

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 9, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CARROLL THOMAS MANNING, JR.,

Defendant - Appellant.

No. 17-8084
(D.C. No. 2:17-CR-00106-NDF-1)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **HARTZ, MORITZ, and EID**, Circuit Judges.

Defendant Carroll Manning was convicted of being a felon and an unlawful user of a controlled substance in possession of a firearm. On appeal, Manning challenges two evidentiary rulings the district court made during his trial. First, Manning argues that the district court erred in excluding hearsay statements by his son, Caleb Gallegos, regarding Manning’s ownership of the firearm. Second, Manning argues that he should have been allowed to elicit testimony that he feared that he would be sentenced to life imprisonment if he was caught with a firearm. For

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

the reasons explained below, we reject Manning’s arguments and uphold his conviction.

I. BACKGROUND

Early in the morning on July 9, 2016, Michael Strand, fresh from a trip to the gym, returned to his home in Casper, Wyoming. ROA Vol. 3 at 242–44. Strand noticed that the front door, which he had left unlocked, was now locked. *Id.* at 245–46. Strand opened the front door and immediately saw that the sliding glass door at the back of the house was wide open. *Id.* at 246. Hearing a noise, Strand looked outside to investigate. *Id.* Strand saw a man—who turned out to be the defendant, Carroll Manning—coming out from the side of Strand’s house and going into the neighbor’s driveway. *Id.*

Strand demanded to know who Manning was and what he was doing. *Id.* at 246, 250. Strand observed that Manning was sweating and that he looked “really paranoid.” *Id.* at 250. Manning was carrying a backpack. *Id.* Strand was suspicious and demanded to know whether Manning had been in Strand’s house and whether Manning had Strand’s belongings in his backpack. *Id.* Strand and Manning argued, and Manning eventually took off on foot. *Id.* at 257.

Strand called the police, and then decided to follow Manning in his car. *Id.* at 258. During the pursuit, Strand lost sight of Manning for short periods of time. *Id.* When Strand caught up with Manning, Strand observed that Manning no longer had the backpack. *Id.* at 269.

Police officers arrived at the scene and found Strand and Manning arguing. *Id.* at 348–49. Manning told the officers that he had not been at Strand’s house and had not taken Strand’s things. *Id.* One of the officers attempted to retrace Manning’s route from Strand’s home. *Id.* at 351–52, 295–96. The officer found a black backpack hidden behind an abandoned door. *Id.* at 295–96.

The officers searched the backpack. *Id.* at 298. The first thing they saw was a firearm. *Id.* They also found burglary tools, a plastic baggie of ammunition, and a rectangular bag containing items stolen in another burglary. *Id.* at 300–01. The backpack also contained a syringe and a spoon with residue of what the officers suspected was methamphetamine. *Id.* The officers did not find any items from Strand’s house in the backpack.

Manning completed several post-arrest interviews with different law enforcement officials in the weeks after the incident. During these interviews he told inconsistent stories about how he came to be in Strand’s backyard, what he knew about the items in the backpack, and whether the backpack was his. All the different stories involved Manning’s son, Caleb Gallegos, and in all versions Manning denied knowledge of the firearm. Manning admitted, however, to owning the drug paraphernalia found in the backpack.

Manning was charged with being a felon and unlawful user of a controlled substance in possession of a firearm. ROA Vol. 1 at 12. At trial, Manning called his sister, Amanda Deatz, as a witness. ROA Vol. 3 at 514–15. Two features of Deatz’s testimony are the subject of the appeal in this case.

First, Manning’s counsel asked whether Deatz had ever known her brother to own a firearm. *Id.* at 515. Deatz answered that she had never known her brother to handle firearms, and commented that “recently he won’t have anything to do with one because he knows he will get life in prison over it.” *Id.* The government objected on the grounds that any discussion of punishment was inappropriate. The district court agreed, commenting that punishment has no evidentiary value. *Id.*

Next, Manning’s counsel asked Deatz about her communications with Manning’s son, Caleb Gallegos. *Id.* at 516. Manning’s counsel asked what Gallegos had told Deatz about Manning’s possession of a firearm. *Id.* at 517. The government objected on the basis of hearsay. *Id.* Manning’s counsel argued that because Gallegos was unavailable as a witness, his comments to Deatz were admissible as statements against interest under Federal Rule of Evidence 804(b)(3). *Id.* The parties argued the issue at sidebar, and the district court eventually decided that the testimony was inadmissible for lack of corroborating evidence “based on the close relationship of this witness as well as the relationship of Gallegos.” *Id.* at 522. After that, Manning rested. *Id.* at 523.

