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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1827

State of Minnesota,
Respondent,

vs.

Robert Earl McKay, III,
Appellant.

Filed October 12, 2010
Affirmed
Peterson, Judge

St. Louis County District Court
File No. 69DU-CR-09-520

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Melanie S. Ford, St. Louis County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Larkin, 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 second-degree murder, attempted first-degree assault, second-degree assault, and possession of a prohibited firearm,

appellant argues that his right to a fair trial was violated by the admission of hearsay statements offered to prove that he intended to kill the victim. We affirm.

FACTS

Following a shooting incident, appellant Robert Earl McKay, III, was charged by amended complaint with one count each of attempted second-degree murder, attempted first-degree assault, second-degree assault, possession of a prohibited firearm, and possession of a prohibited weapon by an underage person. The charges were tried to a jury, which found appellant guilty of all counts except possession of a prohibited weapon by an underage person. The following testimony was presented at the trial.

C.S. dated the victim from October 2007 until about January 2008. During the previous six years, C.S. had an on-and-off dating relationship with J.F. In July 2008, C.S. met with J.F. and appellant in Wisconsin. The three then traveled together through Wisconsin before going to Duluth, where they stayed at L.J.'s house with L.J. and B.A. J.F. left L.J.'s house before appellant and C.S. did.

C.S. called the victim and asked him to help her get out of Duluth. C.S. was crying frantically and said that she was in trouble. The victim gave C.S. directions to his brother's house in Duluth and met her there. C.S. said that she needed to get her stuff from L.J.'s house. The victim testified: "I told her, Well, if you're going to go get your stuff, I'm going to come with you. And she told me, No, you're not. And I asked her why, and she said because the guys that are there have a gun and want to kill you." The victim testified that he had to force C.S. to allow him to accompany her to L.J.'s house. They arrived there at about 10:30 p.m.

On cross-examination, the victim testified that he might have previously told an officer that C.S. had asked him to go with her to L.J.'s house. The victim also testified on cross-examination that he thought that there might be some people waiting there who would try to hurt him if they realized his identity.

C.S. testified that when she and the victim got to L.J.'s house, appellant, L.J., and B.A. were outside, and appellant said that coming back to L.J.'s house "was the worst mistake of [C.S.'s] life." C.S. thought the threat was meant for her. As she went inside to get her purse, she heard a gunshot, went outside, and saw appellant, L.J., and B.A. getting into a car.

The victim testified that when he and C.S. got to L.J.'s house, appellant was having a phone conversation with J.F. The victim testified that appellant said, "[C.S.] is here with that [J.] guy," and J.F. replied, "That [J.K.] or [K.] or whatever?" Appellant said yes, and J.F., said, "well, kill her then kill him, too." Appellant then said, "It's done . . . Get him." In statements that he made to police on July 8 and 11, 2008, the victim did not mention J.F.'s statements.

L.J. testified that when appellant was on the phone, he said something "like, hey, bro, he's in front of me right here, and such-and-such, and then he got off the phone and was, like, 'Get him.'"

L.J. hit the victim in the jaw. The victim saw appellant pull a gun out of his waistband and point it at C.S. The victim hit L.J. to divert appellant's attention from C.S., and as the victim went to attack appellant, appellant shot the victim in the lower abdomen. The victim fled right after he was shot, first hid behind a car, and then ran to

the end of the block. The victim testified that when he hid behind the car, appellant had the gun down for a second. When the victim started running again, appellant raised the gun and aimed it at the victim. The victim continued running to the end of the block, where there was a staircase surrounded by a hill. He lay down in tall grass on the hill, watched appellant, L.J., and B.A. drive by, and then heard "about 30 seconds later a couple more pops." A passing motorist came to the victim's aid and called 911.

In the car after the shooting, appellant said that he liked the feeling that he got when he shot someone. When a police car passed by, appellant said that if they got pulled over, he was "going to shoot the cop."

D E C I S I O N

Appellant argues that the district court erred in allowing the victim to testify (1) that C.S. said that she did not want him to accompany her to L.J.'s house because "the guys that are there have a gun and want to kill you" and (2) that J.F. said, "Well, kill her then kill him, too." Appellant did not object to this testimony at trial but now contends that the testimony was inadmissible hearsay.

The failure to object to the admission of evidence generally waives the right to raise the issue on appeal. *State v. Williams*, 525 N.W.2d 538, 544 (Minn. 1994). But an appellate court may in its discretion review the admission of the evidence under the plain-error test, which requires the defendant to show that there was error that was plain and that affected the defendant's substantial rights. *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). "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." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (alteration omitted) (quotations omitted).

"'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); *State v. Litzau*, 650 N.W.2d 177, 182-83 (Minn. 2002). Hearsay is inadmissible unless an exception to the hearsay rule applies. Minn. R. Evid. 802.

We first consider J.F.'s statement. The state argues that the statement was a command and not an assertion susceptible of being either true or false. In *State v. Brown*, "witnesses testified that just prior to the gun going off, they heard one of the men with appellant tell appellant 'do what you have to do' or 'do what you came to do.'" 455 N.W.2d 65, 68 (Minn. App. 1990), *review denied* (Minn. July 6, 1990). This court concluded: "The statement 'do what you came to do' is not assertive and cannot be determined to be true or false. Therefore, it is not excludable as hearsay." *Id.* at 68; *accord Tompkins v. Cyr*, 202 F.3d 770, 779 & n.3 (5th Cir. 2000) (noting that anonymous threats, including explicit and graphic death threats, were not factual statements, the truth of which was in question, but rather verbal acts); *Cintolo v. United States*, 818 F.2d 980, 998 n.8 (1st Cir. 1987) (noting that order to kill someone was verbal act not offered for the truth of the matter asserted).

