

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0110**

State of Minnesota,
Respondent,

vs.

Joseph Paul Langner,
Appellant.

**Filed February 1, 2021
Affirmed in part, reversed in part, and remanded
Florey, Judge**

Stearns County District Court
File No. 73-CR-18-7319

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Segal, Chief Judge; and Ross, Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

On appeal from his conviction of first-degree criminal sexual conduct, appellant alleges that (1) the district court erred by admitting inconsistent statements from witnesses at trial and (2) his attorney provided ineffective assistance by failing to object to the state's

late notice of its intent to seek an aggravated sentence. Appellant also argues the district court plainly erred when it accepted the state's untimely notice to seek an aggravated sentence where the state did not establish good cause for the untimeliness. Because we determine the district court did not plainly err in its evidentiary rulings, we affirm the convictions. But because we determine the district court did not comply with Minn. R. Crim. P. 7.03, we reverse and remand to the district court for resentencing.

FACTS

Appellant Joseph Paul Langner was convicted of first-degree criminal sexual conduct (penetration/complainant under 16/significant relationship/multiple acts) and first-degree criminal sexual conduct (penetration/complainant under 16/significant relationship) against his daughter, M.L.

Approximately seven months after Langner entered a not guilty plea at the omnibus hearing, the state gave notice that it would seek an aggravated durational departure for multiple forms of sexual penetration. At a hearing, the district court noted that the state had filed the notice after the omnibus hearing, which violated Minnesota Rule of Criminal Procedure 7.03 (requiring that the state give notice of its intent to seek an aggravated sentence at least seven days before omnibus hearing). The district court gave the parties an opportunity to brief the matter, and ultimately granted the state's motion. Langner waived his right to have the jury make the factual finding regarding the existence of aggravating factors. The district court granted the state's departure motion.

At trial, the victim in this case, M.L., the investigating officers, Langner's ex-girlfriend, the victim's friend E.K., E.K.'s mother J.K., and E.K.'s grandmother H.K. testified for the state.

Fourteen-year-old M.L. testified that she had been sexually assaulted by Langner, her father, since moving in with him when she was 11 years old. M.L. said that Langner had assaulted her with multiple forms of penetration on multiple occasions.

In August 2018, M.L. disclosed this information to her friend E.K. when E.K. asked M.L. if Langner had ever done "anything weird" with M.L. M.L. replied that Langner "did that to me." M.L. did not "say the words," but M.L. believed it was clear to E.K. what they were talking about. When asked if she went into more details about what had happened to her, M.L. responded:

M.L.: Not really, just that he - - I think I told her - - I don't remember what I told her exactly, but we were, like, talking about that, and, like, being weird and stuff, and, like, she asked if, like, my dad had been weird to me like that ever and if he's done anything more than that. And I told her that, yeah, he's - - at first I didn't want to tell her anything because I was scared.

[...]

Prosecutor: Okay. And [did] you get into any of the actual specifics about what'[d] been happening?

M.L.: No.

E.K. also testified to her conversation with M.L. E.K. had been suspicious about M.L.'s relationship with Langner because "he was just very clingy to her, like he would never leave her alone." E.K. said that M.L. told E.K. that Langner came into her room at

night or brought her into his room. M.L. did not give E.K. more details, and made E.K. promise not to tell anyone.

E.K.'s mother, J.K. testified about a conversation she had with E.K., during which E.K. told J.K. about E.K.'s conversation with M.L. E.K. told J.K. that Langner was "raping" M.L. J.K. confirmed that "[t]hose were [E.K.'s] exact words." E.K.'s grandmother, H.K. also testified that E.K. "told [her] that [M.L.] told her that her dad had been raping her." J.K. and H.K. called the police.

During his rebuttal closing statements, the prosecutor argued to the jury:

And she told [E.K.] enough information that an hour or so later, when she's at home in her bedroom crying keeping the secret that [M.L.] told her to, she tells her mom he's raping [M.L.] That's what she told her. She didn't mince words. She knows. She knows what [M.L.] told her. And that's how she interprets it. That's what [M.L.] told the police, and that's what she told you over the course of two days.

Langner was found guilty and sentenced to 344 months in prison.

This appeal follows.

DECISION

I. The district court did not err by admitting unobjected-to statements.

Langner argues the district court plainly erred by admitting unobjected-to inconsistent hearsay statements, and as a result, he is entitled to a new trial. As a result of appellant's failure to object at trial, we review the admission of the evidence for plain error. *State v. Smith*, 825 N.W.2d 131, 138 (Minn. App. 2012), *review denied* (Minn. Mar 19, 2013). "The plain-error standard is more difficult for an appellant to meet than the standard for objected-to error," *State v. Word*, 755 N.W.2d 776, 782 (Minn. App. 2008), and

requires the defendant to show (1) error; (2) that was plain; and (3) that affected the defendant's substantial rights. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). "If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Griller*, 583 N.W.2d at 740.

