STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0596

State of Minnesota,
Respondent,

vs.

Hector Rufino Vergara-Sanchez,
Appellant.

Filed February 12, 2018
Affirmed in part, reversed in part, and remanded
Larkin, Judge

Hennepin County District Court
File No. 27-CR-15-30451

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Bratvold, Judge; and Florey, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant challenges his conviction of first-degree controlled-substance sale, arguing that the district court erred by admitting a squad-car video recording into evidence, by allowing the jury to review the recording during deliberations, and by misstating the law in its jury instruction regarding aiding and abetting. Appellant also argues that he is entitled to resentencing under the Drug Sentencing Reform Act (DSRA). Because the district court did not abuse its discretion by admitting the recording into evidence, because any error in allowing the jury to review the recording was harmless, and because the district court did not err in instructing the jury, we affirm in part. But because appellant is entitled to resentencing under the DSRA-amended sentencing grid, we reverse his sentence and remand for resentencing.

FACTS

Respondent State of Minnesota charged appellant Hector Rufino Vergara-Sanchez with first-degree controlled-substance sale. The complaint alleged that on October 23, 2015, officers conducted surveillance near 34th Street and Longfellow Avenue in Minneapolis after receiving a tip from a confidential reliable informant (CRI) that a drug transaction involving a large amount of methamphetamine was going to take place. The CRI described one of the individuals involved in the transaction, reported that he would be driving a silver minivan, and identified its license plate number. Officers observed a minivan near 34th Street and Cedar Avenue. The minivan and its driver matched the CRI's descriptions.

The minivan parked at 34th Street and Longfellow Avenue. Officers observed a red SUV pull up next to the minivan, make contact with its driver, and park nearby. The minivan's driver got out of the minivan and into the backseat of the red SUV. Officers approached and arrested the driver of the minivan, whom they identified as Luis Antonio Pimentel; the driver of the red SUV, whom they identified as Vergara-Sanchez; and the passenger in the red SUV, whom they identified as Moisius Perez-Ochoa. Vergara-Sanchez was the registered owner of the red SUV. The officers searched the red SUV and found a bag on the floor behind the driver's seat containing 465 grams of methamphetamine in a plastic container. Officers also found 15.4 grams of methamphetamine in Pimentel's jacket.

The case was tried to a jury. During trial, the state added a charge of first-degree controlled-substance possession. The jury found Vergara-Sanchez guilty of the sale and possession charges, and Vergara-Sanchez moved for a new trial. The district court denied Vergara-Sanchez's new-trial motion, entered judgment of conviction on the first-degree controlled-substance-sale offense, and sentenced him to a 94-month prison term. Vergara-Sanchez appeals.

D E C I S I O N

I.

Vergara-Sanchez contends that the district court erred by admitting, over his objection, "an audio and visual recording of statements made while [he], Perez-Ochoa and Pimentel were in a police squad car," arguing that the recording contains hearsay.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Minn. R. Evid. 801(a). If an "'out of court statement is being offered for some other purpose, such as to prove knowledge, notice or for impeachment purposes, it is not hearsay.'" *State v. Hanley*, 363 N.W.2d 735, 740 (Minn. 1985). Hearsay is inadmissible unless an exception to the hearsay rule applies. Minn. R. Evid. 802; *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006).

"Evidentiary rulings rest within the sound discretion of the district court, and [appellate courts] will not reverse an evidentiary ruling absent a clear abuse of discretion." *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). A district court abuses its discretion when its ruling is "based on an erroneous view of the law or is against logic and the facts in the record." *State v. Bustos*, 861 N.W.2d 655, 666 (Minn. 2015) (quotation omitted).

The statements at issue here were recorded in a police squad car where officers detained Vergara-Sanchez, Perez-Ochoa, and Pimentel after arresting them. The recording shows the view out of the front of the squad car. The recording depicts officers stopping the red SUV, handcuffing its three occupants, bringing two of the occupants back to the squad car, searching the third occupant, and finding something in his jacket, which turned out to be methamphetamine. The officer who performed the search testified that Pimentel was the third occupant. Law enforcement placed Pimentel in the squad car with Vergara-Sanchez and Perez-Ochoa.

