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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0624**

State of Minnesota,
Respondent,

vs.

Justin Carlos Tolbert,
Appellant.

**Filed March 19, 2018
Affirmed
Reilly, Judge**

Ramsey County District Court
File No. 62-CR-16-5708

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

John Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Connolly, Judge; and
Reilly, Judge.

UNPUBLISHED OPINION

REILLY, Judge

Appellant Justin Carlos Tolbert was convicted of second-degree assault, felony domestic assault, and threats of violence arising from an argument with V.S., his former

wife, in her home. Appellant challenges the admission of two hearsay statements and relationship evidence and also argues the prosecutor committed prosecutorial error. Because the district court did not err or abuse its discretion, we affirm.

FACTS

Appellant and V.S. have known each other for over 23 years and have two children together. In August 2016, appellant and V.S. had an argument that began during a recreational trip to a lake and continued when they returned to V.S.'s residence. Their sons, J. and his brother, were present or in the next room for most of the argument. The argument became heated, and, at one point, appellant had a gun in his hand. J. and his brother called the police and briefly spoke with an operator but told the operator that they did not need help. Appellant left the residence, and V.S. left with her mother to go to a bar. Appellant returned later with the gun and asked J. where his mother was. Appellant left again, and J. called the police. V.S. returned home while J. was on the phone with the police and briefly spoke to the operator. While on their way to V.S.'s residence, police apprehended appellant. V.S. and J. both spoke with officers at the scene about the events of the evening. Appellant was charged with second-degree assault, domestic violence, and threats of violence. V.S. and J. both testified at trial. Portions of V.S.'s and J.'s statements to the 911 operator were played in open court, and the arresting officers testified about V.S.'s and J.'s statements the night of the offense. The jury convicted appellant of all three counts.

This appeal followed.

DECISION

I. The district court did not err by admitting V.S.'s hearsay statements under the residual exception.

Appellant argues that V.S.'s statements to police are not reliable and thus inadmissible under the residual exception to the hearsay rule because she made the statements while intoxicated. Appellant argues this was not a harmless error, and that the state cannot prove beyond a reasonable doubt that the statement did not affect the jury's verdict. We review the district court's evidentiary rulings for an abuse of discretion. *State v. Flores*, 595 N.W.2d 860, 865 (Minn. 1999) (reviewing a hearsay ruling). "The burden is on the [appellant] to show that the district court abused its discretion and that [appellant] was prejudiced thereby." *State v. Ahmed*, 782 N.W.2d 253, 259 (Minn. App. 2010).

A hearsay statement that does not fall under an explicit hearsay exception may be admitted under the residual exception when:

(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Minn. R. Evid. 807. When determining the reliability of hearsay statements under the residual exception, we consider the totality of the circumstances, "looking to all relevant factors bearing on trustworthiness to determine whether the extrajudicial statement has circumstantial guarantees of trustworthiness equivalent to other hearsay exceptions." *Ahmed*, 782 N.W.2d at 260 (quotations and citations omitted).

At trial, respondent argued that V.S.'s statements to police were non-hearsay because they were consistent with V.S.'s in-court testimony.¹ To the extent the statements might be inconsistent, respondent argued the statements should be admissible under the residual exception because they were made against her interest in her relationship with the defendant, that they were made at a time and under circumstances that had substantial guarantees of their trustworthiness, or that they were excited utterances. The court agreed that V.S.'s in-court testimony was consistent to the extent she testified that appellant threatened her with a gun and that they argued. The district court determined her testimony seemed largely consistent with her statements to police, and that any inconsistent testimony would be admissible under the rule 807 residual exception as being reliable under the circumstances. Appellant argued that V.S.'s statements were not reliable under an 807 analysis because she was heavily intoxicated. The district court determined her intoxication went to the weight of the evidence and not its admissibility.

On appeal, appellant does not specify which of V.S.'s statements to police were inconsistent with her sworn testimony and thus admitted under the residual exception. Appellant has not identified which statements he is asking this court to evaluate under the residual exception, and it is appellant's responsibility on appeal to clarify what issues the court should consider. Independently, we identify two instances where V.S.'s testimony *might* be considered inconsistent with her statements to police. V.S. testified that appellant "pulled a gun on her," but told police that appellant held a gun to her head. V.S. also

¹ Minn. R. Evid. 801(d)(1)(B) provides that consistent out-of-court statements by a testifying declarant are not hearsay.

testified she was not afraid of appellant, but, in her statements to police, V.S. said she was sometimes afraid of appellant and thought him capable of killing her.

