

*This opinion will be unpublished and  
may not be cited except as provided by  
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-2041**

State of Minnesota,  
Respondent,

vs.

James A. Burr,  
Appellant.

**Filed January 27, 2009  
Affirmed  
Shumaker, Judge**

St. Louis County District Court  
File No. CR-07-2298

Lori Swanson, Attorney General, Gunnar B. Johnson, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101; and

Melanie Ford, St. Louis County Attorney, St. Louis County Courthouse, 100 North Fifth Avenue West, Duluth, MN 55802 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Peterson, Judge; and Stauber, Judge.

## **UNPUBLISHED OPINION**

**SHUMAKER**, Judge

On appeal from his conviction of fifth-degree assault, appellant argues that (1) the district court abused its discretion by denying his motion for a mistrial based on the failure to disclose a final version of a police report, (2) the district court plainly erred by admitting medical records which contained inadmissible statements indicating the victim had been assaulted, (3) the district court abused its discretion by denying his request for a jury instruction on voluntary intoxication, and (4) the evidence is not sufficient to prove beyond a reasonable doubt that he intentionally assaulted the victim. We affirm.

### **FACTS**

While on patrol on April 22, 2007, Duluth police officer Brian Jones received a report of an intoxicated white male lying in the road. On the way to the reported location, Officer Jones received a call indicating that the man had moved out of the road and was sitting on some steps.

As Officer Jones approached the location, he saw a man and a woman sitting on some steps. The man, later identified as appellant James Burr, held the woman in the crook of his arm and she was leaning back, clutching Burr's arm and struggling. Officer Jones indicated that the woman was "scared" or "in distress" and he thought she was being assaulted. When Burr saw the squad car pull up, he quickly pulled his arm down and appeared to pretend that nothing had happened.

Officer Jones talked to the couple to see if there was a problem. The woman, who was crying, said that Burr “was choking the sh-t out of me.” Officer Jones could smell a strong odor of alcohol coming from Burr but Burr showed no signs of intoxication. A preliminary breath test (PBT) later showed Burr’s blood-alcohol level to be .305.

The woman had signs of injury to her neck. Officer Jones noted marks on her neck that matched the lines of the collar and the zipper on her jacket. Another officer photographed the woman’s injuries, and she was taken to the hospital for a medical examination.

The state charged Burr with three counts of assault but dismissed two of them before trial. Burr went to trial for fifth-degree assault.

Officer Jones testified about his observations as he came upon the scene. He stated that he did not notice how the woman reacted because he was focused on Burr. The prosecutor then sought to refresh the officer’s recollection with his police report. During this process, it became evident that Officer Jones’s report was different from the copy the prosecutor had. In the prosecutor’s copy, the report stated, “The *woman* observed my squad and stopped and tried to pretend as if nothing had happened.” The report the officer had indicated, “The *male* observed my squad and stopped and tried to pretend as if nothing had happened.”

Officer Jones explained the discrepancy. In accordance with police procedures, he dictated his report as a draft and forwarded it to a clerk to type it. The report Officer Jones had at trial was his final report, which corrected the draft and, he testified, was the

accurate report. The copy the prosecutor had, and the one produced for the defense in pretrial discovery, was the draft the clerk had typed from the officer's dictation.

Because Burr's counsel had relied on the draft report in constructing his opening statement, he moved for a mistrial, contending that his own credibility with the jury had been diminished because he had argued that the woman, who appeared to be in distress, stopped pretending when the squad car drove up. Thus, his focus was on the woman's pretense but the final report indicated that Burr was pretending nothing had happened. The state argued that the discovery error was a clerical one and was inadvertent.

The court concluded that it was unlikely that the jury would hold the discrepancy against Burr or defense counsel in light of the explanation and denied the motion. The court did give defense counsel extra time to prepare a cross-examination based on the final report.

A report of the medical examination of the woman involved in the incident was received in evidence. Some portions were redacted but several references by medical personnel to "assault" were left in. Defense counsel did not object to the report.