The recording also includes audio from inside the squad car. The recording captured the following conversation, which was translated from Spanish at trial by an interpreter while the recording was played for the jury:

> Don't be saying that I knew. It f—ed up. It's still not coming out. Man, was it there.
>
> Yes? Yes. They found it? Yes, they found it, yup, hell. Don't screw around, man. No. You f—ed up.
>
> No, what the f—k. You got fingered.
>
> That f—er ain't worth s—t, man. You got fingered, man, yeah.
>
> You screwed me. Me? Me? I don't think so friend. No man.
>
> I'm worse off, dude. I got my old lady and kids here, dude. Me too, man. I got papers, dude. Huh?
>
> I got papers, dude. Well, me too. And where, they got it? We're f—ed.
>
> No, well, you f—ed up. Man, but, well. You, since last night, since last night you knew it was there, you knew, you knew the gig.
>
> They were already waiting, f—er. How am I going to know, man.
>
> And how am I going to know, man, I swear by my daughters I didn't. Don't make me take the fall because I'm not going to say nothing.

The officer who provided foundation for the recording testified that he did not overhear the conversation in the squad car and could not identify the speakers.[1]

[1] None of the occupants of the squad car testified at trial.

The district court overruled Vergara-Sanchez's objection to the recording, reasoning as follows:

> I'm going to find that first of all these statements are not even assertions, I've got the translation, and if they are not assertions they can't be offered for the truth and therefore they're not hearsay so I find there's no hearsay issue. And I also, in getting the translation also accept that they are not being offered for the truth, they are being offered to show knowledge. That does seem clear in the sense that they are all somehow involved.

The record supports the district court's reasoning. The prosecutor discussed the recording in his closing argument as follows:

> It's true the voices were not able to be identified. Again, think of the circumstances of these individuals and think about the translation of their conversation that you heard. It was three men, all three, Mr. Vergara-Sanchez, Mr. Pimentel, and Mr. Perez-Ochoa, all in the back of that car and that conversation was clearly between people who *knew* what was going on and they *knew* that they had been caught. It was serious, they were panicked, and that's because they *knew* that there was a pound of methamphetamine in the back of that car.

(Emphasis added.)

The prosecutor described the recording as a "conversation between three individuals who knew that they were caught and who knew what they were caught for." In his rebuttal argument, the prosecutor argued:

> While we don't know who said what exactly, things like man was it there, yes, yes they found it, yes they found it, hell, and you, since last night you *knew* it was there, you *knew*, you *knew* the gig. These statements show the state of mind of these individuals. These three men are all on the same page, all aware of what they were there to do and that was to do a drug transaction.

(Emphasis added.)

The prosecutor's statements show that the recording was offered to prove knowledge, as the district court reasoned. Because the recorded statements were offered to prove knowledge, they were not hearsay, and the district court did not abuse its discretion by admitting the recording into evidence.

II.

Vergara-Sanchez contends that the district court "prejudicially erred by allowing the jury to twice review the statements recorded in the police squad car during deliberations."

At the beginning of deliberations, the jury asked to review the squad-car recording. Defense counsel objected to the jury's request, arguing that it "puts too much of an emphasis on that exhibit and, you know, obviously I had a problem with the admission of it in the first place so this would exacerbate the problems that were inherent in the Court's decision to allow it to be played in the first place." The district court responded, "All right. Well, for all the reasons I admitted it in the first place I will—I won't give them a transcript but I will replay just that portion of the video and have [the interpreter] translate just as he did before."

When the jury returned to the courtroom to review the recording, the jury's foreperson informed the district court that the jury "would like to hear [the recording] once without the translation and then hear it back with it just so we can have a continuous flow." The district court played the portion of the recording containing the squad-car conversation without translation and then played that same portion of the recording while the interpreter

translated. Defense counsel did not object to the recording being played without translation.

The district court "may allow the jury to review specific evidence." Minn. R. Crim. P. 26.03, subd. 20(2). "Any jury review of . . . audio or video material, must occur in open court." *Id.*, subd. 20(2)(b). In determining whether to allow the jury to review specific evidence, the district court "should" consider "(i) whether the material will aid the jury in proper consideration of the case; (ii) whether any party will be unduly prejudiced by submission of the material; and (iii) whether the material may be subjected to improper use by the jury." *State v. Kraushaar*, 470 N.W.2d 509, 515 (Minn. 1991). This court reviews the decision to grant a jury's request to review evidence for an abuse of discretion. *State v. Everson*, 749 N.W.2d 340, 345 (Minn. 2008).

