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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1133**

State of Minnesota,
Respondent,

vs.

Christopher Lee Rogers,
Appellant.

**Filed April 6, 2020
Affirmed in part, reversed in part, and remanded.
Hooten, Judge**

Becker County District Court
File No. 03-CR-18-2427

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St. Paul, Minnesota; and

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Considered and decided by Reilly, Presiding Judge; Rodenberg, Judge; and Hooten,
Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

In this direct appeal from the judgment of conviction for domestic assault, appellant
Christopher Lee Rogers argues that the district court: (1) abused its discretion by admitting

the victim's out-of-court statement as an "excited utterance," (2) committed plain error by admitting hearsay statements that the complainant made several months after the charged incident, and (3) erred in entering judgments of conviction for both counts of domestic assault for which he was found guilty. We affirm in part, reverse in part, and remand.

FACTS

On November 18, 2018, an officer from the White Earth Police Department responded to a report of domestic assault (the 2018 incident). Upon arrival at the residence, the officer spoke with the victim who reported that Rogers, with whom she lived, assaulted her. The victim stated that during an argument, Rogers got upset, picked up items around the house, and threw them at her. The victim called her mother and asked to be picked up from the residence. The victim's mother told the victim to call the police. Within minutes, the victim called her mother again, stating that Rogers would not let her call the police and that he had punched her in the face. The victim's mother immediately called the police.

Within three minutes of receiving the call from dispatch, an officer arrived at the victim's home. The officer's body camera showed that as he walked through the open front door, the victim informed him that she "just got beat up." The footage showed that the victim's hand trembled as she lit a cigarette. She then told the officer through sobs that Rogers pulled her hair, kicked her legs, and punched her in the forehead, left eye, nose, and in the back of the head. She also admitted that he had been violent with her in the past but she had not reported those prior incidents. The officer noticed swelling around the victim's left eye and that "her nose appeared to be misshaped."

Later that evening, law enforcement located and arrested Rogers. Rogers, who had two prior gross misdemeanor domestic assault convictions, admitted that he and the victim were in an argument but denied throwing anything at the victim or physically assaulting her.

The state charged Rogers with one count of felony domestic assault (fear), and one count of felony domestic assault (harm), both in violation of Minn. Stat. § 609.2242, subd. 4 (2018).

At trial, the victim testified that she did not remember what she had said to the officer and that she did not remember if she had been hit. Although she acknowledged that Rogers was the only other person present at the home, and that photographic and video evidence existed of a red mark on her swollen face, the victim testified that she did not know who hit her and that maybe she had just slipped.

The officer who responded to the victim's home also testified at trial. He stated that although there were eggs on the floor, the victim did not have any eggs on her and did not mention slipping on eggs. The jury was shown the body camera footage that included the victim's statements to the officer made within 10 minutes of the argument.

The state presented evidence that, just over a week before trial, Rogers and the victim were involved in another incident characterized by the victim as a "domestic" (the 2019 incident), which resulted in the arrest of Rogers. The district court admitted evidence of the 2019 incident as evidence of domestic conduct admissible under Minn. Stat. § 634.20 (2018). The day after the 2019 incident, the victim met with a second officer for a victim interview and was shown the body camera footage from the 2018 incident.

At trial, both the victim and the second officer testified regarding the 2019 victim interview. Although the victim claimed that she did not remember the exact events of the victim interview, the second officer testified that the victim was “very adamant that she wanted to go to trial.” The second officer noted that the victim appeared “distraught” at the meeting and was “bandaged up” and “shaken.”

The jury found Rogers guilty on both counts of felony domestic assault. At his sentencing hearing, the district court imposed a sentence on only one count of felony domestic assault. The district court did not impose a sentence on the second count of domestic assault, but stated that the jury verdict remained. Nevertheless, the warrant of commitment listed Rogers as standing convicted of both offenses.

This appeal follows.

D E C I S I O N

Evidentiary rulings “rest within the sound discretion of the district court. *State v. Guzman*, 892 N.W.2d 801, 812 (Minn. 2017). We will not reverse unless an appellant demonstrates both an abuse of discretion and resulting prejudice. *Id.*

I. The district court did not abuse its discretion when it admitted the victim’s out-of-court statement to the first officer as an “excited utterance.”

