STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0634

State of Minnesota,
Respondent,

vs.

Aureliano Flores,
Appellant.

Filed December 27, 2022
Affirmed
Reyes, Judge

Scott County District Court
File No. 70-CR-19-4168

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Ronald Hocevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Cassandra J. Bautista, Sieben Edmunds Miller, P.L.L.C., Eagan, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Slieter, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

Appellant challenges his conviction of second-degree assault with a dangerous weapon, arguing that the district court abused its discretion by admitting two victims' out-of-court statements into evidence under the excited-utterance exception and the residual

exception to the hearsay rule. Appellant also claims that the state committed prosecutorial misconduct by repeatedly misstating the evidence. We affirm.

FACTS

On the night of March 1, 2019, G.F. was sitting in the couch at home with her friend F.R. G.F.'s husband, appellant Aureliano Flores, came home from work and saw F.R.'s car in the driveway. He walked directly up to F.R. and punched him in the face multiple times. Appellant then took out a sheathed machete and hit F.R. with it. G.F. knew the machete was still sheathed because she could hear the leather cover hitting F.R. When appellant unsheathed the machete, G.F. stepped in between them. She tried to calm appellant down and asked him to stop or she would call the police. With the unsheathed machete still in his hand, appellant took G.F.'s phone and made the first 911 call. At the same time, G.F. tried to make a separate 911 call using F.R.'s phone because she was worried about appellant's safety if the police arrived and saw him with a weapon.

Appellant smacked the phone from G.F.'s hand and struck the phone with his machete. He hung up the first 911 call and threw the phone to the floor. Dispatch called back shortly thereafter. G.F. picked up the phone from the floor. She gave a description of appellant and informed the police that he had a machete. By the time G.F. got on the phone with dispatch, appellant had put his machete down.

At around 11:42 p.m., Shakopee Police received a report of a domestic assault in progress involving a male with a machete. The police responded immediately and arrived within five minutes. Upon arrival, officers found appellant at the front door and handcuffed him after matching him to the suspect's description. Officers then entered the living room

and saw the two victims, G.F. and F.R. G.F. had scratches on her chest. She told the police that they came from the appellant, but she was not sure whether it was with his hands or with the machete. F.R. had injuries on his face and right hand.

F.R. did not appear to speak or understand English, and he shook his head when one officer asked him whether he needed medical assistance or an ambulance. G.F. gave an initial account of the incident to the police in front of F.R. in English. The conversation lasted about 12 minutes in the living room before Officer L. followed G.F. into a separate room to take a formal recorded statement. F.R. remained in the living room with Officer F. and provided a recorded statement through a Spanish interpreter over the phone.

On March 4, 2019, respondent State of Minnesota charged appellant with assaulting G.F. and F.R. and damaging F.R.'s cellphone. In May, G.F. and F.R. filed two signed affidavits recanting their original recorded statements from the night of the assault. Contrary to the recorded statements to the police, G.F.'s affidavit stated that appellant did not hit F.R. on his face with the machete, he never "made physical contact while holding the machete with anyone," and "he never raised [the machete] in a threatening manner." G.F. further averred that he did not touch, push, or hit her, and the scratches on her chest were from her dog. G.F. claimed that she never feared that appellant would harm her, but she did fear for appellant's safety.

The state knew that G.F. intended to recant portions of her recorded statement. It filed motions in limine to admit the recorded statements by the appellant, G.F., and F.R. from the night of the incident. The district court granted the state's motions and admitted the statements as substantive evidence under Minn. R. Evid. 803(2) and 807.

The case proceeded to a jury trial in November 2021. The jury found appellant guilty of second-degree assault with a dangerous weapon under Minn. Stat. § 609.222, subd. 1 (2018); criminal damage to property under Minn. Stat. § 609.595, subd. 2(a)(1) (2018); fifth-degree assault with fear of bodily harm or death under Minn. Stat. § 609.224, subd. 1(1) (2018); and fifth-degree assault inflicting or attempting bodily harm under Minn. Stat. § 609.224, subd. 1(2) (2018). The district court sentenced appellant to 18 months in prison for his conviction of second-degree assault. This appeal follows.

DECISION

I. The district court did not abuse its discretion by admitting G.F.'s and F.R.'s out-of-court statements as excited utterances.

Appellant argues that the district court abused its discretion by admitting into evidence the body-worn-camera video that captured G.F's. and F.R.'s out-of-court statements under the excited-utterance exception.[1] We are not convinced.

We review a district court's evidentiary rulings, including a determination that a statement meets the requirements of a hearsay exception, for an abuse of discretion. *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019). "A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Hallmark*, 927 N.W.2d at 291. We will not set aside a district court's factual findings unless they are clearly erroneous. *State v. Prtine*, 784 N.W.2d 303,

[1] Appellant also challenges the district court's admission of the statements based on the residual exception to the hearsay rule. Because we conclude that the district court did not abuse its discretion by admitting the statements under the excited-utterance exception, we need not address the residual exception.

