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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0487**

State of Minnesota,
Respondent,

vs.

Varney J. Kiazolu,
Appellant.

**Filed May 27, 2008
Affirmed
Kalitowski, Judge**

Hennepin County District Court
File No. 06028426

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Connolly, Presiding Judge; Kalitowski, Judge; and Minge, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Following his conviction of domestic assault by strangulation in violation of Minn. Stat. § 609.2247 (Supp. 2005), appellant Varney J. Kiazolu argues that the district court's failure to give the jury a cautionary instruction regarding two incidents of "relationship evidence" admitted at trial constituted plain error entitling him to a new trial. We affirm.

DECISION

I.

Appellant argues that the district court's failure to caution the jury that they could not convict him of the charged offense based on two incidents of "relationship evidence" admitted at trial was plain error that affected his substantial rights. We disagree.

Plain error affecting substantial rights is the appropriate standard of review when the disputed matter was not objected to at trial. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "Plain errors or defects affecting substantial rights may be considered by the court upon motions for new trial, post-trial motions, and on appeal although they were not brought to the attention of the [district] court." Minn. R. Crim. P. 31.02. To succeed on a claim of plain error each of the following must be found: (1) error; (2) that is plain; and (3) that affected appellant's substantial rights. *Griller*, 583 N.W.2d at 740.

Cautionary instructions are designed to ensure that a jury does not convict a defendant due to his prior bad acts. *State v. Williams*, 593 N.W.2d 227, 237 (Minn. 1999), *cert. denied*, 528 U.S. 874 (1999). When relationship evidence is introduced "[a] cautionary instruction is strongly preferred. However, the absence thereof does not

automatically constitute plain error.” *State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007); *cf. State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004) (noting that relationship evidence has historically been treated differently than *Spreigl* evidence). To satisfy the third prong of the *Griller* test, an “appellant bears the ‘heavy burden’ of showing that the error was prejudicial to the degree that ‘giving of the instruction in question would have had a significant effect on the [jury’s] verdict.’” *Meldrum*, 724 N.W.2d at 20 (quoting *Griller*, 583 N.W.2d at 741). A reviewing court must examine the entire record to determine if it is significantly likely that the jury misused the evidence. *See State v. Frisinger*, 484 N.W.2d 27, 31 (Minn. 1992). If plain error is found, the reviewing court may consider if “a new trial is necessary to ensure fairness and the integrity of judicial proceedings.” *Griller*, 583 N.W.2d at 742.

At trial here, the victim, who was appellant’s wife on the date of the offense, testified regarding two incidents of relationship evidence: (1) appellant choked her in September 2005, precipitating an overnight stay at a domestic violence shelter; and (2) approximately a week before the charged offense, appellant yelled at her, calling her a “gold-digger,” a “b-tch” and a “motherf-cker.”

Appellant failed to request a cautionary instruction regarding the relationship testimony. Thus, we must review the record to determine whether the omission of the instruction was plain error that prejudiced appellant by significantly affecting the jury’s verdict.

The record indicates that the state presented substantial evidence of appellant’s guilt. The victim testified that on the date of the offense appellant pushed her, grabbed

her wrists forcefully, and then grabbed her neck with both hands. She testified that appellant's thumbs were on her throat, that his fingers were on the sides of her neck and that appellant "kind of lift[ed] [her] off the ground" while squeezing her neck with his hands. She further testified that she could not scream or breathe as she struggled to get free. A police officer who responded to a 911 call testified that she observed a red mark on the victim's wrist, "deep" red marks on the side and front of her neck, and several scratches on the front of her neck. The victim told the officers, consistent with her trial testimony, that her husband strangled her, preventing her from breathing or screaming. In addition, the photos that police took of the victim's neck on the day of the incident were admitted into evidence, indicating red marks and scratches on her neck.

In his brief, appellant argues that the victim's testimony was incredible because: (1) she was not treated for any injuries immediately following being "strangled"; (2) the victim's brother, in the next room at the time of the incident, did not hear an altercation; and (3) appellant could not have "lifted her off the ground" as she claimed because appellant is 5'6" tall and weighs 180 lbs. and the victim is 5'8" tall and weighs 150 lbs. But this court gives particular deference to a jury's credibility determinations. *See Dale v. State*, 535 N.W.2d 619, 623 (Minn. 1995) (stating that "judging the credibility of witnesses is the exclusive function of the jury.").

There is considerable evidence to corroborate the victim's version of the events and refute appellant's argument. The victim testified that she did not seek immediate medical treatment because she "assumed the pain will go away. Just like the other time in September, but it didn't go away." And evidence was presented that the victim went to

a doctor approximately three weeks after the incident because “[i]t was hard for [her] to swallow food, liquids. It was hard for [her] to speak louder.” And the victim’s doctor testified that she observed “some fullness” and swelling on the right of her neck. In addition, the victim’s brother testified that on the date of the incident, he was in his bedroom, with the door shut, watching his television “loud” and working on homework on his laptop. He testified that although he did not hear voices he heard a “thump on the wall.” And, again, the victim testified that because appellant was choking her, she was unable to scream for help. Finally, the victim testified that appellant is stronger than her.

The record further indicates that the prosecutor did not unduly focus on the relationship evidence. We conclude that there is no evidence indicating the jury may have convicted appellant based on his prior bad acts. Thus, in light of the strong evidence of appellant’s guilt, we further conclude that the omission of a cautionary instruction did not significantly affect the jury’s verdict and that appellant failed to carry his heavy burden imposed by the third prong of the *Griller* test. 583 N.W.2d at 741.

Affirmed.