This opinion is nonprecedential except as provided by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
A19-1511

State of Minnesota,
Respondent,

vs.

Joshua James Allen,
Appellant.

Filed January 11, 2021
Affirmed
Florey, Judge

Freeborn County District Court
File No. 24-CR-18-1015

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

David J. Walker, Freeborn County Attorney, Albert Lea, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Florey, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

Appellant challenges his aggravated-robbery conviction, arguing that the prosecutor committed misconduct by eliciting testimony from the responding officer about the victim's prior out-of-court statements and that the district court erred in determining it lacked jurisdiction to consider his untimely motion for a new trial. We affirm.

FACTS

Appellant Joshua James Allen was charged with aggravated robbery, ineligible person in possession of a firearm, and fleeing a peace officer in a motor vehicle. During appellant's three-day trial, the state called five witnesses: (1) the victim, C.S.; (2) the victim's brother and housemate, J.S.; (3) Officer Nathan Idstein who was the responding officer that interviewed the victim shortly after the 911 call; (4) Detective Julie Kohl, who investigated the victim's home, photographed his injuries, and later searched the car appellant had been driving; and (5) Officer Adam Hamberg who was involved in the squad-car pursuit and subsequent arrest of appellant.

The victim testified that on the night of the robbery, appellant and a mutual friend, Tony Viramonh, knocked on the victim's back door around 9:00 p.m. When he opened the door, Viramonh "rushed" him, grabbed his neck, and pushed him up against the wall while appellant hit him with a handgun. At some point, the men took "more than a couple hundred bucks" from the victim's pockets. The victim claimed he could not remember what either assailant said during the assault but denied that there was any "talk of drugs" or "money owed for drugs." The men eventually went to the living room, and appellant told the victim to take the mounted television off the wall and to put it into the vehicle outside, a white SUV. According to the victim, he was "not listening," so appellant fired a shot into the floor. The victim then unhooked the television and loaded it into the SUV.

After hearing the gunshot, the victim's brother, who was upstairs, called 911. According to the victim's brother, after coming downstairs he noticed the large television was missing from the living room and, through the window, saw people outside loading it

into the back of a white SUV. Shortly thereafter, the victim came back through the backdoor looking "shell shocked" and told his brother, "Josh and Tony just robbed me."

Based on the 911 report from the victim's brother, law enforcement attempted to initiate a traffic stop of the white SUV. After a 25-mile pursuit, the SUV pulled over. The car's occupants—appellant and Viramonh—were arrested. Later, when the impounded SUV was searched, officers found the missing television, a generic gun holster, a drug pipe, plastic baggies, and a scale with white powder residue on it, as well as a spiral-bound notebook with a page heading of "pay up" followed by a list of names and numbers, including one entry with the same first name as C.S. with "30" next to it.

Shortly after the robbery, the victim was interviewed by law enforcement. The victim testified that he could "faintly remember" his conversation with responding Officer Idstein but could provide no details on what was said. Officer Idstein, however, testified that during that conversation, the victim admitted "there had been a drug deal in Austin that had gone bad from a party . . . . And that's why [appellant and Viramonh] had come over to rob him." Officer Idstein's testimony regarding the victim's initial report, and the change in the victim's version of events during the interview itself and later at trial, was referenced by both the state and defense counsel during closing argument.

In a mixed verdict, appellant was found guilty of first-degree aggravated robbery but not guilty of being an ineligible person in possession of a firearm.[1] Appellant later

[1] Before trial, appellant pleaded guilty to the fleeing-an-officer charge.

moved for a new trial based on newly discovered evidence. The district court denied appellant's motion as untimely. This appeal follows.

DECISION

I. Prosecutorial misconduct

Appellant argues that the prosecutor committed misconduct by eliciting and later referencing inadmissible testimony from the responding officer. We review unobjected-to prosecutorial misconduct under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 297-99 (Minn. 2006). This type of plain-error review has three requirements: (1) the prosecutor's unobjected-to act must constitute error; (2) the error must be plain; and (3) the error must affect the defendant's substantial rights. *Id.* at 302. An error is plain if, under current law, it is clear or obvious. *Johnson v. United States*, 520 U.S. 461, 467 (1997). The defendant has the burden of showing error that is plain. *Ramey*, 721 N.W.2d at 302. If plain error is established, the burden shifts to the state to show that the error did not affect the defendant's substantial rights. *Id.*

The testimony in dispute concerns the victim's prior statements to Officer Idstein during an interview in his squad car regarding the possible motive for the robbery:

> [Prosecutor:] And what did [the victim] tell you about what had happened? Do you recall that?
>
> [Officer Idstein:] He told me a pretty detailed story about what had occurred. He started off by telling me that he didn't know why Josh Allen or Tony Viramonh had come over to his house, and I instantly called his bluff on that. That is not typical; people don't just come over to a house and rob somebody at gunpoint and not know what is going on. So I told [C.S.] I didn't – right away, I didn't believe what he was saying. And if he was going to tell me what happened, then he needed to be

> honest. So he said that–he acknowledged that he was being untruthful, and then he started over the narrative. And he talked about that there had been a drug deal in Austin that had gone bad from a party that Tony Viramonh and Josh Allen–as well as he knew. And this individual's name was "Ben." Ben had apparently sold them bad–Josh and Tony bad drugs. And that's why Josh and Tony had come over to his house to rob him.