The jury returned a guilty verdict on the single count in the indictment. ROA Vol. 2 at 26–27 (sealed). Manning appealed.

II. ANALYSIS

On appeal, Manning argues that the district court’s two restrictions on Deatz’s testimony require reversal of his conviction and remand for a new trial. We disagree.

A. Gallegos's Statements

Manning's principal argument on appeal is that the district court erred by refusing to admit hearsay statements allegedly made by Manning's son, Caleb Gallegos. Manning says that his sister, Amanda Deatz, would have testified that Gallegos told her that the firearm found in the backpack did not belong to Manning. Aplt. Br. at 28–29. We reject the argument that the district court's refusal to admit these statements amounts to reversible error. Although the district court's decision was not a model of clarity, the decision finds support in the record and our precedent.

Hearsay is generally not admissible as evidence. Fed. R. Evid. 802. However, Rule 804(b)(3) excepts from the general rule against hearsay an unavailable witness's statements against interest. As relevant in this case, a statement against interest must be one that "a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it . . . had so great a tendency . . . to expose the declarant to . . . criminal liability." Fed. R. Evid. 804(b)(3)(A). The statement must be "supported by corroborating circumstances that clearly indicate its trustworthiness." *Id.* 804(b)(3)(B). The district court determined that Deatz's testimony about Gallegos's statements was inadmissible because the statements lacked sufficient corroborating circumstances indicating their trustworthiness. ROA Vol. 3 at 522.

The district court clearly stated that its finding of lack of corroborating circumstances was based on "the relationship of Gallegos"—presumably referring to Gallegos's relationship to Manning. *Id.* The defense raised its arguments regarding

the Manning/Gallegos relationship at trial. *See id.* at 517–22. The district court’s analysis on this point is therefore reviewed for abuse of discretion. The district court’s evidentiary finding will not be disturbed “absent a distinct showing that it was based on a clearly erroneous finding of fact, or an erroneous conclusion of law or manifests a clear error in judgment.” *United States v. Smalls*, 605 F.3d 765, 773 (10th Cir. 2010) (quoting *United States v. Contreras*, 536 F.3d 1167, 1170 (10th Cir. 2008)). “A district court by definition abuses its discretion when it makes an error of law.” *Koon v. United States*, 518 U.S. 81, 100 (1996).

The district court’s decision to exclude Gallegos’s statements based on Manning’s relationship to Gallegos was not an abuse of discretion. As this court has recognized, a close relationship between a declarant and a defendant can be a factor undermining the trustworthiness of a statement against interest. In *United States v. Lozado*, we held that the relationship between a defendant and his brother-in-law counseled against a finding that the brother-in-law’s statements against interest were trustworthy. 776 F.3d 1119, 1133 (10th Cir. 2015). In this case, the district court’s conclusion that Gallegos’s relationship to Manning undercut the trustworthiness of Gallegos’s statements was a permissible application of *Lozado* and well within the district court’s discretion.

Manning argues that *Lozado* is inapplicable because the family relationship in *Lozado* was a “subsidiary” factor. He suggests that the result in *Lozado* would have been different if “the only difficulty with the statement had been the relationship of the declarant to the defendant.” *Aplt. Br.* at 20–21. But *Lozado* is far more

analogous than Manning suggests. As in *Lozado*, in Manning's case there was a conspicuous lack of corroborating circumstances that would clearly indicate that Gallegos's statements were trustworthy. Manning points out that Gallegos refused to testify on his father's behalf, but that was true in *Lozado* too: although the brother-in-law in *Lozado* initially spoke to law enforcement, he later invoked his privilege against self-incrimination. 776 F.3d at 1123. Other than Gallegos's reluctance to testify, all Manning's counsel could point to as corroboration was that Gallegos's statements were voluntarily made to a family member. ROA Vol. 3 at 522. As far as corroboration goes, that is not much. And Rule 804(b)(3)(B) sets up a high bar: the corroborating evidence must "*clearly*" indicate trustworthiness. In both *Lozado* and this case, the corroborating evidence was murky at best.

