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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0412**

State of Minnesota,
Respondent,

vs.

Andre Westley Carter,
Appellant.

**Filed February 5, 2018
Affirmed
Ross, Judge**

Winona County District Court
File No. 85-CR-15-203

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

Karin L. Sonneman, Winona County Attorney, Stephanie E. Nuttall, Assistant County Attorney, Rebecca R. Church, Assistant County Attorney, Winona, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Bratvold, Judge.

UNPUBLISHED OPINION

ROSS, Judge

A jury found Andre Carter guilty of first- and second-degree assault for stabbing a man in a bar bathroom in Winona. Carter appeals from his conviction, arguing that the

district court improperly allowed the state to introduce evidence of prior statements from the victim, failed to instruct the jury how to assess identification testimony and accomplice testimony, and allowed the prosecutor to engage in misconduct during closing arguments by implying that Carter threatened the victim to prevent him from testifying. Because none of these arguments is convincing, we affirm.

FACTS

Someone stabbed M.M. in the back in January 2015 as M.M. urinated in the bathroom of a Winona bar. C.K. had seen M.M. enter the restroom and approach a urinal about 15 seconds before a second man entered and seemingly “punched” M.M. from behind as M.M. stood facing a urinal. The attacker quickly left the restroom. M.M., hunched and bleeding badly, walked out after his attacker, but he soon collapsed. Investigator Anne Scharmach of the Winona Police Department met with M.M. in the hospital, where she presented M.M. with a photographic lineup from which M.M. identified Andre Carter as his assailant. The state charged Carter with first- and second-degree assault.

Jurors at Carter’s trial saw a surveillance video of Carter walking toward the bathroom and then leaving the bathroom and heading toward the bar’s exit. They heard C.K.’s account of what he saw in the bathroom. Jurors also heard from bar patron, V.W., who had been standing with her companion, D.F., near the bar’s bathrooms. V.W. said that she saw D.F. speak with Carter and hand Carter a pocket knife shortly before Carter entered and then left the bathroom with M.M. following after him, bleeding. D.F. told the jury that he tended to M.M.’s injury until the ambulance arrived and that, after he got home,

he realized he was missing his knife. D.F. also disclosed that the state had charged him with felonies arising from his involvement in the incident but then dismissed the charges in exchange for his cooperation in the state's prosecution of Carter.

The state had difficulty securing M.M.'s testimony. The district court excused the jury and heard from Winona County Attorney's victim services coordinator, Claire Exley, and Winona police sergeant, Mark Dungy. Exley told the district court that the state had subpoenaed M.M. but that, after M.M. arrived at the courthouse, he said he was nervous about testifying and walked out of the building, telling Exley, "F- - - this. I would rather just get arrested." Sergeant Dungy explained that after M.M. left the courthouse he walked over to the law enforcement center and said he would turn himself in, preferring to be jailed than to testify. The district court found M.M. to be in contempt and issued a bench warrant to compel his appearance.

With the jury reconvened, M.M. testified that he did not see his assailant, that he did not remember talking to Investigator Scharmach at the hospital, that he did not remember telling the prosecutor who stabbed him, and that he did not remember identifying his assailant. The district court found that M.M. was an unavailable witness due to his refusal to testify.

The prosecutor called Exley to impeach M.M.'s testimony about not knowing who stabbed him. Exley told the jury that she had been present in a meeting at the prosecutor's office the night before when M.M. arrived and answered, without hesitation or prompting, that Andre Carter was the man who stabbed him. She explained that M.M. had also told them about events leading up to the stabbing, including an altercation one or two months

before the stabbing between Carter and a friend of M.M.'s, and how Carter angrily stared at M.M. in the bar shortly before M.M. went into the bathroom followed by Carter.

The state called Investigator Scharmach to testify about her interview with M.M. in the hospital as M.M. was recovering from the stabbing. She told the jury about the interview, and the jurors heard a recording of the interview. In that recording, M.M. said he saw the man who stabbed him and recognized him from six or seven other occasions. Later in the recording, the jury heard as Investigator Scharmach showed M.M. photographs of six men and as M.M. identified one of them—Carter—and said that he was positive it was the man who stabbed him.

The prosecutor's closing argument opined that M.M. was reluctant to testify because "[i]t is reasonable that he would not want to be sitting a few feet away from the defendant and the person that stabbed him and point him out in front of a bunch of people." The jury found Carter guilty on both charges. This appeal follows.

D E C I S I O N

Carter challenges his conviction based on multiple alleged trial errors. He argues that the district court improperly admitted evidence impeaching M.M.'s testimony. He argues that the investigator's testimony about M.M.'s hospital identification was inadmissible as substantive evidence. He argues that the district court erred by not instructing the jury how to assess identification evidence and accomplice evidence. And he argues that the prosecutor committed misconduct during closing arguments by implying that Carter threatened M.M. to prevent M.M. from testifying. For the following reasons,

we conclude that Carter is correct in only one of his arguments, but we do not reverse because the district court's error did not affect the result.