In announcing that it would allow the jury to review the recording, the district court did not mention or discuss the three *Kraushaar* factors. Instead, it stated that it was allowing the jury to review the recording for "all the reasons [it] admitted it in the first place," suggesting that it did not consider those factors.

It is concerning that the district court simply relied on its earlier evidentiary ruling as the basis to allow the jury to review the recording, apparently without considering the *Kraushaar* factors. "When a jury makes a request such as this, the court 'should' consider [the] three [*Kraushaar*] factors." *Id.* (citing *Kraushaar*, 470 N.W.2d at 515). Moreover, the absence of an on-the-record analysis of the *Kraushaar* factors makes appellate review difficult. *Id*. at 346. However, even if the district court erred in this regard, the error would be subject to harmless-error analysis. *See id.* (applying harmless-error analysis).

When an error does not implicate a constitutional right, the error is harmless unless it "substantially influenced the jury's verdict." *State v. Morrow*, 834 N.W.2d 715, 729 n.7 (Minn. 2013). The defendant has the burden of proving a nonconstitutional error was prejudicial. *See State v. Anderson*, 763 N.W.2d 9, 12 (Minn. 2009) (stating that the defendant has the burden to prove both that the district court abused its discretion in admitting evidence and that the defendant was thereby prejudiced).

Vergara-Sanchez argues that allowing the jury to review the recording was prejudicial because "the recorded statements were erroneously admitted," "[w]hen the recorded statements were received during trial, their presentation was already highlighted," "the recorded statements were probably the state's most compelling evidence of a drug transaction," and "the recorded statements did not echo other evidence in the trial."

As discussed above, the district court properly admitted the recording. In making that evidentiary ruling, the district court noted that defense counsel was free to argue that the jury should not give the recording weight because the speakers in the recording are unidentified. Defense counsel did so in his closing argument, arguing that "nobody knows who was talking, nobody knows if all three of them were talking or if two of them were talking," that there was "no evidence" regarding which of the three occupants of the squad car were talking, and that the jury would have to improperly speculate to determine which of the occupants of the squad car participated in the conversation. Defense counsel also noted that Vergara-Sanchez and Perez-Ochoa did not talk to each other when they were the only occupants of the squad car and that the conversation did not begin until Pimentel

entered the squad car after law enforcement searched him and found methamphetamine on him.

Moreover, the recording was not obviously incriminating. Vergara-Sanchez argues that the recorded statements imply that at least two of the occupants of the squad car knew each other, were aware that police had found drugs, and knew that they were in trouble. But, again, it is unclear which of the occupants spoke in the recording.

Vergara-Sanchez also argues that the jury's review of the recording was prejudicial because one of the presentations of the recording "was different than in the trial." However, Vergara-Sanchez did not object to the recording being played without translation by the Spanish interpreter,[2] and Vergara-Sanchez does not explain how the different presentation prejudiced him.

For these reasons, it does not appear that the recording substantially influenced the jury's verdict. Thus, any error in allowing the jury to review the recording was harmless and therefore does not provide a basis for relief.

III.

Vergara-Sanchez contends that the district court's aiding-and-abetting jury instruction was erroneous because it "allowed the jury to find [him] guilty for merely being present when a crime was committed."

[2] Unobjected-to trial errors are reviewed under the plain-error standard of review. *Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011). We do not engage in plain-error review here because we ultimately conclude that the error, if any, was harmless.

We review a district court's jury instructions for an abuse of discretion. *State v. Huber*, 877 N.W.2d 519, 522 (Minn. 2016). District courts are entitled to considerable latitude when selecting language for jury instructions, but a jury instruction must not materially misstate the law. *State v. Carridine*, 812 N.W.2d 130, 144 (Minn. 2012). Appellate courts "review the jury instructions as a whole to determine whether the instructions accurately state the law in a manner that can be understood by the jury." *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014).

When a defendant fails to object to jury instructions at trial, this court reviews those instructions for plain error. *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012). "Under the plain-error doctrine, the appellant must show that there was (1) an error; (2) that is plain; and (3) the error affected substantial rights." *Huber*, 877 N.W.2d at 522. "An error is plain if it was clear or obvious," and an error is clear or obvious if the error "contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotation omitted). "An erroneous jury instruction affects a defendant's substantial rights if the error was prejudicial and affected the outcome of the case." *Huber*, 877 N.W.2d at 525.