Even in this light, admission of V.S.'s statements to police was not an abuse of discretion. V.S.'s statements to the police were offered to show that appellant put a gun to her head and threatened to shoot her. Her statements to the police are more probative than her trial testimony because there was evidence that, at trial, she minimized appellant's conduct out of a sense of loyalty to their relationship. Furthermore, her statements made to police were more probative because they were made against her relationship interest with appellant. There is no evidence controverting V.S.'s statements to the police, as they are largely consistent with V.S.'s testimony. The statements to the police are persuasive and serve to elaborate on V.S.'s unwilling and hostile testimony at trial. The district court did not abuse its discretion when it admitted V.S.'s statements under the residual exception.

Appellant cites *State v. Greenleaf*, 591 N.W.2d 488, 503 (Minn. 1999), and *State v. Schilling*, 474 N.W.2d 203, 205 (Minn. App. 1991), to support his argument that ex parte statements made during police questioning are traditionally considered untrustworthy. But *Greenleaf* and *Schilling* involved declarants who did not testify at trial, so those cases are not persuasive here, since V.S. testified and was available for cross-examination.

Appellant argues that V.S.'s statements are neither reliable nor trustworthy because she was intoxicated. The district court stated that an intoxicated person's statements are no less reliable than a sober person's, and that V.S.'s intoxication may influence what weight a jury gives to that evidence. Appellant does not cite any authority for the proposition that statements made by an intoxicated person are any less reliable than those

made by a person who is not intoxicated. Appellant simply argues that V.S. was “semi-coherent,” “rambling,” and motivated by her anger at respondent when she was drunk. There is nothing in the record to suggest that V.S. spoke untruthfully because of her intoxication.

V.S.’s statements to police were largely consistent with her testimony, and any inconsistent statements were reliable given the circumstances. The district court did not abuse its discretion by admitting V.S.’s statements to the police.

II. The district court did not err by not sua sponte striking Officer Starkey’s testimony about J.’s prior consistent statement.

Appellant did not object to Officer Starkey’s testimony about his conversation with J., the son of appellant and V.S. This court evaluates unobjected-to error under a plain-error standard. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Plain error occurs where there is: (1) error; (2) that is plain; and (3) the error affects a person’s substantial rights. *Id.* A person’s substantial rights are affected if the error was prejudicial and affected the outcome of the case. *Id.* If the three-pronged test is met, this court must determine whether it should address the issue to ensure the fairness and integrity of the judicial proceedings. *See State v. Dobbins*, 725 N.W.2d 492, 508 (Minn. 2006).

Appellant contends that Officer Starkey’s testimony about J.’s statement to him was not consistent with J.’s testimony at trial, and that its admission was plain error. Officer Starkey testified that J. told him that appellant and V.S. were in an argument earlier that night. J. said that appellant came to the house later that night with a loaded gun and asked where V.S. was. Appellant said “text [V.S.], and tell her to come home, or else she’ll find

out what will happen.” J. said that appellant spun the revolver’s ammunition cylinder and left. J. was worried for his mother’s safety.

At trial, J. did not testify that his father made threats against his mother. J. testified that he heard his mother and appellant fighting, and that his mother signaled them to call the police. J. testified that his father returned after the earlier argument and that he could not remember if he was carrying a gun. J. testified that he believed he would have told the 911 operator if he had seen his father carrying a gun, and, as heard on the 911 call played for the jury, J. told the operator that his father had returned to the house with a gun and was looking for his mom. J. also told the 911 operator that appellant had been at the house earlier with his mom and had a gun.

The district court did not err by failing to sua sponte strike Officer Starkey’s testimony as inconsistent with J.’s testimony. First, even if appellant had objected, J.’s statements to Officer Starkey may have been otherwise admitted as excited utterances or as consistent non-hearsay statements. *See State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006) (noting that unobjected-to hearsay is particularly difficult to deem inadmissible on plain-error review due to the many hearsay exceptions and the absence of a clear ruling on the issue at trial); *see also* Minn. R. Evid. 803(2) (excited utterance) (“A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”); Minn. R. Evid. 801(d)(1) (“A statement is not hearsay if . . . [t]he declarant testifies at the trial . . . and is subject to cross-examination . . . and . . . [the statement is] consistent with the declarant’s testimony and helpful to the trier of fact in evaluating the declarant’s credibility as a witness” Second, Officer Starkey’s

testimony did not directly conflict with J.'s testimony, it merely offered more detail. J.'s testimony was very sparse and had few details about the events. The two pieces of evidence offered by Officer Starkey that elaborated on J.'s testimony were appellant's threat that "she'll find out what will happen" if she comes home and appellant spinning the revolver's cylinder in front of J. Also, J. testified multiple times that he could not remember certain details and that he told the 911 operator and police officers what happened as best he could remember that night. Officer Starkey's testimony and J.'s testimony were consistent. And finally, appellant not objecting to Officer Starkey's testimony may have been a trial strategy. *See State v. Washington*, 693 N.W.2d 195, 205 (Minn. 2005) ("We do not agree that the district court must, or even should, interfere with the trial strategy of the defendant."). The district court did not err by declining to sua sponte strike Officer Starkey's testimony.