312 (Minn. 2010). Findings of fact are clearly erroneous if, based on the entire record, appellate courts are "left with the definite and firm conviction that a mistake occurred." *State v. Andersen*, 784 N.W.2d 320, 334 (Minn. 2010).

The Minnesota 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 certain exceptions allow hearsay to be admitted based on other indicia of reliability. *See* Minn. R. Evid. 803, 804. One such exception is for excited utterances. Minn. R. Evid. 803(2). To be admissible as an excited utterance, a statement must meet three requirements: (1) "there must be a startling event or condition," (2) "the statement must relate to the startling event or condition," and (3) "the declarant must be under a sufficient aura of excitement caused by the event or condition to [e]nsure the trustworthiness of the statement." *State v. Daniels*, 380 N.W.2d 777, 782 (Minn. 1986) (quoting Minn. R. Evid. 803(2) cmt.). To determine whether a declarant was under a sufficient aura of excitement, the district 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.* "The rationale stems from the belief that the excitement caused by the event eliminates the possibility of conscious fabrication and [e]nsures the trustworthiness of the statement." *Id.*

Appellant argues that both G.F.'s and F.R.'s recorded statements fail to satisfy the third requirement because (1) the lapse of time between the event and the statements was too long, giving both witnesses time to reflect and fabricate; (2) neither witness appeared sufficiently "under the aura of excitement" from the officers' body-worn camera footage;

and (3) F.R. heard G.F.'s initial account of the incident in English before giving his separate, individual formal statement. We address each argument in turn.

A. Lapse of time

The excited-utterance exception imposes no "fixed guidelines" for timing. *Daniels*, 380 N.W.2d at 782. However, "[a]s the time lapse between the startling event and subsequent statement increases[,] so does the possibility for reflection and conscious fabrication." *Id.* (quoting Minn. R. Evid. 803(2) cmt.); *see also State v. Hogetvedt*, 623 N.W.2d 909, 913 (Minn. App. 2001) ("The lapse of time between the startling event and the out-of-court statement is not always determinative."), *rev. denied* (Minn. May 29, 2001).

The district court found that "the statements captured on the body-worn-camera videos of both [G.F.] and [F.R.] were taken in the immediate aftermath of the event, both close in time and at the location of the event." The time stamp on Officer L.'s body-worn-camera footage shows that only six minutes had passed between the time of the incident and when G.F. started talking to the police at approximately 11:48 p.m. G.F.'s statement started at around 12:01 a.m., which was approximately 18 minutes after appellant assaulted him.

The time lapsed here is well within the range that caselaw has found a declarant to be under sufficient stress from the startling event. *See State v. Berrisford*, 361 N.W.2d 846, 850 (Minn. 1985) (holding that statements made 90 minutes after murder can still qualify as excited utterance).

B. Aura of excitement

Appellant next argues that neither declarant was under a sufficient aura of excitement, focusing primarily on G.F.'s and F.R.'s demeanors captured by the officers' body-worn cameras. Inferring the declarants' mental states based on their outward behavior is an issue of fact for the district court, which we review for clear error. *Prtine*, 784 N.W.2d at 312.

In its order on the motions in limine, the district court stated that it had reviewed the body-worn-camera footage from Officers L., F., and E. Officer L.'s camera footage captured her telling G.F. to "take a deep breath." G.F. was shaking and crying at times during her statement. This supports the district court's finding. And contrary to appellant's assertion that the location at which declarants made their statements is irrelevant, the fact that the victims remained in the same house where the assault just happened minutes before supports the district court's finding that they were still under the excitement of the event. While F.R. did not show visible signs of stress on camera, we find no clear error in the district court's finding that "both witnesses remained under the stress of assault."

C. Trustworthiness of the statements

Appellant also challenges the trustworthiness of G.F.'s and F.R.'s recorded statements because F.R. overheard G.F.'s account of the assault to the police for 12 minutes before giving his individual, formal statement.

By admitting F.R.'s recorded statement as an excited utterance, the district court made the implicit finding that his statement was trustworthy because he did not understand what G.F. said to the police in English. F.R. wrote his affidavit and testified at trial in

Spanish. When the police asked F.R. to provide a recorded statement, an officer had to ask G.F. to translate the request, supporting the inference that F.R. did not understand that request in English. F.R. also shook his head when an officer asked him whether he speaks English. This could mean that he understood that question but responded that he does not speak English by shaking his head. Alternatively, this could also mean that he did not understand that question at all. Either way, viewing the evidence in the light most favorable to the district court's findings, we conclude that the record supports the district court's implicit finding that F.R. does not speak or understand English to the extent that would allow him to falsify his statement based on what G.F. told the police in front of him.

