

*This opinion is nonprecedential except as provided by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
A23-1774**

State of Minnesota,
Respondent,

vs.

Fortino Zarate,
Appellant.

**Filed September 23, 2024
Affirmed
Bjorkman, Judge**

Mower County District Court
File No. 50-CR-22-1814

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

Kristen Nelsen, Mower County Attorney, Austin, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Worke, Judge; and Larson, Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant challenges his convictions of third- and fifth-degree assault, arguing that the district court abused its discretion by instructing the jury that it would not have access

to audio recordings while deliberating and, even if he did not preserve the issue with an objection, the instruction was plainly erroneous. We affirm.

FACTS

The evening of August 13, 2022, J.R. (husband) and K.R (wife) were out drinking with some friends, including C.T. (friend). At the bar, they saw appellant Fortino Zarate, whom friend did not know but husband and wife knew as “Tino,” and Zarate’s brother, Albert Zarate, whom they all knew.¹ They did not interact with Zarate or Albert at the bar.

Around closing time, husband, wife, and friend left the bar. Husband walked toward their vehicle as wife and friend said goodbye. Wife saw Albert approach husband from behind and yelled out; husband turned, and Albert punched him in the face. The two men fell to the ground, fighting. Friend moved toward husband to help, but another man tripped him, causing him to fall. When friend looked up, the man punched him in the eye. Friend began fighting back, but the man went over to where Albert and husband were fighting and kicked and punched husband in the head and body. At one point, husband saw the second man, recognizing him as Zarate. Wife started to call 911 but dropped her phone. She then jumped on Zarate to get him off husband, and Zarate turned and ran away. Meanwhile, Zarate and Albert’s brother Z. arrived at the scene and separated husband and Albert. Police responded shortly thereafter and followed husband and wife to the hospital.

Police spoke with husband and wife briefly at the hospital and then again several hours later at their home. Husband and wife told police that Albert and his brother

¹ Because the brothers share a surname, we refer to Albert by his first name.

“Zortino” had attacked husband. They did not provide a physical description of the second assailant, but wife said that it was not Z. or the fourth brother, J.

Police initially arrested Albert and Z. On August 17, husband and wife called police and said they heard that Z. was arrested but that they believed it was a mistake; they said it was Zarate, not Z., who attacked husband with Albert. Z. was released.

On August 19, police conducted a photo lineup with wife and friend.² Wife identified Zarate as the second assailant, stating that her identification was “certain.” Friend also identified Zarate as the second assailant and said the man who hit him was called “Fortino.” But friend acknowledged that he was not certain and had looked at social media to help him figure out who hit him. And there were discrepancies between his recollection of Zarate’s appearance and the photo.

Zarate was charged with third-degree assault of friend and third-degree assault of husband.³ During the three-day trial, husband, wife, and friend identified Zarate as the man who had attacked friend and then joined Albert in attacking husband. The jury also heard an audio recording of the photo-lineup procedure in which friend identified Zarate.

At the close of trial, the district court discussed jury instructions with counsel. During that discussion, the district court agreed to add a count for and instruct the jury on fifth-degree assault of husband, as a lesser-included offense. The court also raised the issue of “what exhibits the Jury will have” during deliberations, stating that the jury would have

² The district court excluded the photo lineup itself but permitted testimony about the lineup procedure and admitted the audio recording of the procedure.

³ Albert was also charged with third-degree assault of husband.

documents and photographs but not “the audios that were submitted because, of course, [the jurors] have no way to play them, anyway.” Neither party objected.

During closing argument, defense counsel referenced the audio recording of friend’s photo-lineup identification, arguing that friend’s uncertainty undermined friend’s courtroom identification of Zarate. Counsel told the jury: “You listened to the audio recording. . . . You can listen to that again during your deliberations.” The district court interrupted and called for a bench conference:

DISTRICT COURT: You just told them they could listen to the audio during deliberations. They—they can’t. They won’t have it.

DEFENSE COUNSEL: They—they can—they can request to—to listen to it.

DISTRICT COURT: I don’t want to encourage that.

DEFENSE COUNSEL: Okay.

DISTRICT COURT: Because if they ask for that, what I am going to tell them, most likely, is you need to rely on your memory. They don’t automatically get to hear it if they request it. In fact, every time it has ever been requested, and every trial I did as an attorney, it was denied.

