STATE OF MINNESOTA
IN COURT OF APPEALS
A09-419

State of Minnesota,
Respondent,

vs.

Trayon Maurice Berry,
Appellant.

Filed August 10, 2010
Affirmed
Wright, Judge

Ramsey County District Court
File No. 62-K9-08-3598

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, Afsheen D. Foroozan, Certified Student Attorney, St. Paul, Minnesota (for respondent)

Bradford Colbert, Emily Babcock, Certified Student Attorney, Legal Assistance to Minnesota Prisoners, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

WRIGHT, Judge

Appellant challenges his convictions of two counts of first-degree burglary and one count of terroristic threats. Appellant argues that the district court erred by admitting hearsay evidence and that there is insufficient evidence to support his convictions. We affirm.

FACTS

In early 2008, appellant 29-year-old Trayon Berry was living on the west side of St. Paul. In an apartment across the street from Berry lived two women with whom Berry was acquainted, M.C. and N.M., and N.M.'s 13-year-old daughter, A.M. Berry visited their apartment three or four times, used their telephone, and loaned them money. At some point, Berry offered M.C. $200 if she would "hook him up with [A.M.]" and suggested the possibility of renting a room from M.C. and N.M., which they declined to do.

On May 29, 2008, Berry went to the women's residence to use their telephone. M.C., N.M., and A.M. were at home; A.M. was in her bedroom. N.M. permitted Berry to use the telephone in the kitchen and, as she had on occasion in the past, N.M. gave Berry milk and cookies. N.M. also agreed to Berry's request to use the bathroom. As Berry went down the hall toward the bathroom, N.M. heard him talking to A.M. in her bedroom. Because she did not want Berry to talk to A.M., N.M. told him to "get out of [her] home." While walking back toward the kitchen, Berry stopped and said that he

wanted to meet A.M. and talk to her. N.M. responded that A.M. "wasn't going to be talking to anybody, that she was too young."

Berry then proceeded toward A.M.'s room. As N.M. stopped him, Berry grabbed her by the hair, which caused her glasses to fall off. He also shouted his telephone number to A.M. and told her that he wanted to meet her. While doing so, Berry referred to A.M. by her middle name, although neither M.C. nor N.M. knew how Berry had learned this personal information about A.M. When M.C. threatened to call the police, Berry left the apartment. M.C. followed him outside where Berry repeated his offer to pay M.C. if she would "hook[ ] him up with [A.M.]" When M.C. contacted the police to report the incident, she learned that Berry is a registered sex offender.

As a result of the police report regarding the May 29 incident, St. Paul Police Officer Sharon Ellison went to Berry's residence on June 4. It is the policy of the St. Paul Police Department to follow up whenever a registered sex offender is mentioned in a police report. Because Berry was not at home, Officer Ellison went to Berry's place of employment. Berry was not at work when Officer Ellison arrived, but Berry spoke with his manager on the telephone while the officer was still there. Officer Ellison spoke with Berry and advised him that she was checking on his registration paperwork.

Later that day, Berry returned to M.C.'s and N.M.'s apartment. Using the intercom system, Berry identified himself as Mando. N.M. admitted Berry to the building because she believed that he was her friend Armando. When N.M. opened the door to the apartment, Berry approached her and shouted, "What did you say to the police?" N.M. told Berry to leave, but he refused to do so. His shouting awakened M.C.,

who had been napping in another room. Despite having been told to leave, Berry went into M.C.'s bedroom and also asked her about her contact with the police. Fearing that Berry would strike them, both women denied contacting the police. But M.C. warned Berry of her intention to call the police and walked out of the apartment into the hallway to do so. Berry followed her. When they were outside, Berry told M.C. that he was going to "hurt" N.M. by "having" A.M. M.C. understood Berry's threat to mean "kidnapping [A.M.] or hurting her, sexually." The police responded to M.C.'s call and arrested Berry.