If the appellant satisfies the first three prongs of the plain-error doctrine, a reviewing court may correct the error only if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation omitted). If we conclude that any prong of the plain-error analysis is not satisfied, we need not consider the other prongs. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

Vergara-Sanchez asserts that he "objected to the [district] court's proposed aiding and abetting instruction" at trial, noting that defense counsel stated that he had a problem with the court's proposed instruction because he "thought that there had to be a [scienter] element of it in that defendant has to have knowledge of the wrongdoing that is ongoing by somebody else." However, Vergara-Sanchez acknowledges that the district court "addressed [his] concern by adding definitions for 'intentionally' or 'with intent to'" to the proposed instruction. Defense counsel did not object to the revised instruction. We therefore review for plain error.

Minnesota's aiding-and-abetting statute provides that "[a] person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1 (2014).

The district court gave the following aiding-and-abetting instruction:

> The defendant is guilty of a crime committed by another person when the defendant has played an intentional role in aiding the commission of the crime and made no reasonable effort to prevent the crime before it was committed.
>
> Intentional role includes aiding, advising, hiring, counseling, conspiring with or procuring another to commit the crime. "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or believes that the act performed by the actor, if successful, will cause that result. In addition, the actor must have knowledge of those facts which are necessary to make the actor's conduct criminal.
>
> A defendant's presence constitutes aiding if, first, the defendant knew his alleged accomplice or accomplices were going to or *were committing* the crime of sale or possession with the intent to sell methamphetamine, and second, the defendant intended that his presence and actions aid the commission of the crime. If the defendant aided, advised,

> hired, counseled or conspired with another or otherwise procured the commission of a crime by another person, and the crime was committed, the defendant is guilty of the crime.

(Emphasis added.)

Vergara-Sanchez argues that the district court's instruction conflicted with settled law because the "addition of the language 'or were committing' expand[s] the aiding and abetting liability to include cases where the defendant lacks advance knowledge but is present and thus 'knows' that his accomplices 'were committing' a crime."

This court recently upheld a similar aiding-and-abetting jury instruction in *State v. Smith*, holding that "[a] district court does not err by instructing the jury that the knowledge requirement for accomplice liability under Minn. Stat. § 609.05 (2012) is satisfied if the defendant knew the alleged accomplices 'were going to or were committing a crime.'" 901 N.W.2d 657, 659 (Minn. App. 2017), *review denied* (Minn. Nov. 14, 2017). This court reasoned that the aiding-and-abetting statute requires a defendant "to possess knowledge of the crime *before the defendant intentionally aids in its commission*" and that the intent requirement in the statute adequately protects defendants from being held liable for merely being present at a crime. *Id.* at 662-63. Given this court's decision in *Smith*, the district court's aiding-and-abetting jury instruction was not improper.

IV.

Lastly, Vergara-Sanchez contends that "[b]ecause this case was not final when the Minnesota Drug Sentencing Reform [Act] took effect, the case should be remanded for re-sentencing" under *State v. Kirby*. 899 N.W.2d 485, 486 (Minn. 2017) ("The amelioration doctrine requires the resentencing of a person whose conviction was not yet final on the

effective date of section 18(b) of the Drug Sentencing Reform Act."). He further argues that "[g]iven that the district court previously indicated that it believed that [he] deserved a bottom-of-the-box sentence, [he] is entitled to have his sentence reduced to reflect that belief." The state does not oppose a remand for resentencing under *Kirby*, but it disagrees with Vergara-Sanchez's suggestion that the district court must sentence at the "bottom of the box" on remand.

We agree that Vergara-Sanchez is entitled to resentencing under *Kirby*. However, the district court has discretion to determine the appropriate sentence within the presumptive range of the DSRA-amended sentencing grid on remand. *See State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998) (noting that the district court "is in the best position to evaluate the offender's conduct and weigh sentencing options").

Conclusion

Because the district court did not abuse its discretion by admitting the squad-car video recording into evidence, because any error in allowing the jury to review the recording was harmless, and because the district court did not err in instructing the jury, we affirm Vergara-Sanchez's conviction of first-degree controlled-substance sale. But because Vergara-Sanchez is entitled to resentencing under the DSRA-amended sentencing grid, we reverse his sentence and remand for resentencing.

Affirmed in part, reversed in part, and remanded.