III. Appellant's argument regarding relationship evidence was not properly preserved for appeal.

Appellant argues the district court abused its discretion by admitting evidence of appellant's domestic abuse with V.S. as relationship evidence. Appellant claims the evidence was overly prejudicial and should have been excluded.

A party must make a specific objection on the record to preserve an issue for appeal. *See State v. Mosley*, 853 N.W.2d 789, 797 n.2 (Minn. 2014); *State v. Blom*, 682 N.W.2d 578, 614 (Minn. 2004). Before trial, the prosecution disclosed that it sought to offer relationship evidence to show the nature of appellant and V.S.'s relationship. At a pretrial hearing, appellant did not object to the inclusion of this evidence and only expressed

reservations as to how the evidence would be included. Appellant did not argue that the evidence was overly prejudicial. The district court ultimately admitted the evidence. Because appellant failed to raise an objection that the evidence was overly prejudicial, he has forfeited that issue on appeal. *See Mosley*, 853 N.W.2d at 797 n.2 (finding that an evidentiary issue was not preserved for appeal where the defendant made an objection on due-process grounds, but failed to state the specific ground of objection under an evidentiary rule).

IV. The prosecutor's closing argument was not prosecutorial error.

Appellant argues the prosecutor committed prosecutorial misconduct when she vouched for V.S.'s credibility in her closing argument, argued facts not in evidence, and inflamed the jury. Appellant did not object to the claimed prosecutorial error at trial.²

Failure to object to a prosecutor's statements at trial is generally a forfeiture of that issue on appeal. *See State v. Darris*, 648 N.W.2d 232, 241 (Minn. 2002). However, this court may address the issue if there is plain error. *Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011). On review, the appellant must show that there was error and that it was plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If an appellant shows plain error, the burden then shifts to the state to show that the error did not affect the appellant's substantial rights. *Id.* An error affects appellant's substantial rights if there is prejudice

² Appellant uses the term prosecutorial misconduct. Prosecutorial misconduct "implies a deliberate violation of a rule of practice," while prosecutorial error "suggests merely a mistake of some sort, a misstep of a type all trial lawyers make from time to time." *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009). Because there is no evidence that the prosecutor intentionally violated a rule of practice, we use the term prosecutorial error.

and the error affected the outcome of the case. *State v. Barrientos-Quintana*, 787 N.W.2d 603, 611 (Minn. 2010). An error is prejudicial if there is a reasonable likelihood that the error had a significant effect on the verdict. *Id.* If the three prongs are met, the court may order a new trial only if doing so is necessary to uphold the fairness and integrity of the judicial process. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001).

A prosecutor cannot make arguments that are not supported by evidence or that are designed to inflame the passions and prejudices of the jury. *State v. Mayhorn*, 720 N.W.2d 776, 786-87 (Minn. 2006). During a closing argument, a prosecutor may argue “all reasonable inferences from evidence in the record,” but must not “misstate the evidence or mislead the jury as to the inferences it may draw.” *State v Salitros*, 499 N.W.2d 815, 817 (Minn. 1993). A prosecutor must not express a personal belief as to the truth or falsity of any testimony or evidence. *Id.*

In her closing argument, the prosecutor described what it must have been like to be in a 23-year relationship with appellant. She referenced V.S.’s experience of physical violence and the instability of the relationship. The prosecutor played the 911 tape to show the jury how V.S. sounded the day she was allegedly assaulted by appellant. Following the 911 recording, the prosecutor said: “She doesn’t really mean[] she’s not concerned for her safety. She means, she’s come to the conclusion that there is nothing she can do about it. So that’s what she says to the 911 operator.” The prosecutor addressed V.S.’s casual statements to the police, where she said that she was not afraid of appellant. The prosecutor framed those statements as being the statements of a woman who is resigned to her fate.

The prosecutor explained one way of interpreting V.S.'s statements, and did not argue facts not in evidence.

Next, appellant argues the prosecutor inflamed the jury when she argued that V.S. was telling the truth because “fear trumps loyalty.” But the prosecutor did not inflame the passions of the jury, the prosecutor was describing how the jury might credit V.S.'s statements from the night of the incident more favorably than her comparatively restrained testimony at trial. The prosecutor was describing to the jury how they might interpret the trial testimony as being tempered by loyalty to a loved one, and how the statements made to the police the night of the incident might be motivated by a more trustworthy impulse—fear. The prosecutor never personally vouched for V.S.'s credibility. The prosecutor never used an “I” statement or used her position as an agent of the government to vouch for V.S.'s credibility, and the prosecutor did not inflame the jury.

The prosecutor's closing argument did not constitute prosecutorial error.

Affirmed.