For the events of May 29, 2008, Berry was charged with first-degree burglary, Minn. Stat. § 609.582, subd. 1(a) (2006), and aggravated harassment, Minn. Stat. § 609.749, subds. 2(a)(2), 3(a)(5), 3(b) (2006). Berry also was charged with first-degree burglary, Minn. Stat. § 609.582, subd. 1(a), first-degree witness tampering, Minn. Stat. § 609.498, subd. 1(f) (2006), and terroristic threats, Minn. Stat. § 609.713 (2006), for the events of June 4, 2008. Berry waived his right to a jury trial. After a bench trial during which M.C., N.M., Officer Ellison, and Berry testified, the district court found Berry guilty of each of the charged offenses. This appeal followed.

D E C I S I O N

I.

Berry first argues that the district court committed reversible error by admitting hearsay evidence during N.M.'s testimony regarding the May 29 incident. During direct examination, the prosecutor asked N.M. whether she could "see what [A.M.] was doing" while Berry was pushing N.M. and trying to get to A.M.'s room. N.M. responded, "No, I

didn't see her, she just told me after he left she hid herself in the closet." Berry concedes that he did not object to this testimony.

When a defendant fails to object to the admission of evidence, the right to appeal on that issue ordinarily is forfeited. Minn. R. Evid. 103(a)(1); *State v. Williams*, 525 N.W.2d 538, 544 (Minn. 1994); *see also State v. Pearson*, 153 Minn. 32, 35, 189 N.W. 404, 405 (1922) (stating that purpose of rule is "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"). This forfeiture rule is particularly applicable when the admission of hearsay is at issue because

> [t]he number and variety of exceptions to the hearsay exclusion make objections to such testimony particularly important to the creation of a record of the trial court's decision-making process in either admitting or excluding a given statement. The complexity and subtlety of the operation of the hearsay rule and its exceptions make it particularly important that a full discussion of admissibility be conducted *at trial*.

State v. Manthey, 711 N.W.2d 498, 504 (Minn. 2006) (emphasis added). By failing to object, Berry prevented both the state's opportunity to offer a basis for admitting the evidence and the district court's opportunity to address the issue. Because Berry's failure to object when N.M. testified to A.M.'s statement prevented the district court from making an informed ruling on the issue, his hearsay argument is forfeited on appeal.

Moreover, Berry's challenge is unavailing even when we address its merits using the plain-error standard. *See* Minn. R. Crim. P. 31.02 (establishing plain-error review when error was not brought to district court's attention); *see also Manthey*, 711 N.W.2d

at 504 (applying plain-error test when appellant did not object to admission of hearsay evidence at trial). Under this standard, we consider (1) whether there is an error, (2) whether such error is plain, and (3) whether it affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740, 742 (Minn. 1998). An error is plain if it is "clear" or "obvious," *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002), or if it "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, we then consider whether the error seriously affected the fairness and integrity of the judicial proceedings. *Griller*, 583 N.W.2d at 740 (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 offered for purposes other than 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. Minn. R. Evid. 802. And 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); *Manthey*, 711 N.W.2d at 504. But it is plain error for a district court to admit hearsay that does not satisfy an exception to hearsay exclusion. *State v. Tscheu*, 758 N.W.2d 849, 864 n.17 (Minn. 2008).

A.M.'s statement may have been admissible under an exception to the hearsay rule. Rule 803(3), for example, permits evidence of

> [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of [the] declarant's will.

To be admissible under rule 803(3), the statement must be contemporaneous with the mental state sought to be proven, *State v. DeRosier*, 695 N.W.2d 97, 104-05 (Minn. 2005), and the victim's state of mind must be relevant, *State v. Miller*, 754 N.W.2d 686, 704 (Minn. 2008). Here, A.M.'s state of mind is not merely relevant, it is an element of the offense. The temporal relationship between Berry's conduct and A.M.'s statement is not apparent from this record, and N.M.'s testimony does not supply sufficient detail to determine what motivated A.M.'s statement. But these lapses in the record could have been cured by a timely objection. Had Berry objected, proffered evidence of relevant facts would have clearly established whether the standard for admission under rule 803(3) had been met. On the record as it exists, however, plain error cannot be established.