I

Carter argues that the district court erred by allowing the state to impeach M.M. We review a district court's decision to admit impeachment evidence for an abuse of discretion. *State v. Moua*, 678 N.W.2d 29, 37 (Minn. 2004). Carter's argument rests on three theories. He contends that the state tried to present evidence of otherwise inadmissible statements under the guise of impeachment evidence; that the impeachment evidence was inadmissible because M.M. was not given an opportunity to admit, deny, or explain the inconsistency between his prior statement and his testimony; and that admitting the impeachment evidence violated the Confrontation Clause. We address each contention in turn.

We first address Carter's theory that the prosecutor put M.M. on the witness stand knowing he would not identify Carter as his attacker as he had previously identified Carter to the investigator and the prosecutor, intending only to manufacture the need to impeach his trial testimony using the prior identifications. This is the sort of ruse now commonly referred to as the *Dexter* problem. See *State v. Dexter*, 269 N.W.2d 721 (Minn. 1978). The concern is that the prosecutor might tactically introduce inadmissible hearsay evidence disguised as impeachment evidence under the prior-inconsistent-statement exception to the hearsay rule, and that the jury will consider the prior inconsistent statement as substantive evidence rather than merely as impeachment evidence. See *State v. Ortlepp*, 363 N.W.2d 39, 42–43 (Minn. 1985). But Carter cannot establish that the prosecutor presented M.M. only to impeach him because this case misses a critical element of a genuine *Dexter*

problem. The *Dexter* problem occurs when the witness has recanted his prior statement that implicates the defendant “and signified an intent to testify in defendant’s favor if called by the prosecutor.” *Id.* at 43. M.M. indicated only that he wanted to avoid testifying, not that he had recanted his statements identifying Carter or that he would testify differently from his statements. M.M. gave the prosecutor no reason to predict that he would change his story after he took the stand. This is no *Dexter* problem. We turn to Carter’s next theory.

Carter’s next theory fares no better. We reject his contention that the impeachment evidence was inadmissible because M.M. was not given the opportunity to admit, deny, or explain the inconsistency between his prior statements and his trial testimony. Extrinsic evidence of a prior inconsistent statement is admissible only if the witness is given the opportunity to explain or deny what he said and the opposing party has a chance to cross-examine the witness. Minn. R. Evid. 613(b) (2016). Carter declined to cross-examine M.M. or recall him later in the trial. Carter could have directed M.M. to address the inconsistencies between his prior statements and his testimony, but he chose not to. We turn to Carter’s third theory.

We also are not persuaded by Carter’s third theory that admitting the impeachment evidence violated his rights under the Confrontation Clause. Whether his rights were so violated is a question of law that we review de novo. *State v. Warsame*, 735 N.W.2d 684, 689 (Minn. 2007). The Confrontation Clause guarantees a criminal defendant the right to be confronted with the witnesses against him. U.S. Const. amend. VI; Minn. Const. art. I, § 6. The provision assures that testimonial statements of witnesses who do not testify at trial are inadmissible. *Crawford v. Washington*, 541 U.S. 36, 53–54, 124 S. Ct. 1354, 1365

(2004). Carter maintains M.M.’s refusing to testify and the district court’s finding him unavailable at trial based on that refusal means that M.M. could not have been cross-examined. The argument ignores the fact that the district court expressly gave Carter the opportunity to cross-examine M.M. and kept M.M. under subpoena so that Carter could recall him to testify later. *See State v. Holliday*, 745 N.W. 2d 556, 568 (Minn. 2008) (“The Confrontation Clause is satisfied by a declarant’s appearance at trial for cross-examination”). Because Carter had the opportunity to confront M.M. but merely elected not to, the Confrontation Clause is not implicated.

In sum, Carter has not established that the district court abused its discretion by allowing the state to impeach M.M.

II

Carter argues that Investigator Scharmach’s testimony that M.M. identified Carter constitutes inadmissible substantive evidence. We review evidentiary rulings for an abuse of discretion and will not order a new trial unless an error substantially influenced the jury’s decision. *Francis v. State*, 729 N.W.2d 584, 591 (Minn. 2007). The district court admitted the testimony substantively, as an out-of-court identification. An out-of-court identification is admissible if the declarant testified at trial, the witness was subject to cross-examination about the statement, and the district court is satisfied that the identification is reliable. Minn. R. Evid. 801(d)(1)(C) (2016).

Akin to his argument on other issues, Carter again asserts that the prior identification is inadmissible because M.M. was unavailable and therefore not subject to cross-

examination. Again, although the district court did say that M.M. was unavailable, for the reasons we have already discussed, we hold that M.M. was available for cross-examination.