DEFENSE COUNSEL: Okay.

DISTRICT COURT: I mean—but, anyway, I—

DEFENSE COUNSEL: I am sorry, Judge.

DISTRICT COURT: Yeah.

DEFENSE COUNSEL: That’s not been my experience, so I didn’t mean any—

DISTRICT COURT: No. Well, but you made it sound like they would have it back there with them, and they can listen to it if they wanted to. So I just want to make sure they understand they are not going to have it back there.

DEFENSE COUNSEL: Do you want me to correct myself, or do you want to say anything, or—

DISTRICT COURT: However you want to do it.

DEFENSE COUNSEL: Okay.

DISTRICT COURT: I—I will do it, if you want me to.

DEFENSE COUNSEL: No, I will just—I will handle it.

DISTRICT COURT: Okay.

When counsel resumed his argument, he asked the jury to “disregard [his] comment about listening to the recording again.”

After closing arguments, the district court gave the jury several clarifying instructions, including:

As far as any exhibits that you will have back there, that came up a little bit in closing when I interrupted at the one point, you will have all of the hard copies of exhibits, the photographs, any documents, back there with you. The audio recordings you won’t have. Well, and the truth is you would have no way to play them in the Jury room, anyway. So you won’t have those in the room with you.

The jury found Zarate guilty of third-degree assault of friend and fifth-degree assault of husband but acquitted him of third-degree assault of husband. The district court sentenced him to 24 months’ imprisonment for the third-degree offense.

Zarate appeals.

DECISION

A district court has “broad discretion to formulate appropriate jury instructions” but must not confuse or mislead the jury or materially misstate the law. *State v. Taylor*, 869 N.W.2d 1, 14-15 (Minn. 2015). “Normally, an appellate court reviews a district court’s jury instructions for an abuse of discretion.” *State v. Lagred*, 923 N.W.2d 345, 348 (Minn. App. 2019). But “an unobjected-to jury instruction is subject to plain-error analysis.” *State v. Watkins*, 840 N.W.2d 21, 27 (Minn. 2013).

Zarate assigns error to the district court’s instruction to the jury regarding the audio recordings, arguing that (1) he preserved an objection to the instruction; and (2) even if he did not, it was plainly erroneous under Minn. R. Crim. P. 26.03, subd. 20 (2022).⁴ We address each argument in turn.

Objection

Zarate contends that he objected to the district court’s instruction during the bench conference that took place during defense counsel’s closing argument. We discern no such objection at that or any other point during the trial. Before closing arguments, the district court told counsel that the jury would not have any audio recordings in the jury room; defense counsel did not object. When the district court interrupted his closing argument as he was telling the jury that it would have access to audio recordings during deliberations,

⁴ In 2023, the supreme court amended Minn. R. Crim. P. 26.03, subd. 20, to require district courts to permit juries to access audio exhibits in the deliberation room, with exceptions including when it is “not feasible” to do so. *Order Promulgating Amendments to the Minnesota Rules of Criminal Procedure*, No. ADM10-8049 (Minn. Feb. 24, 2023). Because Zarate’s trial took place before the amendment was effective, it is undisputed that the new version of the rule does not apply here.

defense counsel did not object. Rather, he expressly acquiesced in the court's ruling that his statement was inaccurate and told the jury to disregard it. When the court thereafter gave the clarifying instruction that Zarate now assigns as error, defense counsel again did not object. And when the district court asked whether either party had "any errors, omissions, or corrections in the instructions that counsel would like to call to the Court's attention" before it dismissed the jury to deliberate, defense counsel said no. On this record, Zarate failed to preserve any challenge to the district court's instruction and must show prejudicial plain error to be entitled to relief.

Plain Error

Under the plain-error standard, an appellant must demonstrate (1) there was error, (2) the error was plain, and (3) the error affected the appellant's substantial rights; even then, we may reverse only if the error undermines the "fairness, integrity, or public reputation of judicial proceedings." *Taylor*, 869 N.W.2d at 15 (quotation omitted). An error is plain if it "contravenes a rule, case law, or a standard of conduct, or when it disregards well-established and longstanding legal principles." *State v. Scruggs*, 822 N.W.2d 631, 642 (Minn. 2012) (quotation omitted).