Finally, Berry asserts in a footnote that defense counsel's failure to object to the admission of A.M.'s statement during N.M.'s testimony constitutes ineffective assistance of counsel. A claim of ineffective assistance of counsel requires proof that (1) counsel's performance was deficient such that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) the defendant was prejudiced by counsel's performance. *Strickland v. Washington*,

466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987). Declining to object for purposes of trial strategy, however, does not constitute ineffective assistance of counsel. *See State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009) (stating that decision of whether to object is "part of an attorney's trial strategy" within discretion of trial counsel). A claim of ineffective assistance of counsel ordinarily should be raised in a postconviction petition for relief, rather than on direct appeal because "[a] postconviction hearing provides the court with additional facts to explain the attorney's decisions, so as to properly consider whether a defense counsel's performance was deficient." *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000) (quotation omitted). On the record before us, there is no basis for discerning why defense counsel did not object during N.M.'s testimony. In the absence of an adequate record, we decline to address Berry's ineffective-assistance-of-counsel argument raised as a footnote in his direct appeal.

II.

Berry also challenges the sufficiency of the evidence to support his convictions. When reviewing a challenge to the sufficiency of the evidence, we conduct a careful and thorough analysis to determine whether the fact-finder reasonably could find the defendant guilty of the offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). In doing so, we view the evidence in the light most favorable to the verdict and assume that the fact-finder believed the evidence supporting the guilty verdict and disbelieved any evidence to the contrary. *Id.* We will not disturb the verdict if the

fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, reasonably could conclude that the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988). We address each conviction in turn.

A.

A conviction of first-degree burglary under Minn. Stat. § 609.582, subd. 1(a), requires proof that, while a person other than the defendant's accomplice was inside a dwelling, the defendant entered that dwelling without consent and either committed or intended to commit a crime while there. Entry into a dwelling without consent includes entry "without the consent of the person in lawful possession," entry "by using artifice, trick, or misrepresentation to obtain consent to enter from the person in lawful possession," or "remain[ing] within a building without the consent of the person in lawful possession." Minn. Stat. § 609.581, subd. 4 (2006).

1.

Berry challenges his conviction of first-degree burglary on May 29 on several grounds. First, he argues that he did not remain in the building without consent. The evidence demonstrates that N.M. unambiguously told Berry to leave. But rather than leave, Berry approached A.M.'s bedroom and physically assaulted N.M. in his effort to enter the bedroom. Berry left only after M.C. threatened to call the police. Berry asserts that evidence of remaining without consent is sufficient only when one refuses to leave over an extended period of time. Although an offender's refusal to leave over a period of time has been held sufficient to support a burglary conviction, *see State v. Totimeh*, 433

N.W.2d 921, 924 (Minn. App. 1988) (holding that "failure to comply when told to leave several times" was violation of burglary statute), *review denied* (Minn. Feb. 22, 1989), neither the plain language of the statute nor caselaw interpreting the statute imposes the evidentiary requirement that Berry asserts. Evidence that Berry assaulted N.M. rather than comply with her request that he leave and that he abandoned his pursuit of A.M. only after he was threatened with police intervention amply supports the district court's finding that Berry remained in the apartment without N.M.'s and M.C.'s consent.

Berry also argues that the evidence does not establish that he intended to or actually committed the offense of aggravated harassment while in the apartment. Because the May 29 burglary conviction was premised on a finding that Berry committed the offense of aggravated harassment while in the apartment, we examine the record to determine whether there is sufficient evidence that Berry committed aggravated harassment.

Under Minnesota's criminal harassment statute, "[a] person who harasses another by committing any of the following acts is guilty of a gross misdemeanor: . . . stalks, follows, monitors, or pursues another, whether in person or through technological or other means." Minn. Stat. § 609.749, subd. 2(a)(2). "Harass" means "to engage in intentional conduct which: (1) the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated; and (2) causes this reaction on the part of the victim." *Id.*, subd. 1 (2006). Harassment is a felony offense when it is committed "against a victim under the age of 18, if the actor is more than 36 months older than the victim." *Id.*, subd. 3(a)(5).