Manning also attempts to distinguish *Lozado* on the grounds that in *Lozado*, the declarant's statements were inconsistent with the physical evidence. Aplt. Br. at 22. Although it is true that the inconsistencies in *Lozado* were an important factor, the corroboration inquiry is a discretionary one. *Lozado* does not suggest that inconsistencies between the declarant's testimony and the other evidence are *required* to fall short of the 804(b)(3)(B) bar. Indeed, it was Manning's burden to show corroborating circumstances, not the government's burden to show that the proffered corroboration was unreliable. *See Lozado*, 776 F.3d at 1132. In short, the district court's decision to disallow Gallegos's hearsay statements based on lack of corroborating circumstances is in line with our precedent and within the court's discretion.

Manning, however, argues that the district court improperly considered Deatz's relationship to Manning as a factor undermining corroborating circumstances indicating trustworthiness. He points to the district court's statement that corroborating circumstances were lacking "*based on the close relationship of this witness as well as the relationship of Gallegos.*"¹ ROA Vol. 3 at 522 (emphasis added). If the district court relied on Deatz's relationship to Manning as a factor against admitting the statements, that would be an obvious error. An in-court witness's credibility is a classic jury question. Any bias Deatz had because of her relationship with Manning should have been weighed by the jury. The advisory

¹ As both sides acknowledge, that sentence is ambiguous: it is not clear whether the district court meant the "close relationship" between Deatz and Manning (witness/defendant) or the relationship between Deatz and Gallegos (witness/declarant). *See* Aplt. Br. at 16 n.8; *see also* Aple. Br. at 22. However, as Manning points out, a close relationship between witness and declarant is more often treated as a factor *in favor* of a finding of trustworthiness rather than a point against. *See, e.g., United States v. Ocasio-Ruiz*, 779 F.3d 43, 46 (1st Cir. 2015) ("This Court has repeatedly recognized that a close family relationship between a declarant and recipient of a statement against interest is an indication of truthfulness."); *United States v. US Infrastructure, Inc.*, 576 F.3d 1195, 1209 (11th Cir. 2009) ("Courts have found that self-inculpatory statements are sufficiently corroborated where the evidence presented at trial supports the veracity of the out-of-court statement and where the declarant makes the statement to someone with whom he shares a close relationship."). That is an excellent reason to resist interpreting the district court's statement as referring to the relationship between Deatz and Gallegos. There is no obvious reason why the relationship *would* cut against trustworthiness in this case. In fact, Manning's counsel cited the relationship between Deatz and Gallegos as a point *in favor* of corroboration. ROA Vol. 3 at 522 ("So as in most of these cases the only corroborating circumstances we have is the contacts with family which were completely voluntary."). Reading the district court's "close relationship of this witness" comment to refer to Deatz's relationship to Gallegos simply does not make sense. Thus, we assume that the district court was referring to the relationship between Deatz and Manning when it mentioned the "close relationship of this witness."

committee notes regarding Rule 804(b)(3) make this explicit: “[T]he credibility of the witness who relates the statement is not a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the witness’s credibility would usurp the jury’s role of determining the credibility of testifying witnesses.” Fed. R. Evid. 804(b), Advisory Committee Note (2010 Amendment).

But even if the district court did wrongly rely on the relationship between Deatz and Manning, Manning forfeited his challenge to this reasoning by failing to object at trial. Thus, on appeal, the district court’s consideration of the Deatz/Manning relationship is reviewable only for plain error. “Plain error occurs when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *United States v. Burbage*, 365 F.3d 1174, 1180 (10th Cir. 2004). To establish that an error affected his substantial rights, a defendant must show “a reasonable probability that, but for the error claimed, the result of the proceeding would have been different.” *United States v. Gonzalez-Huerta*, 403 F.3d 727, 733 (10th Cir. 2005) (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 81 (2004)).