Zarate's plain-error challenge rests on Minn. R. Crim. P. 26.03, subd. 20. Under that rule, a district court "must permit received exhibits or copies, except depositions and audio or video material, into the jury room." Minn. R. Crim. P. 26.03, subd. 20(1). The court "may allow the jury to review specific evidence," but "[a]ny jury review of . . . audio or video must occur in open court." *Id.*, subd. 20(2)(b).

Zarate contends the district court contravened this rule by telling the jury that it would not have audio recordings because this instruction “shut down” any possible request from the jury to hear the recordings again. But the district court’s instruction accurately stated the substance of Minn. R. Crim. P. 26.03, subd. 20(1)—that the jury would not have access to the audio recording in the jury room. And while Minn. R. Crim. P. 26.03, subd. 20(2)(b), affords a district court discretion to allow a deliberating jury to review audio evidence in the courtroom, nothing in that rule requires the court to advise the jury of that option. Nor does Zarate identify any caselaw requiring such an instruction. Instead, he contends the challenged instruction misled the jury to believe it could not ask to review the audio recordings. The record defeats this contention. Immediately after giving the challenged instruction, the district court told the jury, “If you are confused by anything in the instructions or in the verdict forms while you are deliberating, let the bailiffs know, and then we can alleviate the confusion.”

Zarate also asserts that the district court improperly “preemptively decide[d]” whether it would grant a jury request to listen to audio exhibits. But nothing in the district court’s instruction told the jury that it could not listen to those exhibits; the instruction addressed only what the jury would have with it in the deliberation room.

Finally, we are mindful of the context in which the district court gave the challenged instruction. It did not do so until defense counsel inaccurately told the jury that it would have the audio recordings during its deliberations. While defense counsel then told the jury to “disregard” his statement, he did not tell the jury that it would not have the recordings. The challenged instruction simply clarified that matter for the jury. On this

record, Zarate has not demonstrated that the district court committed instructional error, plain or otherwise.

Moreover, Zarate has not demonstrated that the instruction affected his substantial rights. To do so, he must show that it was prejudicial, meaning there is a “reasonable likelihood” that the instruction had a “significant effect” on the jury verdict.⁵ *Watkins*, 840 N.W.2d at 28. “An erroneous jury instruction will not ordinarily have a significant effect on the jury’s verdict if there is considerable evidence of the defendant’s guilt.” *State v. Kelley*, 855 N.W.2d 269, 283-84 (Minn. 2014).

Zarate contends the instruction prejudiced him because it deprived the jury of an opportunity to review “critical evidence” on the “central disputed issue of identity”—the audio recording of friend’s photo-lineup identification—and the state’s evidence was “not strong” on that issue. Identification was a critical issue at trial, but Zarate understates the strength of the state’s identification evidence. Husband and wife were consistent in all of their statements to police that the man who attacked friend and joined Albert in attacking husband was Zarate, whom they both knew. They sometimes identified him by name, sometimes identified his image in a photo lineup, sometimes called him “Zortino” because they knew him as “Tino,” and sometimes said that it was one of Albert’s three brothers but not J. or Z. But all of these descriptions point unerringly to Zarate. Although friend’s

⁵ We observe that, even if Zarate had objected to the challenged instruction, he would have been required to make essentially the same showing of prejudice to obtain a reversal. *See Watkins*, 840 N.W.2d at 27 n.3 (noting that objected-to error that does not implicate constitutional rights warrants reversal only if the appellant shows “that there is a reasonable possibility that the error significantly affected the verdict” (quotation omitted)).

photo identification was more equivocal, and he acknowledged some outside influences in determining the identity of an assailant whom he did not know personally, he also told police that he was confident that Zarate was the man who attacked him and then husband. And all three identified Zarate as such in court. Given this evidence, it is not reasonably likely that rehearing the audio recording of friend's photo-lineup identification would have had any impact on the jury's verdict.

In sum, Zarate failed to preserve an objection to the district court's instruction that the jury would not have audio recordings in the deliberation room and has not demonstrated that giving the instruction constitutes prejudicial plain error.

Affirmed.