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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1380**

State of Minnesota,
Respondent,

vs.

Justin Michael Lang,
Appellant.

**Filed August 14, 2017
Affirmed
Toussaint, Judge***

McLeod County District Court
File No. 43-CR-14-1696

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

Michael K. Junge, McLeod County Attorney, Daniel R. Provencher, Assistant County Attorney, Glencoe, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Jesson, Judge; and Toussaint, Judge.

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

UNPUBLISHED OPINION

TOUSSAINT, Judge

On appeal from his conviction of third-degree assault following a court trial, appellant Justin Lang argues that the district court erroneously admitted hearsay statements identifying him as the person who punched the complainant because the statements (1) did not qualify for admission under any exception to the hearsay rule and (2) unfairly influenced the district court. We affirm.

DECISION

The state charged Lang with one count of third-degree assault in violation of Minn. Stat. § 609.233, subd. 1 (2016), after Lang confronted the complainant (M.G.) at a bonfire in front of R.P. and punched M.G. at least one time in the face, breaking his jaw. Lang waived his right to a jury trial, and the district court held a two-day court trial where M.G. testified that Lang was the person who broke his jaw and later apologized to him for doing so. M.G. also testified that he heard R.P. inform Lang that M.G. was the person Lang injured. Because R.P. also testified at trial, but disavowed his original statements to police identifying Lang as the individual who punched M.G., the district court allowed the girlfriend of R.P.'s father (S.A.) to testify as a rebuttal witness. S.A. testified that R.P. told her that Lang was the person who punched M.G. and broke his jaw. On appeal, Lang argues that R.P.'s out-of-court statements to M.G. and S.A. were inadmissible because the statements did not qualify for admission under any exception to the hearsay rule and unfairly influenced the district court. Lang did not object to M.G.'s testimony at trial, but did object to S.A.'s testimony.

I. The district court did not err by admitting hearsay statements for the purpose of impeachment.

In this case, the district court overruled Lang's objection to S.A.'s testimony, concluding that "the statement is admissible for the Court to determine credibility of this witness and of [R.P.] who has already been testifying in this case under oath." On appeal, Lang argues that the district court did not merely admit R.P.'s statements to S.A. to evaluate credibility. Instead, Lang contends that the district court admitted the statements as substantive evidence of his guilt.

A district court's evidentiary rulings generally will not be reversed absent a clear abuse of discretion, *State v. Flores*, 595 N.W.2d 860, 865 (Minn. 1999), and it is the appellant who bears the burden of establishing that the district court abused its discretion and that he was prejudiced as a result, *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Minnesota Rule of Evidence 801(c) defines hearsay as "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." But the comments to this rule note that if an out-of-court statement "is being offered for some other purpose, such as to prove knowledge, notice, or for impeachment purposes it is not hearsay." Minn. R. Evid. 801 1989 comm. cmt. Here, the district court explicitly stated that the objected-to statements were admitted "for the Court to determine credibility of this witness and of [R.P.]," not for the truth of the matter asserted, and the record supports this determination.

R.P.'s out-of-court statements to S.A. were offered not for the truth of the matter asserted but rather to show that R.P. testified falsely under oath. The record shows that the

prosecutor relied on the contested statements only to establish that (1) Lang was at R.P.'s father's residence the following morning, (2) Lang spoke to M.G. for several minutes at the residence, and (3) R.P. falsely testified at trial. For example, the prosecutor explained that S.A. "says . . . [R.P.] told her who punched [M.G.] in the face; she said it was [Lang]. That's different than what [R.P.] testified to today, but that's not different than what he told the police a month after this incident." Moreover, the district court did not reference S.A.'s testimony regarding R.P.'s out-of-court statements in its Findings of Fact and only relied on S.A.'s statements in its explanatory memorandum to make credibility determinations. The district court commented that, with the exception of S.A., "[r]arely has this Court observed such evasiveness" by witnesses. The court explained:

[R.P.] was obviously intimidated testifying in [Lang's] presence. He couldn't even look at [Lang] while on the stand. He attempted, unsuccessfully, to distance himself from what he initially reported to law enforcement, but when pressed, reluctantly admitted the version of events he provided a few weeks after the incident was likely more accurate than what he recollected at trial.

The bottom line is that [S.A.'s] unequivocal and unbiased testimony, in combination with common threads from the testimony of [M.G.], Deputy Kroll, [R.P.], and [R.P., Sr.], leads this court to conclude beyond a reasonable doubt that [Lang] was at the party, punched [M.G.] in the jaw at least once, and asked [M.G.] face-to-face later that same day not to press charges.

The district court did not err by admitting the out-of-court statements for the purpose of impeachment.

II. Even if the district court erred by admitting the out-of-court statements to M.G., any error did not affect Lang’s substantial rights.

Because Lang did not object to M.G.’s testimony at trial, the record does not reflect the basis for admitting M.G.’s statements, and these statements are reviewed for plain error. *See* Minn. R. Crim. P. 31.02 (establishing that the plain-error standard requires defendant show: (1) an error, (2) that was plain, and (3) that affected defendant’s substantial rights); *see also State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (noting that this court’s review of unobjected-to evidentiary rulings is limited to plain error). We, however, decline to address the contested statements under plain-error review and assume, without deciding, that even if the district court erred by admitting the challenged out-of-court statements, any error did not affect Lang’s substantial rights.

Because no constitutional right was implicated, this court will reverse only if the district court’s error substantially influenced the factfinder’s decision. *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016). When “evaluating the reasonable likelihood that the erroneously admitted evidence significantly affected the verdict,” we consider “the persuasiveness of that evidence” and “the manner in which the evidence was presented.” *State v. Jackson*, 764 N.W.2d 612, 620 (Minn. App. 2009), *review denied* (Minn. July 22, 2009).

M.G.’s testimony with regard to the out-of-court statements made by R.P. was not the only evidence presented against Lang. M.G. testified that Lang apologized for punching him in the jaw and asked M.G. not to report the incident because he had recently been released from prison; and a party’s own statements are admissible under Minn. R. Evid.

801(d)(2)(A) (“A statement is not hearsay if . . . the statement is offered against a party and is . . . the party’s own statement, in either an individual or representative capacity.”). Moreover, McLeod County Deputy Bill Kroll credibly testified that M.G. identified Lang as the individual who struck him in the face and apologized to him later that day. This testimony was consistent with that of M.G. and corroborated M.G.’s version of events occurring on the date in question. Because there was overwhelming evidence of Lang’s guilt, we conclude that any error that may have resulted from the admission of the challenged statements did not affect Lang’s substantial rights.

Affirmed.