Rogers argues that the district court abused its discretion when it admitted the victim’s statement to the first officer after the 2018 incident under the excited utterance exception to the hearsay rule because it was not trustworthy and, in the alternative, was not an excited utterance.

The rules of evidence generally exclude as hearsay any statement made out of court and offered to prove the truth of the matter asserted. Minn. R. Evid. 801(c), 802. But there are numerous exceptions to this rule, including one for excited utterances. Minn. R. Evid. 803(2). A statement is admissible as an excited utterance if: (1) there was “a startling event or condition,” (2) the statement related to the startling event or condition, and (3) “the declarant [was] under a sufficient aura of excitement caused by the event or condition to insure the trustworthiness of the statement.” *State v. Daniels*, 380 N.W.2d 777, 782 (Minn. 1986). There are no strict temporal requirements when a district court determines whether a “sufficient aura of excitement” affected the declarant at the time of the statement in question; thus a court must consider “all relevant factors including the length of time elapsed, the nature of the event, the physical condition of the declarant, [and] any possible motive to falsify.” *Id.* at 782–83.

The district court admitted the victim’s 2018 statement to the first officer under the excited utterance exception to the hearsay rule because the victim was “under the stress of the incident that allegedly occurred between her and Defendant” when she spoke with the first officer.

When considering all relevant factors, we conclude that the district court did not abuse its discretion by determining that the victim’s 2018 statement to the first officer constitutes an excited utterance. The victim’s discussion with the officer occurred after a stressful and scary event. She told the officer how her hair was pulled, how she had been kicked, and how she had been punched in the face. The body camera footage shows the victim searching to find a cigarette and light it, crying, and gingerly touching her nose, jaw,

and left eye. The officer noticed visible swelling around the victim's left eye and that "her nose appeared to be misshaped." This evidence supports admission under the first two prongs of the excited utterance analysis. Finally, the officer arrived at the victim's home within a few minutes after dispatch received the victim's mother's 911 call, and the victim's statement occurred only minutes after the officer arrived. Although there is no specified temporal requirement related to when an individual is under the "aura of excitement," this short period of time, and the officer's observations that the victim was crying and shaken, sufficiently support that the victim was under an "aura of excitement" so as to assure the "trustworthiness" of her statements and render the evidence admissible. *See Daniels*, 380 N.W.2d at 782–83 (determining that a statement made about an hour after a startling event was still within the "aura of excitement").

Rogers argues that the victim's 2018 statement to the first officer did not constitute an excited utterance because the victim did not make eye contact with the officer (and thus was lying) and she was not under the "aura of excitement" because Rogers had already left the residence when the officer arrived. However, it is not necessary that the danger still be present for a district court to determine that statements were made under the "aura of excitement" as the district court must consider all relevant factors. Not only did the victim admit at trial that Rogers was the only person in the house when she was hit, but the exceptionally short period of time that elapsed between the event and the victim's statement to the first officer, the intensity of the argument as corroborated by the victim's mother, and the victim's tears and physical condition all support the district court's determination.

Therefore, we conclude that the district court did not abuse its discretion when it determined that the victim's statement to the officer immediately after the 2018 event was admissible under the excited utterance exception to the hearsay rule. As we hold that the 2018 statement is admissible, we need address neither prejudice nor the statement's admissibility under the residual exception to hearsay.

II. The district court did not commit plain error when it admitted the victim's out-of-court statement regarding the 2019 incident.

Rogers argues that the district court committed plain error when it admitted the second officer's testimony relaying the victim's 2019 statement made to him during an interview. Rogers only contests the admissibility of the second officer's statements with regard to the 2019 interview and claims that the second officer's testimony should be excluded because it is inadmissible hearsay.

Despite vigorous objections to hearsay throughout the proceeding, Rogers did not object to the testimony of the officer who interviewed the victim following a subsequent "domestic" with Rogers just over a week before the trial began. *See State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006) (noting that "[t]he 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" because "[i]n the absence of an objection, the state [is] not given the opportunity to establish that some or all . . . statements were admissible under one of the numerous exceptions"). Furthermore, Rogers did not move to strike the second officer's testimony. Accordingly, we review only for plain error. *See Minn. R. Crim. P. 31.02* (providing that appellate courts may review for plain error even if the issue

was not brought to the district court’s attention); *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (stating that appellate courts have discretion to consider plain error affecting substantial rights).