Berry challenges the district court's finding that he pursued A.M. His argument primarily focuses on the lack of stealth in his conduct and the brevity of the incident. Although these may have been legitimate factors for the district court to consider when determining whether Berry's conduct was intentional, neither stealth nor prolonged conduct is a required element of harassment. *Cf. State v. Olson*, 765 N.W.2d 662, 665 (Minn. App. 2009) (stating in discussion of aggravating factors for sentencing departure that length of an attack is not an element of harassment). Nor are they necessarily relevant to whether Berry pursued A.M.—the basis on which the district court's harassment determination is founded. To pursue is to "follow in an effort to overtake or capture." *The American Heritage Dictionary* 1471 (3d. ed. 1992). The evidence establishes that Berry approached A.M.'s bedroom, told A.M. over her mother's objection that he wanted to meet her, and sought to make contact with A.M. a second time by approaching her bedroom, yelling his telephone number to her, and physically fighting with N.M. to get to A.M.'s bedroom. This evidence is more than sufficient to support a finding that Berry pursued A.M.

Further, although the district court focused on that portion of the harassment statute addressing pursuit, the evidence, as credited by the district court, also supports a finding that Berry monitored A.M. *See* Minn. Stat. § 609.749, subd. 2(a)(2). The district court found that, before May 29, Berry learned of A.M.'s presence in the household, expressed interest in A.M., and offered to pay M.C. $200 to "hook him up" with her. Additionally, the uncontroverted evidence from the testimony of both M.C. and N.M. is that Berry addressed A.M. by her middle name on May 29, which is significant because it

establishes a higher degree of familiarity with A.M. than they could otherwise explain. This evidence, together with the evidence of Berry's conduct on May 29, establishes that Berry monitored A.M. and intended, by remaining in the apartment, to continue to do so. When taken as a whole, the evidence amply establishes that Berry harassed A.M. by both pursuing and monitoring her on May 29.

Berry also contends that there is not any properly admitted evidence that A.M. felt frightened, threatened, oppressed, persecuted, or intimidated by his conduct. Because Berry fails to establish that the district court plainly erred by admitting A.M.'s statement that she hid in the closet while Berry pursued her,[1] we consider A.M.'s statement in our analysis. Berry argues that a number of reasons could explain why A.M. would have been in the closet at that time. But N.M. testified, based on A.M.'s statement, that A.M. was "hiding" in the closet. This evidence strongly suggests fear. Fear also is a reasonable explanation for A.M.'s behavior when considered in the context of a man shouting at her using an overly familiar name, demanding to meet her, and fighting with her mother to gain access to her in their home. The record, therefore, amply supports the district court's finding that A.M. was frightened by Berry's pursuit. When the record is viewed in the light most favorable to the guilty verdict, there is more than sufficient evidence to support Berry's convictions of the May 29 offenses.

2.

Berry also challenges the sufficiency of the evidence supporting his conviction of the June 4 burglary. He first argues that the evidence does not establish that he used

[1] *See* section I *supra*.

artifice, trick, or misrepresentation to obtain consent from N.M. to enter the apartment building. *See* Minn. Stat. § 609.581, subd. 4. Berry testified that he gave the name "Naji," his nickname. But N.M. testified that Berry used the name "Mando," the nickname of a friend of M.C. and N.M. The district court credited N.M.'s testimony that Berry used the name "Mando." The district court's determination that Berry "entered the dwelling . . . by using artifice, trick or misrepresentation," therefore, is supported with sufficient evidence. The record also supports the district court's finding that Berry again remained in the apartment without the consent of the residents. N.M. testified that, when she told Berry to leave, he continued to yell at her. Berry then moved farther into the apartment, confronting M.C. in her bedroom about her contact with the police. When taken together, that Berry used trickery to gain entry and then remained in the apartment without consent has more than sufficient evidentiary support to establish the entry element of the June 4 burglary.