Carter also seems to argue that the identification lacked the necessary indicia of reliability. The circumstances do not support the argument. We apply a two-step test to determine if an out-of-court identification is reliable enough to be admissible. *State v. Kelly*, 668 N.W.2d 39, 44 (Minn. App. 2003). We need look no further than the first step. The first step focuses on whether the procedure was unnecessarily suggestive. *Id.* The investigator showed M.M. six photographs of physically similar men wearing similar clothing in front of similar backgrounds. Neither this arrangement nor the investigator's administration of the process, which was captured in an audio recording, includes any unfairly suggestive elements. The district court did not abuse its discretion.

III

Carter argues that the district court erred by not including a jury instruction explaining how to assess identification evidence. Because Carter did not object to the absence of this jury instruction, we review only for plain error. *State v. Clark*, 755 N.W.2d 241, 251 (Minn. 2008). We will reverse only if we find an error that is plain and that affects substantial rights, and if we also determine that we must correct the error to ensure “fairness and the integrity of the judicial process.” *Id.* at 251–52.

We can assume (without deciding) that the district court erred by not including the jury instruction because even if this was error, it was not plain. An error is plain if it is obvious. *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002). Although the omitted jury instruction is merely discretionary, the district court planned to include it; the only reason

it did not include it is because Carter specifically urged that it not be included. When a defendant specifically asks that a merely discretionary instruction be omitted, it is not obvious that omitting it constitutes an error.

IV

Carter argues that the district court erred by not instructing the jury on the state's need to corroborate accomplice testimony. A defendant cannot be convicted by accomplice testimony unless other inculpatory evidence corroborates that testimony. Minn. Stat. § 634.04 (2016). District courts must instruct juries on accomplice testimony if a witness against the defendant is arguably an accomplice. *State v. Strommen*, 648 N.W.2d 681, 689 (Minn. 2002). Here Carter seems to be referring to D.F., who was talking to Carter before the stabbing and who may have handed Carter a knife.

Carter requested no instruction on accomplice corroboration, so again, we review for plain error. The state concedes that the district court erred plainly by failing to instruct the jury on accomplice testimony because D.F. was a witness who had been charged with a felony for some role in the events. (D.F.'s actual charges are not in the record before us.)

The state's concession is well founded and needs no discussion, but we agree with the state that Carter has not demonstrated that the plain error affected his substantial rights. An error affects substantial rights if there is a reasonable likelihood that it had a significant effect on the verdict. *State v. Barrientos-Quintana*, 787 N.W.2d 603, 611 (Minn. 2010). We are satisfied that there is no reasonable likelihood that the jurors convicted Carter because they were unaware that they could rely on D.F.'s testimony only if it was corroborated by other evidence in the record. *See id.* at 612–13. Corroborating evidence

need not support a conviction on its own, it just needs to “restore confidence in the truthfulness of the accomplice’s testimony.” *Id.* at 612–13 (quotation omitted). Here the jury received corroborating evidence, including the surveillance video and hospital identification, supporting D.F.’s testimony. And nothing in this case raises the slightest question that D.F. was the actual perpetrator or ever even entered the bathroom during the stabbing. Despite the plain error, we do not reverse because the error did not affect Carter’s substantial rights.

V

Carter’s final argument that the prosecutor committed misconduct during closing arguments is undermined by the record. Since Carter did not object to the alleged misconduct, we apply a variation on the plain-error test we have just discussed. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under this variation, Carter must first identify a plain error, and if he succeeds, the burden shifts to the state to prove that his substantial rights were not affected by the error. *Id.* If the state fails its burden, we must determine “whether [we] should address the error to ensure fairness and the integrity of the judicial proceedings.” *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). Carter does not pass the threshold showing that an error occurred in the form of prosecutorial misconduct.

The prosecutor committed no misconduct. A prosecutor commits misconduct if she violates “established standards of conduct.” *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008) (quotation omitted). We review the closing arguments as a whole, not “selected phrases and remarks.” *Id.* (quotation omitted). Carter argues that the misconduct occurred

when, according to Carter, the prosecutor implied that Carter had threatened M.M. to prevent M.M. from testifying:

And on the stand he testified that he didn't know who stabbed him. When he testified he sat on the stand just a few feet from the defendant. His body language was clear. He was not comfortable on the stand. He didn't want to testify. He didn't want to be here.

. . . .

[M.M.] did not testify on the stand that the defendant stabbed him. And again why didn't he do that. His body language stated as much as his words did. He was not . . . here voluntarily. And he did not want to be testifying. It is reasonable to think that [M.M.] was afraid. He was stabbed in a public bar in the bathroom in the presence of an eye witness over a disagreement the defendant had with a friend months ago. It is reasonable that he would not want to be sitting a few feet away from the defendant and the person that stabbed him and point him out in front of a bunch of people.

This passage does not support Carter's argument. Nothing in this summation to the jury implies that Carter threatened M.M. The prosecutor was reasonably and fairly attempting to explain the reason the stabbing victim would not identify his assailant in court even though he had positively identified him in a police lineup. The prosecutor asked the jury to reasonably infer that M.M. was reluctant to repeat his identification in front of the accused; she did not ask the jury to infer that Carter had otherwise threatened M.M. There was no misconduct.

Affirmed.