Appellant argues that these prior out-of-court statements regarding what the victim reported to Officer Idstein are hearsay and do not meet the threshold trustworthiness requirement of the residual exception under Minn. R. Evid. 807.

Even if we assume that this testimony by the responding officer constituted 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. We need not determine whether the admission of these prior out-of-court statements was erroneous because any error here was not plain, nor did it affect appellant's substantial rights.

The responding officer's brief testimony regarding the victim's statements about prior drug involvement went only to appellant's motive, not an element of the convicted offense. Further, there was other significant evidence suggesting that this was a drug-motivated crime—namely the notebook with the victim's name and an amount due under the heading "pay up" along with a list of other names, dates, and amounts due, all found in the same vehicle driven by appellant where a scale with white powder residue and other

drug paraphernalia was discovered. This evidence was presented at trial in conjunction with repeated references to the victim's ongoing methamphetamine use and prior drug-possession convictions, both of which were utilized by defense counsel to attack the victim's credibility and bolster appellant's own theory of the case. Indeed, defense counsel's failure to object to Officer Idstein's testimony and repeated references to the victim's inconsistent statements to law enforcement may have been trial strategy. *See State v. Washington*, 693 N.W.2d 195, 205 (Minn. 2005) ("We do not agree that the district court must, or even should, interfere with the trial strategy of the defendant.").

Given the extensive references by both parties to the victim's prior drug involvement and the substantial evidence linking appellant to the robbery—including two eye witnesses to the incident, a bullet hole and facial injury matching the victim's description of events, and drug paraphernalia found in the car appellant was driving—it is highly unlikely that any error by the prosecutor in eliciting testimony about the victim's initial report suggesting that this was a drug-deal-related robbery affected appellant's substantial rights.

II. Motion for new trial

Appellant also argues that the district court abused its discretion in denying his motion for a new trial on the basis of newly discovered evidence. A district court may grant a new trial in the interests of justice or any of the other six grounds for a new trial articulated in Minnesota Rule of Criminal Procedure 26.04, subd. 1(1). The motion "must be based on the record" or a party may submit an affidavit or sworn statement containing pertinent facts not in the record. Minn. R. Crim. P. 26.04, subd. 1(2). The motion for a

new trial must be served within 15 days after the verdict and must be heard within 30 days after the verdict, unless the court extends the period for good cause. *Id.*, subd. 1(3). The rules of criminal procedure do not allow a district court to extend the deadline for serving a new-trial motion. Minn. R. Crim. P. 34.02. We review a district court's denial of a new-trial motion for an abuse of discretion. *State v. Green*, 747 N.W.2d 912, 917 (Minn. 2008).

Here, the jury returned its verdict in September, 2018, and appellant moved for a new trial in March, 2019. As the district court observed, "[Appellant]'s motion was filed 194 days after the guilty verdict." The district court denied appellant's motion as untimely under rule 26.04, noting that it lacked discretion to extend the deadline. Appellant concedes that his motion was filed "after the 15-day deadline in Minn. R. Crim. P. 26.04, subd.1(3), had passed" but argues that the district court nevertheless erred by determining that "the late filing meant it no longer had jurisdiction to adjudicate the motion" by misinterpreting this court's prior decision in *DeLaCruz*.

In its order denying appellant's motion, the district court stated:

> Close review of *State v. DeLaCruz* shows that the Court has no discretion to extend the filing deadline. Because Minn. R. Crim. P. 26.04 subd. 1 grants a 15-day period to file a motion for a new-trial, and Defendant's motion was filed 194 days after the guilty verdict, the Court denies the motion for a new-trial. The Court reviewed *State v. DeLaCruz*, the sole cases distinguishing *DeLaCruz*, and Minn. R. Crim. P. 34.02; which conclusively denies the Court any discretion to expand the 15-day period for the Defendant in this case.

The above analysis by the district court is consistent with relevant case law and governing procedural rules. "The rules of criminal procedure do not permit the district court to extend the deadline for serving a new-trial motion." *State v. DeLaCruz*, 884 N.W.2d 878, 884

(Minn. App. 2016). While rule 34.02 allows the district court to extend some deadlines, the rule "specifically excludes the deadline for a defendant's new-trial motion." *Id*. (citing Minn. R. Crim. P. 34.02 (providing that a court "may not extend the time for taking any action under Rule [. . . 26.04, subd. 1(3)]")). Because appellant's new-trial motion was undisputedly untimely, the district court did not abuse its discretion in denying the motion.

Affirmed.