Burr did not call any witnesses and did not himself testify. At the conclusion of the evidence, he requested an instruction on voluntary intoxication. The court denied the request.

The jury found Burr guilty, and this appeal followed.

## DECISION

### I

On appeal, Burr first argues that the district court abused its discretion by denying his motion for a mistrial based on the failure to disclose the officer's final report.

The Minnesota Rules of Criminal Procedure require a prosecutor to disclose law-enforcement officer reports to the defense. Minn. R. Crim. P. 9.01, subd. 1(3). This requirement extends to any information or material possessed by members of the prosecuting staff or by others who have participated in the investigation of the case. Minn. R. Crim. P. 9.01, subd. 1(8). Whether a discovery violation occurred is an issue of law, which we review de novo. *State v. Bailey*, 677 N.W.2d 380, 397 (Minn. 2004).

Here, there was a significant discrepancy between the draft report and the final report. The prosecutor is responsible for ensuring proper compliance with the rules of discovery, but there was not a willful violation of the rules. The parties agree that the nondisclosure was unintentional.

The district court is in the best position to determine what harm is caused by discovery violations and whether such harm can be eliminated or alleviated. *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). Accordingly, a district court has "broad discretion in imposing sanctions for violations of the discovery rules." *State v. Patterson*, 587 N.W.2d 45, 50 (Minn. 1998); *see also State v. Spann*, 574 N.W.2d 47, 52 (Minn. 1998) (stating that the denial of a mistrial motion is reviewed under an abuse-of-discretion standard). "A [district] court's determination should be reversed on appeal only when the prosecutor's misconduct, viewed in the light of the whole record, appears

to be inexcusable and so serious and prejudicial that the defendant's right to a fair trial was denied." *State v. Scanlon*, 719 N.W.2d 674, 685 (Minn. 2006) (quotation omitted). "Any discovery-related misconduct on the part of the state is harmless beyond a reasonable doubt if the verdict rendered was surely unattributable to the error." *Id.* (quotation omitted).

When ruling on a motion for a mistrial based on a discovery violation, the district court must consider the reason for the nondisclosure, the extent of prejudice resulting from the nondisclosure, the feasibility of rectifying any prejudice by a continuance, and other relevant factors. *Id.* Absent "a showing of prejudice to the defendant, the state's violation of a discovery rule will [generally] not result in a new trial." *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005).

Here, the reason for the nondisclosure was inadvertent clerical error. The district court analyzed the prejudice to Burr and found that it was not significant. We agree that the contradiction in the reports more likely damaged the state than the defense. The district court recessed, thereby giving Burr's counsel the opportunity to examine both reports and prepare a cross-examination of the witness. Further, we note that although the jury was not given any instruction explaining the newly discovered final report, the officer's testimony adequately explained what had occurred.

The district court responded appropriately to the discovery violation in this relatively simple and straightforward case. We, therefore, conclude that the district court did not abuse its discretion by denying Burr's motion for a mistrial.

## II

Burr next argues that V.G.’s medical records contained inadmissible statements, indicating that V.G. had been “assaulted” and listing “assault” as the official assessment by medical personnel. Burr argues that such statements are legal conclusions or terms of art that are not helpful to the trier of fact and are therefore inadmissible. *State v. Moore*, 699 N.W.2d 733, 740 (Minn. 2005); *State v. Saldana*, 324 N.W.2d 227, 230–31 (Minn. 1982). Although Burr’s counsel did not object at trial on this basis, Burr now argues that the admission of such statements constitutes plain error.

By failing to object to an error at trial, generally a defendant forfeits appellate consideration of an issue. *State v. Martinez*, 725 N.W.2d 733, 738 (Minn. 2007). This court, however, has the discretion to review the unobjected-to admission of evidence if it amounts to plain error. *Id.*; *see also* Minn. R. Crim. P. 31.02 (providing for review of “[p]lain errors or defects affecting substantial rights” not brought to district court’s attention). To establish the existence of plain error, a three-prong test must be met: (a) there must be error, (b) the error must be plain, and (c) the error must affect substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Error is plain if it is clear or obvious. *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002). And clear or obvious error is shown if the alleged “error contravenes case law, a rule, or a standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error affects a defendant’s substantial rights if the error was prejudicial and affected the outcome of the case. *Griller*, 583 N.W.2d at 741. If the appellate court concludes that all three prongs

are met, it “will consider whether a new trial is necessary to ensure fairness and the integrity of judicial proceedings.” *Id.* at 742.