Appellant relies on cases from other jurisdictions to support his position that admission of J.F.'s statement was error. *Stoddard v. State*, 887 A.2d 564, 581-82 (Md. 2005) (concluding that question "is [defendant] going to get me?" was inadmissible hearsay when offered to prove that declarant had in fact witnessed defendant assaulting

victim, which would have required numerous inferences that were untested by cross-examination and unsupported by the evidence); *Lampitok v. State*, 817 N.E.2d 630, 640 (Ind. Ct. App. 2004) (rejecting argument that assertion could never be found in question or command and concluding that command or request to find gun and dispose of it was inadmissible hearsay when whether a gun was used in course of offense was disputed fact issue at trial).

Because the precise question presented in this case has not been addressed by this court or the Minnesota Supreme Court and because *Brown* is consistent with *Tompkins* and *Cintolo*, we cannot conclude that admission of J.F.'s statement was plain error. *See Manthey*, 711 N.W.2d at 504 (stating that to constitute plain error, the trial error must have been "clear under applicable law at the time of conviction"); *State v. Hollins*, 765 N.W.2d 125, 133 (Minn. App. 2009) (stating that an error is plain "if it contravenes case law" and that "[a]n alleged error does not contravene caselaw unless the issue is conclusively resolved" (quotations omitted)).

Appellant also relies on *Bernhardt v. State*, in which the supreme court concluded that a detective's statements that accomplices allegedly asserted that the defendant told them to "rough [the murder victim] up" and "wanted [the murder] done" were inadmissible hearsay statements. 684 N.W.2d 465, 473, 476 (Minn. 2004). *Bernhardt* is not on point because the detective's statements were made during an interrogation and were admittedly false, and that was not explained to the jury.

Another reason that appellant has failed to show plain error is that even if J.F.'s statement was hearsay, it may have been admissible under an exception to the hearsay rule.

> The number and variety of exceptions to the hearsay exclusion make objections to such testimony particularly important to the creation of a record of the [district] 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.

Manthey, 711 N.W.2d at 504.

By failing to object to J.F.'s statement at trial, appellant deprived the state of the opportunity to make a record on whether the statement was admissible under an exception to the hearsay rule and also deprived the district court of the opportunity to exercise its discretion and make a ruling on the issue. *See State v. Loving*, 775 N.W.2d 872, 879 (Minn. 2009) (stating that district court's evidentiary rulings are reviewed for abuse of discretion); *Manthey*, 711 N.W.2d at 504 (considering fact that state was not given opportunity to establish that statements were admissible under exception to hearsay rule in applying plain-error standard); *cf. Brown*, 455 N.W.2d at 69 (upholding admission of statement "do what you came to do" under Minn. R. Evid. 801(d)(2)(E), which states that statement made by co-conspirator is not hearsay).

We next address C.S.'s statement to the victim that the guys at L.J.'s house had a gun and wanted to kill the victim. The state argues that the statement was not offered to prove the truth of the matter asserted but to prove that the situation was dangerous.

Arguably, however, the statement goes to intent and was offered to prove that appellant intended to kill the victim. But even if we assume that the admission of the statement was plain error, appellant must also show that it affected his substantial rights. To affect substantial rights, an error must be prejudicial; that is, there must be a "reasonable likelihood" that the error would have had a significant effect on the verdict. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998).

The defense theory of the case was that appellant did not intend to kill the victim. This theory was based on the facts that "[appellant] saw that [the victim] was only injured by the first shot and raised the gun, but he chose not to shoot [the victim] again" and did not pursue the victim. A person who "causes the death of a human being with intent to effect the death of that person or another, but without premeditation," is guilty of second-degree intentional murder. Minn. Stat. § 609.19, subd. 1(1) (2006). "With intent to" means "that the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result." Minn. Stat. § 609.02, subd. 9(4) (2006). "Intent is an inference drawn by the jury from the totality of circumstances." *State v. Fardan*, 773 N.W.2d 303, 321 (Minn. 2009) (alteration omitted).

C.S.'s statement did not specify that appellant wanted to kill the victim, and there was considerable other evidence from which the jury could have inferred appellant's intent to kill the victim. Both L.J. and the victim testified that when appellant ended his telephone conversation with J.F., appellant said, "Get him." Appellant then pulled out a gun and pointed it at C.S., but his attention was diverted from C.S. when the victim tried to attack him. Appellant shot the unarmed victim in the abdomen at close range and then

drove away in a car. *See State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998) (stating that factfinder may infer that defendant intended natural and probable consequences of actions); *see also Fardan*, 773 N.W.2d at 321-22 (upholding verdict of intentional murder based in part on evidence that defendant pointed gun at victim, shot him at close range "in the abdomen, a vital part of the body," and "left [victim] lying on the ground, still alive and bleeding"). Additional evidence of intent included appellant's statement when C.S. and the victim arrived that coming there "was the worst mistake of [C.S.'s] life"; the telephone conversation between appellant and J.F.; and appellant's statements after the shooting that he liked the feeling that shooting someone gave him and that he would "shoot the cop" if they got pulled over. Based on the totality of the circumstance, we conclude that there is no reasonable likelihood that C.S.'s statement had a significant effect on the jury's finding of intent.

Affirmed.