Under the plain-error test, we will reverse a district court’s decision to admit testimony only if the appellant can demonstrate that: (1) the district court committed an error, (2) the error is plain, and (3) the plain error affected the defendant’s substantial rights. *Griller*, 583 N.W.2d at 740. “An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct.” *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). An error affects a defendant’s substantial rights “if the error was prejudicial and affected the outcome of the case.” *Griller*, 583 N.W.2d at 741. Even if all three elements of plain error are satisfied, an appellant also must demonstrate that the error “seriously affects the fairness and integrity of the judicial proceedings.” *State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014). If any requirement of the plain-error test is not satisfied, the appellate court need not consider the other requirements. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012). When a reviewing court assesses plain error in the context of an evidentiary decision, “the real question . . . is *not* whether the trial court erred in *admitting* the evidence, but instead whether the trial court’s failure to sua sponte strike the testimony or provide a cautionary instruction was plain error.” *State v. Vick*, 632 N.W.2d 676, 678 (Minn. 2001).

Therefore, the only issue we need to decide on appeal is whether or not the district court committed plain error when it failed to sua sponte strike the testimony of the second officer relaying the victim’s statements at the victim interview following the 2019 incident.

A. The second officer's statements are admissible under Minn. R. Evid. 801(d)(1)(B).

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is admissible only in certain instances. Minn. R. Evid. 801(c), 802. A statement is not hearsay if it is offered for corroborative purposes, rather than to prove the truth of the matter asserted. *State v. Smith*, 384 N.W.2d 546, 548 (Minn. App. 1986), *review denied* (Minn. May 29, 1986). Additionally, a statement is not hearsay if, among other things, “[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, 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.” Minn. R. Evid. 801(d)(1)(B). However, before a prior consistent statement can be admitted, “the witness’ credibility must have been challenged, and the statement must bolster the witness’ credibility with respect to that aspect of the witness’ credibility that was challenged.” *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997).

As no hearsay objection was made, the district court did not determine whether or not the statements were admissible under rule 801(d)(1)(B). Accordingly, this court must determine if the testimony was admissible and thus not plain error for the district court to fail to sua sponte strike the testimony. *See State v. Hallmark*, 927 N.W.2d 281, 294–95 (Minn. 2019) (examining a hearsay exception when the district court failed to do so).

At trial, the victim testified and was subject to cross-examination regarding both of her interviews after the 2018 and 2019 incidents. During her testimony, both the state and defense counsel questioned her regarding her inconsistent statements about the incidents.

Rogers' counsel concentrated on her accusations of abuse to the first officer following the 2018 incident and to the second officer following the 2019 incident, in the cross-examination and closing so as to challenge and undermine the victim's credibility. After the victim's credibility was attacked, and the door was opened regarding testimony related to the victim's interview by both parties in their examinations of the victim, the second officer merely testified in greater detail regarding the victim's statements during the victim's second interview and about his impressions of the victim at that interview. The second officer testified that the victim had been shown the body camera footage from the 2018 incident.

As the second officer's testimony was consistent with the victim's testimony regarding her 2019 interview, and the district court had previously ruled that evidence of that incident was admissible under Minn. Stat. § 634.20, we hold that the second officer's testimony is admissible as a prior consistent statement of the victim's under Minn. R. Evid. 801(d)(1)(B). Therefore, the district court did not commit plain error when it failed to sua sponte object to the admission of the second officer's testimony relating to the victim's statement at the interview following the 2019 incident.

As we have concluded the district court's failure to sua sponte strike the second officer's testimony was not plain error, we need not consider whether the second officer's statements prejudiced Rogers. *See Brown*, 815 N.W.2d at 620 (noting that if any requirement of the plain-error test is not satisfied, an appellate court need not consider the other requirements).

B. The second officer's statements are also admissible under Minn. R. Evid. 807.

An additional exception to the general prohibition against the admission of hearsay is the residual exception. Minn. R. Evid. 807. Hearsay is admissible under the residual exception when the testimony has “circumstantial guarantees of trustworthiness,” and:

[T]he court determines that (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.

Id.