Burr has not shown plain error. First, under the rules of evidence, “[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment” are admissible. Minn. R. Evid. 803(4). Here, at least some of the allegedly inadmissible statements appear to have been statements made by the victim herself to medical personnel in an attempt to describe her injuries and their cause so that she could be treated. The admission of those statements was not plain error.

Second, the word “assault” was not used as a legal conclusion in the medical records. The term is not only a legal term, but also carries a common meaning. *See The Am. Heritage Dictionary* 51 (4th ed. 2001) (defining “assault” as “[a] violent physical or verbal attack”). The medical records use the word in its ordinary meaning. Thus, even if the statements were erroneously admitted, the admission was not plain error.

Third, to the extent that the word was used by medical experts, it is permissible in its factual connotation. “Minnesota’s rules of evidence permit expert opinion testimony on ultimate issues if such testimony is helpful to the factfinder.” *Moore*, 699 N.W.2d at 740; *see also* Minn. R. Evid. 704 (“Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”). Because an expert’s opinion can embrace an ultimate factual issue, the admission of the statements in the medical records was not plain error.



### III

Burr also contends the district court erred by denying his request for a jury instruction on voluntary intoxication. The refusal to give a requested jury instruction lies within the discretion of the district court and will not be reversed absent an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). We focus our analysis on whether the refusal resulted in error. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001).

Under Minnesota law,

An act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind.

Minn. Stat. § 609.075 (2006).

Voluntary intoxication is only a defense if specific intent is a necessary element of the charged crime. *State v. Fortman*, 474 N.W.2d 401, 403 (Minn. App. 1991). To determine when to give a voluntary-intoxication instruction, the court “must analyze whether the crime charged has a specific intent or purpose as an essential element. The crime is a general-intent crime if the only intent required is to do the act which is prohibited by the statute.” *State v. Lindahl*, 309 N.W.2d 763, 766 (Minn. 1981); *see also State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007) (explaining that “specific intent means that the defendant acted with the intent to produce a specific result” and that “general intent means only that the defendant intentionally engaged in prohibited

conduct”). A defendant is entitled to a jury instruction on voluntary intoxication when he is charged with a specific-intent crime, the evidence shows the defendant’s intoxication, and the defendant offers intoxication as an explanation of his conduct. *State v. Torres*, 632 N.W.2d 609, 616 (Minn. 2001).

Relying on *Vance* for the proposition that assault is a specific-intent crime, Burr argues that he is entitled to the voluntary-intoxication instruction. In *Vance*, the Minnesota Supreme Court stated that “assault is a *specific intent* crime.” 734 N.W.2d at 656 (citing *State v. Edrozo*, 578 N.W.2d 719, 723 (Minn. 1998)). But *Vance* did not deal with the voluntary-intoxication instruction.

In the past, “Minnesota case law has never required a voluntary intoxication instruction in assault cases.” *Fortman*, 474 N.W.2d at 403. In *Lindahl*, the Minnesota Supreme Court explained that an assault which involved the intent to cause fear and did not require physical touching of the victim required an “abstract mental element” or a specific intent. 309 N.W.2d at 767. But an assault that involved the infliction of injury requires no abstract intent, only the intent to do the prohibited physical act of committing a battery. *Id.* In *Fortman*, we applied the reasoning from *Lindahl* to a case involving a defendant charged with assault and concluded that the defendant was not entitled to a jury instruction on voluntary intoxication. 474 N.W.2d at 403-04. We explained:

[T]his case involves an assault resulting in the infliction of actual bodily injury rather than the more abstract assault based merely upon an intent to cause fear of immediate bodily harm or death. Therefore, the assault in this case did not require any specific intent beyond a general intent to do the prohibited physical act of committing a battery. We

conclude that the trial court did not abuse its discretion in refusing to give a voluntary intoxication instruction.