The testimony in dispute concerns E.K.'s, J.K.'s, and H.K.'s recollections of M.L.'s conversation with E.K. during which M.L. disclosed that Langner "had been weird to [her]." First, Langner argues that although M.L. testified that "she did not give E.K. any details [about the relationship with Langner]," E.K. inconsistently testified that M.L. told her that Langner "comes into [M.L.'s] room at night, or he'll bring [M.L.] into his room." Second, Langner argues that while "E.K. testified that she could not remember what she told her mother and grandmother about her conversation with M.L.," both J.K. and H.K. testified that E.K. told them that M.L. said Langner had been raping M.L.

Hearsay is defined as an out-of-court statement that is offered for the truth of the matter asserted. Minn. R. Evid. 801(c). Hearsay is generally inadmissible, unless it fits under an exception that is specifically provided by the rules of evidence. Minn. R. Evid. 802. A prior consistent statement of a testifying witness is not hearsay if it is helpful to the jury in evaluating the witness's credibility. Minn R. Evid. 801(d)(1)(B).

Even if we assume that this disputed testimony is hearsay, the admission of hearsay does not always constitute plain error. See *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). There are a multitude of exceptions to the hearsay rule and "[i]n the absence of an objection, the state [is] not given the opportunity to establish that some or all of the

statements were admissible under one of the numerous exceptions to the hearsay rule.” *Manthey*, 711 N.W.2d at 504.

Here, Langner’s counsel did not object to any of the testimony he now contests. Langner’s failure to object at trial deprived the state of the opportunity to argue that an exception to the general hearsay rule applied. In light of Langner’s failure to object and the district court’s inherent discretion, the testimony from E.K., J.K., and H.K. regarding details of the conversation between M.L. and E.K. was not clearly or obviously inadmissible. *See Manthey*, 711 N.W.2d at 504.

Because we determined the district court did not err, we need not consider whether the admission of the challenged statements affected Langner’s substantial rights.

II. The district court erred when it accepted the state’s untimely notice of its intent to seek an aggravated sentence.

Langner argues that “the district court plainly erred by accepting the state’s untimely notice of its intent to seek an aggravated sentence where no good cause existed for its late filing.” We agree. Because Langner did not object to the district court’s grant of the state’s motion to seek an aggravated sentence, we again review under the plain-error standard set forth above. *See State v. Barthman*, 938 N.W.2d 257, 268 (Minn. 2020) (determining unobjected-to violations of rule 7.03 are reviewed under the plain-error standard).

For the state to seek an aggravated sentence, it must provide notice to the defendant. *State v. Rourke*, 773 N.W.2d 913, 923 (Minn. 2009). The rules of criminal procedure require the following:

The prosecutor must give written notice at least seven days before the Omnibus Hearing of intent to seek an aggravated

sentence. *Notice may be given later if permitted by the court on good cause and on conditions that will not unfairly prejudice the defendant.* The notice must include the grounds or statutes relied upon and a summary statement of the factual basis supporting the aggravated sentence.

Minn. R. Crim. P. 7.03 (Emphasis added.).

Here, the state filed its notice for an aggravated departure over seven months after Langner’s omnibus hearing, the deadline set by rule 7.03. The district court stated that “technically these were also supposed to be filed back at omnibus. I mean, I get what the practice is here, but the rule actually talks about being filed at the omnibus.” Langner’s counsel replied, “[y]es,” to which the district court responded, “[b]ut it is what it is.” After reviewing submissions on this issue and without a finding of good cause for the state’s untimely submission, the district court granted the state’s motion. Neither the state nor the district court complied with rule 7.03’s good-cause requirement. Because the district court did not make the required good-cause finding, the district court erred by permitting the state to proceed on its late notice. We further determine this error was plain because it clearly contravenes the requirements of rule 7.03. *See State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (“[a]n error is plain if it is clear or obvious, which is typically established if the error contravenes [...] a rule”).

We must next determine if the district court’s erroneous granting of the state’s untimely motion to seek an aggravated sentence affected Langner’s substantial rights. This prong of the plain-error test is satisfied “if the error was prejudicial and affected the outcome of the case.” *Griller*, 583 N.W.2d at 741. Langner bears the burden of persuasion on this third prong. *Id.* Langner argues this error enabled the district court to impose an

upward durational departure from the sentencing guidelines. Per the guidelines, without the upward durational departure, the district court would have been able to sentence Langner to a maximum of 172 months in prison. However, because of the aggravating factor, the district court was permitted to double the presumptive sentence and sentenced Langner to 344 months in prison. Based on this error, we conclude that Langner has met his burden and shown he was prejudiced by the sentence imposed by the district court. Therefore, it is necessary to reverse Langner's sentence and remand to the district court for sentencing within the presumptive guidelines to ensure the fairness and integrity of the judicial proceeding.

Because we determine Langner met his burden of showing the district court plainly erred by accepting the state's late notice to seek an aggravated sentence, we need not reach his alternative argument that his trial counsel provided ineffective assistance by failing to object to the state's motion to seek an aggravated sentence as untimely.

Affirmed in part, reversed in part, and remanded.