charged offense is plain error. *State v. Vance*, 734 N.W.2d 650, 658 (Minn. 2007). Plain error

affects the defendant's substantial rights "where there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *Reed*, 737 N.W.2d at 583 (quotation omitted). While the determination of whether plain error affects substantial rights "includes the equivalent of a harmless error inquiry," a plain-error analysis also "requires consideration of a fourth factor, specifically, whether correction of the unobjected-to error is required to ensure fairness and integrity of the judicial process." *Id.* at 584 n.4.

The charged offense was committed on September 2, 2007, and effective August 1, 2007, the legislature raised the damages range for third-degree criminal damage to property from $250-$500 to $500-$1000. 2007 Minn. Laws ch. 54, art. 2, § 18, at 244-45. But here, the jury was instructed to find only whether the damage appellant caused reduced the value of the window by more than $250. Appellant argues that this failure to properly instruct the jury as to an element of the charged offense constitutes reversible plain error. We agree.

In *State v. Jorgenson*, the district court instructed the jury that the crime of making terroristic threats required that the defendant threaten to commit a violent crime and instructed the jury that assault was a violent crime, but failed to instruct the jury that it must find whether the defendant threatened third-degree assault or worse in order to convict the defendant. 758 N.W.2d 316, 322 (Minn. App. 2008), *review denied* (Minn. Feb. 17, 2009). This court concluded that the state submitted sufficient evidence at trial to show that the defendant threatened to commit third-degree assault. *Id.* But this court could not determine whether a properly instructed jury would have found that the

defendant had threatened to commit third-degree assault rather than a lesser degree of assault. *Id.* at 325. Therefore, this court determined that it could not conclude "beyond a reasonable doubt that the error had no significant impact on the verdict" and determined that the jury instructions, though unobjected-to, were plain error affecting the defendant's rights. *Id.* Furthermore, reversing the defendant's conviction and remanding for a new trial was necessary to ensure fairness because "the jury was not given the opportunity to consider the critical question" of whether the defendant's conduct satisfied an element of the offense. *Id.* at 326.

In this case, the state offered only one piece of evidence, Exhibit 9, to prove the value of the damage to the window, and appellant offered no evidence contesting or confirming the amount shown in the estimate. Although Exhibit 9 may have been sufficient to support appellant's conviction, the jury was not given the opportunity to consider whether the damage to the window exceeded the $500 threshold for third-degree property damage. It is within the province of the jury to determine the credibility and weight of evidence, *State v. Clark*, 739 N.W.2d 412, 418 (Minn. 2007), and we cannot conclude here "beyond a reasonable doubt" that a properly-instructed jury would not have found that the value of the window was reduced by less than $500. We therefore conclude that there was a reasonable likelihood that the erroneous jury instruction had a significant effect on the jury's verdict, and we further conclude that the error affected the fairness of the proceedings. Accordingly, we reverse and remand for a new trial.

III

Appellant also argues that Exhibit 9 was testimonial in nature and was admitted in violation of his rights under the Confrontation Clause. The testimonial statements of a declarant are not admissible when the defendant is not given the opportunity to confront the declarant at trial, unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365 (2004). Appellant further argues that the prosecutor committed misconduct during closing arguments. We note, again, that this objection was not made at trial and also note that the right to confrontation, like other constitutional rights, is waivable. *See State v. Osborne*, 715 N.W.2d 436, 441 (Minn. 2006) ("As a general rule, district court errors—even those affecting constitutional rights—can be forfeited for purposes of appeal by the failure to make a timely objection in the district court."). But because we remand for a new trial, we need not reach these issues.

Reversed and remanded.