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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0115**

State of Minnesota,
Respondent,

vs.

Orlando Maurice Johnson,
Appellant.

**Filed November 6, 2017
Affirmed
Florey, Judge**

Benton County District Court
File No. 05-CR-15-2197

Lori Swanson, State Attorney General, Michael Everson, Assistant Attorney General,
St. Paul, Minnesota; and

Philip K. Miller, Benton County Attorney, Foley, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Sheridan, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Rodenberg, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

FLOREY, Judge

Appellant challenges his convictions of first-degree aggravated robbery and first-degree burglary. He argues that the district court plainly erred in permitting an officer to

testify about out-of-court statements made by a witness because the statements were not consistent with the witness's trial testimony. We affirm.

FACTS

Appellant Orlando Johnson was charged with first-degree burglary and two counts of first-degree aggravated robbery after D.S. reported to police that appellant entered his apartment, hit him on the head, placed a gun in his mouth, and took his property. The case proceeded to trial.

D.S. testified at trial that he was "punched in the face and robbed" by appellant in his apartment on November 13, 2015. D.S. testified that he smoked cocaine and methamphetamine in his apartment with two women, one of whom is appellant's cousin. D.S. testified that when he went to lock his door, appellant opened the door and "took a swing" at him, striking him on the side of his cheek. D.S. testified that he backed away and felt appellant place a metal object in his mouth, which he believed to be a gun because of the way it felt in his mouth. He testified that he was "pretty certain" it was a gun, and he did not resist because he did not know if appellant was going to pull the trigger. After appellant left, D.S. called the police.

An officer was dispatched to D.S.'s apartment. He testified at trial regarding statements that D.S. made to him at that time. He testified that D.S. told him that appellant entered his apartment, struck him on the head, and placed a gun in his mouth. The officer testified that D.S. told him that it was a gun because of "the cold metal touch on his mouth or in his mouth." Appellant did not object to the officer's testimony about D.S.'s out-of-court statements.

The jury returned a guilty verdict on all counts. This appeal followed.

DECISION

Because appellant did not object to the officer's testimony regarding D.S.'s out-of-court statements, we review for plain error. *See* Minn. R. Crim. P. 31.02 (permitting appellate review of a plain error affecting a defendant's substantial rights even if the error was not brought to the trial court's attention); *State v. Beaulieu*, 859 N.W.2d 275, 279 (Minn. 2015) (providing that the limited power of appellate courts to review unobjected-to error "is known as the plain-error doctrine" (quotation omitted)). Under the plain-error standard, appellant must establish (1) an error, (2) that is plain, and (3) that affects his substantial rights. *Id.* If the three prongs of the plain-error standard are met, we must then determine whether it is necessary to address the error in order "to ensure fairness and the integrity of the judicial proceedings." *State v. Rossberg*, 851 N.W.2d 609, 618 (Minn. 2014) (quotation omitted).

A declarant's out-of-court statement is admissible at trial as substantive evidence if (1) the declarant testifies at trial; (2) the declarant is subject to cross-examination concerning the statement; (3) the statement is consistent with the declarant's testimony; and (4) the statement is helpful to the jury in evaluating the declarant's credibility as a witness. Minn. R. Evid. 801(d)(1)(B); *State v. Nunn*, 561 N.W.2d 902, 908 (Minn. 1997). The purpose of permitting prior statements under rule 801(d)(1)(B) is to allow a party "to enhance the credibility of a witness." *State v. Farrah*, 735 N.W.2d 336, 344 (Minn. 2007) (quotation omitted).

Appellant argues that D.S.'s out-of-court statements to the officer should have been excluded because they were not consistent with D.S.'s trial testimony. Appellant argues that the out-of-court statements and trial testimony were "materially inconsistent" because they differed on whether appellant was "struck in the head" or "hit on the cheek with a closed fist," and they differed on the level of certainty D.S. expressed concerning whether the metal object placed in his mouth was a gun.

"The trial testimony and the prior statement need not be identical to be consistent, and admission of a [prior] statement that is reasonably consistent with the trial testimony is not reversible error." *State v. Zulu*, 706 N.W.2d 919, 924 (Minn. App. 2005) (citation and quotation omitted); *see State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000) ("The trial testimony and the prior statement need not be verbatim."), *review denied* (Minn. Feb. 24, 2000). Out-of-court statements that are not consistent with the declarant's trial testimony, or which contain assertions about events that were not described by the declarant during his trial testimony, are not helpful to the jury in evaluating the declarant's credibility and are inadmissible under Minn. R. Evid. 801(d)(1)(B). *Farrah*, 735 N.W.2d at 344-45 (indicating that the rule is not a "means to prove new points not covered" in the trial testimony of the witness). The out-of-court statements are inadmissible under rule 801(d)(1)(B) if there are "inconsistencies [that] directly affect the elements of the criminal charge." *Bakken*, 604 N.W.2d at 110.

Appellant has not met his burden of establishing error. D.S. testified that he believed appellant had a gun because of the way it felt in his mouth. The officer testified that D.S. told him the object was a gun because of the way it felt in his mouth. D.S. also

testified that he was struck on the cheek. The officer testified that D.S. told him he was struck on the head. D.S.'s statements to the officer are reasonably consistent with D.S.'s trial testimony and aided the jury in evaluating D.S.'s credibility. The out-of-court statements did not directly affect the elements of the criminal charges. The statements were properly admitted by the district court under Minn. R. Evid. 801(d)(1)(B). Because appellant has not established error, we need not address the remaining prongs of the plain-error standard. *See State v. Campbell*, 861 N.W.2d 95, 101 (Minn. 2015) (noting that the failure to satisfy one of the requirements under the plain-error standard “dooms the appellant’s claim”).

Affirmed.