“The decision to admit hearsay statements under Rule 807 has two steps. First, the district court must look at the totality of the circumstances to determine whether the hearsay statement has circumstantial guarantees of trustworthiness.” *Hallmark*, 927 N.W.2d at 292 (quotation omitted). A district court is to “use a totality of the circumstances test to determine whether the statement has equivalent circumstantial guarantees of trustworthiness.” *State v. Davis*, 820 N.W.2d 525, 537 (Minn. 2012) (quotations omitted). “The second step . . . requires the district court to determine whether the three enumerated requirements of Rule 807 are met.” *Hallmark*, 927 N.W.2d at 293. Only the trustworthiness of the victim’s statements to the second officer made just over one week before trial regarding the 2019 incident are disputed here.

There is not a defined list of factors necessary for a court to consider to decide whether or not a hearsay statement has circumstantial guarantees of trustworthiness. However, the supreme court identified a number of circumstances that might be considered

among the totality of the circumstances necessary to determine trustworthiness. *Davis*, 820 N.W.2d at 537. These circumstances include:

[W]hether the statement was given voluntarily, under oath, and subject to cross-examination and penalty of perjury; the declarant's relationship to the parties; the declarant's motivation to make the statement; the declarant's personal knowledge; whether the declarant ever recanted the statement; the existence of corroborating evidence; and the character of the declarant for truthfulness and honesty.

Id.

Rogers claims that the second officer's testimony regarding the victim's statements does not contain circumstantial guarantees of trustworthiness because the victim's statements to the officer were not under oath, not against her own interests, and made only to guarantee that Rogers would remain "locked up." However, when considering the factors described in *Davis*, we hold that Rogers has failed to demonstrate that the totality of the circumstances necessitates a determination that it was plain error for the district court to fail to sua sponte strike the testimony.

The victim spoke to the second officer voluntarily at a victim interview. She subsequently testified under oath and was cross-examined by defense counsel regarding her statements during the interview with the second officer. Although the second officer was not present for what the victim called the "domestic," and there was testimony about an ongoing romantic relationship between the victim and Rogers, both the mother and the victim testified about Rogers' violent history. Additionally, the second officer observed that the victim was "bandaged up," "shaken," and "distraught" during this interview. He testified that the victim was "adamant" that she wanted to testify and that the officer

showed the victim the body camera footage from the 2018 incident. Finally, Rogers stipulated to two prior domestic assault charges and the district court offered a curative instruction that evidence of the 2019 incident was “being offered for the limited purpose of demonstrating the nature and extent of the relationship” between the parties.

Therefore, we conclude that Rogers has failed to demonstrate that the victim’s statements to the second officer lack sufficient guarantees of trustworthiness so as to be inadmissible under rule 807. Thus, we need not consider whether the second officer’s statements prejudiced Rogers. *See Brown*, 815 N.W.2d at 620 (noting that if any requirement of the plain-error test is not satisfied, an appellate court need not consider the other requirements).

III. The warrant of commitment erroneously entered two judgements of conviction.

Rogers argues that the district court erroneously adjudicated two counts of felony domestic assault even though both counts arose from the same behavioral incident.

Even though a defendant may be convicted of multiple counts arising from a single incident, the district court must “adjudicate formally and impose sentence on one count only.” *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). When the written sentencing order conflicts with the district court’s oral pronouncement, the district court’s unambiguous oral pronouncement on sentencing controls. *State v. Staloch*, 643 N.W.2d 329, 331 (Minn. App. 2002). Additionally, when an official judgment order or a warrant of commitment incorrectly notes that a party has been “convicted of or sentenced for more

than one included offense,” this court will vacate the erroneous conviction. *State v. Pflepsen*, 590 N.W.2d 759, 767 (Minn. 1999).

At the sentencing hearing, the district court acknowledged that because Rogers had been found guilty of two counts of domestic assault arising from the same incident, a conviction should only be entered on one of the counts. Accordingly, the district court pronounced that Rogers was convicted of, and sentenced on, one count of felony domestic assault (fear), in violation of Minn. Stat. § 609.2242, subd. 4. The district court stated that it would not impose a sentence on the second count “but the jury verdict remains.” Nevertheless, Roger’s warrant of commitment listed convictions on both counts.

Because the district court only entered a conviction on the first count of felony domestic assault, and the district court’s unambiguous oral pronouncement controls, *Staloch*, 643 N.W.2d at 331, the district court did not impermissibly adjudicate Rogers on both counts. However, because the warrant of commitment incorrectly indicates entries of conviction on two counts of domestic assault, we remand to the district court for correction of the warrant of commitment to reflect a conviction only on the first offense.

Affirmed in part, reversed in part, and remanded.