Although it would be plainly erroneous to rely on the relationship between a defendant and witness as a circumstance undermining trustworthiness, any error did not affect Manning’s substantial rights. As discussed, the district court properly exercised its discretion in determining that the father-son relationship between

Gallegos and Manning cut against a finding of trustworthiness. No other circumstances strongly supported an inference that Gallegos's statements were trustworthy. In light of the weakness of Manning's argument in favor of corroboration, there is little chance that the district court's passing reference to the Manning-Deatz relationship made a difference to the district court's evidentiary finding, or to the trial as a whole. Thus, Manning has not satisfied the third prong of plain-error review.²

² The government also argues that we should uphold the district court's decision because "nothing in the transcript indicates that Gallegos had said the gun was his, or that he had ever possessed the gun." Aple. Br. at 28. When asked what Deatz would testify that Gallegos told her, Manning's counsel proffered that Deatz would testify "[t]hat [Gallegos] has admitted on multiple occasions that the firearm was not his father's, his father didn't know about it, and that as soon as he could, he asserted and on a number of occasions that if [his father] was ever arrested, he'd come forward." ROA Vol. 3 at 521. The government asserts that this proffer was not sufficient to demonstrate that Gallegos's statements were statements against interest. Ultimately, however, we do not rely on that argument as grounds to uphold the district court's decision.

Although Manning's counsel did not *explicitly* state that Gallegos admitted to owning or possessing the firearm, it was obvious in context that Deatz's testimony would have been that Gallegos admitted that he had owned or possessed the firearm. Earlier in the trial, Gallegos had asserted his privilege against self-incrimination based on the risk that he would incriminate himself through testimony that he possessed the firearm. ROA Vol. 3 at 507–08. In light of that earlier assertion, the unstated assumption underlying the proffer was that Gallegos's statements were incriminating because they indicated that he illegally possessed the firearm.

That Gallegos's statements admitted to ownership of the firearm is also clear from Manning's counsel's arguments in favor of admitting the statements. Manning's counsel asserted that the statements "would tend to admit against [Gallegos's] personal or penal interest," and argued that the circumstances corroborating trustworthiness were that Gallegos avoided being interviewed by law enforcement and that he made the statements to a trusted family member. Those arguments only make sense if Gallegos's statements indicated that he possessed the firearm. There would be no need for Gallegos to avoid law enforcement, nor any probative value in the fact that the statements were made to a family member, if the

B. Fear of Life Imprisonment

Manning's next argument is that the district court erred by preventing Deatz from testifying that Manning feared he would get life imprisonment if he was caught with a firearm. The government objected to that testimony on the grounds that discussion of punishment was inappropriate. The court sustained the objection: "Punishment in all respects is left to the sentencing judge, and it is not a matter to be considered by the jury in any respect. It has no evidentiary value, and the jury is instructed to disregard the witness' last comment." ROA Vol. 3 at 515. Manning argues that the district court misunderstood the purpose of Deatz's testimony about his fear of life imprisonment "by treating this evidence as relevant only to the issue of punishment." He contends that the reference to punishment was relevant to establishing his state of mind—that is, that his fear of life imprisonment made him less likely to have committed the crime.

Manning did not object to the district court's decision during trial and concedes that it is reviewable only for plain error. *See* Aplt. Br. at 32. As noted above, "[p]lain error occurs when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Gonzalez-Huerta*, 403 F.3d at 732.

statements were an innocuous averment that the firearm did not belong to Manning. In short, although Manning's counsel did not explicitly state that Gallegos told Deatz the firearm was his, it was implicit throughout the arguments that this was the case. It appears that the district court understood the proffer that way, because the district court did not make a finding that Gallegos's statements were not statements against interest.

We need not reach the question whether the district court was wrong to analyze the evidence as relevant only to punishment because any error did not affect Manning's substantial rights. The probative value of evidence concerning Manning's fear of life imprisonment was *de minimis*. Common sense would tell the jury that no one would want to be caught with an illegal firearm because imprisonment would surely follow. The precise length of the punishment that Manning feared he would receive does not add much, if anything, to Manning's case. Indeed, the district court permitted Manning's counsel to elicit very similar evidence from Deatz without discussion of the prison term: Deatz testified that Manning told her "he would never handle a gun because he is a convicted felon." ROA Vol. 3 at 516. The jury would have understood that to mean that Manning knew it was unlawful for him to possess a firearm and would have inferred that Manning feared punishment. There is only the most remote possibility that the additional information that Manning feared a life sentence would have affected the outcome of the trial, especially because the other evidence against Manning, although circumstantial, was strong. The district court did not plainly err by limiting Deatz's testimony about Manning's fear of imprisonment.

III. CONCLUSION

We reject Manning's arguments that the district court committed reversible error. Accordingly, we AFFIRM the district court and uphold Manning's convictions.

Entered for the Court

Allison H. Eid
Circuit Judge