F.R.'s individual, corroborating statement also indicates that his and G.F.'s statements are trustworthy. *See Berrisford*, 361 N.W.2d, 846, 850 (Minn. 1985) (noting that corroborating evidence may provide "circumstantial guarantees of trustworthiness" when assessing whether statement qualifies as excited utterance). F.R.'s statement not only matches G.F.'s, but also contains additional consistent details that G.F. never mentioned, such as where appellant concealed the machete when he first entered.

Furthermore, neither declarant had any motive to falsify their statements against appellant. To the contrary, G.F. demonstrated a strong interest in protecting her husband. During her recorded statement, she repeatedly told the police that she was worried about appellant's safety and did not want him to get in trouble.

Lastly, the district court explicitly stated in its order the basis upon which it found circumstantial guarantees of trustworthiness for G.F. and F.R.'s statements: Both witnesses gave the statements voluntarily and were not coerced; the police recorded the

statements, *see Hallmark*, 927 N.W.2d at 293 (stating that recorded statement is more trustworthy because it "removes any real dispute about what the declarant said") (citation omitted); and their statements were based on first-hand knowledge. We conclude that the district court did not abuse its discretion by admitting G.F.'s and F.R.'s recorded statements under the excited-utterance exception to the hearsay rule.

II. The state did not commit prosecutorial misconduct.

Appellant claims that the prosecutor committed misconduct by repeatedly misrepresenting the evidence at trial. We are not persuaded.

Appellant did not object to the instances of alleged prosecutorial misconduct at trial. We therefore review the prosecutor's statements under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 296 (Minn. 2006). The appellant bears the burden of satisfying the first two prongs of the plain-error test by showing an error that is plain. *Id.* at 302. An error exists when there is "[a] deviation from a legal rule during the district court proceedings unless the defendant has waived the rule." *United States v. Olano*, 507 U.S. 725, 725 (1993). "Mere forfeiture does not extinguish an error." *Id.* An error is plain if it "contravenes [caselaw], a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302.

Once the appellant shows plain error, the burden shifts to the state "to demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights." *Id.* (citing *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998); Minn. R. Crim. P. 31.02). If the court finds that any prong is not satisfied, it need not address the others. *State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017) (quotation omitted). If all three prongs of the plain-error

test are satisfied, we assess "whether [we] should address the error to ensure fairness and the integrity of the judicial proceedings." *Griller*, 583 N.W.2d at 740.

Here, appellant first alleges that the state committed prosecutorial misconduct when it misstated the evidence during its opening argument by claiming that both victims provided the same story to officers in separate rooms when the state knew that F.R. was present when G.F. explained the incident to the police for 12 minutes. During opening argument, the prosecutor told the jury:

> [T]hanks to modern technology, you are going to be able to hear from [F.R.] from 2019. You will hear his taped statement, and you will see what he told officers, and what he tells officers pretty much lines up with what [G.F.] tells the officers. He's going to—and remember these stories are told separately. [. . .] They tell officers these stories that are consistent with each other at the same time separately.

The record shows no misstatement by the prosecutor. The body-worn-camera footage captured that G.F. and F.R. gave their individual statements to different officers in separate rooms, consistent with the prosecutor's argument. The fact that F.R. was present when G.F. explained the incident to officers is irrelevant given the reasonable inference based on the evidence that F.R. does not speak or understand English.

Appellant next claims that the state impermissibly guaranteed the jury that, had G.F. and F.R. fabricated their statements before the police arrived, appellant would have let the jury know because he was there. During closing argument, the prosecutor said:

> I guarantee you if they came up with a story and they had time to talk about it and work out these details, I guarantee you when the [d]efendant testified he would have let us know about that, but it didn't happen and logic should tell you it didn't happen.

> There simply was not any time for them to meet and discuss this many details.

Appellant argues that the evidence directly contradicts the prosecutor's statements because appellant had no opportunity to know that G.F. explained the assault to the police in front of F.R. after the police had already arrested him. However, the prosecutor simply made a logical inference that there was no time for G.F. and F.R. to fabricate their stories *before* the police arrived with appellant still there. To the extent that appellant also alleges that the prosecutor's comment on appellant's lack of testimony prejudiced him, appellant did not identify any legal authorities to support his claim and therefore waived this argument. *Fontaine v. Steen*, 759 N.W.2d 672, 679 (Minn. App. 2009) ("A claim that is based on mere assertion and not supported by any argument or authorities is waived unless prejudicial error is obvious on mere inspection.").

Lastly, appellant contends that the prosecutor misstated the evidence by claiming that F.R. does not *understand* English when the record only supports that F.R. does not *speak* English. However, as discussed in Part I, the evidence supports a reasonable inference that F.R. does not speak, write, or understand English. At a minimum, we discern no clear error in the district court's implicit finding that F.R.'s understanding of English, if any, is insufficient to enable him to falsify his statement based on what G.F. said to the police.

Because appellant failed to carry his burden to demonstrate that the prosecutor committed any error, we conclude that the state did not commit prosecutorial misconduct.

Affirmed.