Berry also argues that, because he did not threaten to cause harm or injury, there is insufficient evidence to establish that he committed first-degree witness tampering, the underlying crime that Berry was alleged to have committed while in M.C.'s and N.M.'s apartment on June 4. A conviction of first-degree witness tampering under Minn. Stat. § 609.498, subd. 1(f), requires proof that the defendant intentionally caused injury or "threaten[ed] to cause injury" to a person or property in retaliation against a person who has provided information to law-enforcement authorities.

The record establishes that, after ignoring their requests to leave the apartment, Berry stood in close proximity to the two women and shouted at them about contacting

the police. Each witness testified credibly, according to the district court, that in doing so, Berry caused them to believe that he intended to strike them. When viewing the evidence in the light most favorable to the verdict, Berry's confrontational conduct and statements, when considered together, are more than sufficient evidence that Berry intentionally threatened to cause injury to N.M. and M.C. in retaliation for providing information to law-enforcement authorities. *See State v. Marchand*, 410 N.W.2d 912, 915 (Minn. App. 1987) (stating in analysis of terroristic-threats conviction that victim's reaction to a threat is circumstantial evidence relevant to the element of intent), *review denied* (Minn. Oct. 21, 1987). This challenge to Berry's burglary conviction, therefore, fails.

B.

Finally, Berry argues that the evidence is insufficient to support the terroristic-threats conviction because the record does not establish that he threatened to commit a crime of violence. A person who "threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror" is guilty of making terroristic threats. Minn. Stat. § 609.713, subd. 1. The state must prove that the defendant (1) threatened to commit a crime of violence and (2) made the threat with either (a) specific intent to cause extreme fear in another or (b) reckless disregard of the risk that it would have that effect. *Id.*; *State v. Schweppe*, 306 Minn. 395, 398-400, 237 N.W.2d 609, 613-14 (1975) (discussing statutory elements).

The record evidence, which Berry does not dispute on appeal, establishes that, after leaving the apartment, he threatened to "hav[e]" or "get" A.M. in order to hurt her mother, N.M. Based on Berry's previous offers to pay money if M.C. "hooked him up" with A.M. and Berry's history as a sex offender, the district court found that Berry threatened to physically harm A.M. in a sexual manner. As such, the district court determined that Berry threatened to commit third-degree or fourth-degree criminal sexual conduct. *See* Minn. Stat. §§ 609.344 (defining third-degree criminal sexual conduct to include sexual penetration accomplished through use of force), 609.345 (defining fourth-degree criminal sexual conduct to include sexual contact accomplished through use of force) (2006). Both of these offenses are crimes of violence. Minn. Stat. §§ 609.1095, subd. 1(d) (including first-degree through fourth-degree criminal sexual conduct in definition of "violent crime"), 609.713, subd. 1 (stating that "crime of violence" in terroristic-threats statute has "the meaning given 'violent crime' in section 609.1095") (2006).

Berry disputes that third-degree and fourth-degree criminal sexual conduct should be considered crimes of violence. But even if he were correct that some forms of third-degree or fourth-degree criminal sexual conduct should not be considered crimes of violence, his argument improperly limits the district court's decision to definitions of those offenses that are based solely on the ages of the defendant and the victim. *See* Minn. Stat. §§ 609.344, subd. 1(b) (sexual penetration), 609.345, subd. 1(b) (sexual contact). Contrary to Berry's argument here, the district court specifically found that Berry's threat "had a sexual connotation" and "suggest[ed] some sort of physical harm"

to A.M. We also disagree with Berry's argument that his criminal sexual history and previous offers to pay for sex with A.M. support only an inference that he was threatening to have consensual sexual intercourse with A.M. The evidence demonstrates Berry's sexual interest in A.M., which, when combined with a threat to have or get A.M., supports a finding that he threatened sexual force or violence.

Because the substance of Berry's threat is undisputed and the record supports the inference that the threat was a threat to commit third-degree or fourth-degree criminal sexual conduct against A.M., the evidence is more than sufficient to support the district court's determination that Berry committed terroristic threats.

Accordingly, Berry's challenges to his convictions of two counts of first-degree burglary and one count of terroristic threats fail.

Affirmed.