*Id.* at 404.

Although we acknowledge the apparent inconsistency between the statement in *Vance* and the analysis in *Lindahl* and its progeny, we do not address the issue further here because Burr was not entitled to the voluntary-intoxication instruction on the facts of this case.

Regardless of how we characterize his offense, Burr is only entitled to an instruction on voluntary intoxication if there is evidentiary support for it. *See State v. Ruud*, 259 N.W.2d 567, 578 (Minn. 1977) (“It is beyond dispute that a party is entitled to an instruction on his theory of the case if there is evidence to support it.”); *Torres*, 632 N.W.2d at 616 (stating that a jury instruction on voluntary intoxication is appropriate if the evidence shows the defendant’s intoxication). “[C]onsumption of intoxicants does not create a presumption of intoxication and the possibility of intoxication does not create the presumption that a defendant is thereby rendered incapable of intending to do a certain act.” *Torres*, 632 N.W.2d at 617 (citing *State v. Lopez*, 587 N.W.2d 26, 28–29 (Minn. 1998)). The defendant bears the burden of showing by a fair preponderance of the evidence that he was too intoxicated to form intent. *State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn. 1980).

On appeal, Burr seems to argue that the mere fact that he had a .305 PBT reading is sufficient evidence of intoxication to warrant the jury instruction. We recognize that this blood-alcohol concentration is more than three times the legal limit for driving a

vehicle and that some people would be comatose, or at least unable to function, with that much blood alcohol.

But the evidence in this case was that Burr was awake and functioning and that he showed no signs of intoxication. When Officer Jones arrived at the scene, Burr removed his arm from V.G.'s shoulders and tried to act as if nothing had happened. Although he smelled of alcohol, Burr showed no particular signs of intoxication, such as stumbling, slurred speech, or incoherence. He was able to respond to police questions about the incident. *Cf. Torres*, 632 N.W.2d at 617 (noting that the testimony indicated that the defendant “was ‘under control’ and ‘calm’ shortly before the murder, which tends to show [that he] was not intoxicated”).

The PBT reading alone is not enough from which to infer that the alcohol impacted Burr's ability to form intent. In this case, the reasonable inference based on the evidence is to the contrary—namely, that the alcohol did not impair Burr's mental processes or functions. This is the only plausible inference based on the evidence. Because the evidence did not support an instruction on voluntary intoxication, the district court did not err by refusing to give such an instruction.

#### IV

Lastly, Burr contends that the state failed to prove beyond a reasonable doubt that he intentionally assaulted the woman in the incident because of his severe intoxication and the general lack of evidence. In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine if the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow

the jury to reach a guilty verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). “[W]e draw reasonable inferences in favor of the state and assume that the jury credited the state’s witnesses and rejected any contrary evidence.” *State v. Jackson*, 726 N.W.2d 454, 460 (Minn. 2007). “We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that [the] defendant was proven guilty of the offense charged.” *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted).

Burr contends that the evidence was not sufficient to convict him given his intoxication. But, as explained above, his intoxication did not impact his functioning or his ability to form intent.

Burr also argues that the woman’s injuries were slight, and therefore do not establish intent. But when Officer Jones arrived at the scene, the woman looked like she was “scared,” appeared to be “in distress,” and “was struggling.” When the officer asked what had happened, she was crying and told him that Burr “was choking the sh-t out of me.” Officer Jones saw visible marks on her neck. Those same marks were also depicted in a photograph, which clearly shows the imprint of the woman’s jacket on her neck. Similarly, medical staff found injuries to her face and throat when she was taken to the emergency room.

Because the evidence when viewed in the light most favorable to the conviction is sufficient to allow the jury to find Burr guilty of fifth-degree assault, we reject the insufficiency-of-the-evidence claim.

**Affirmed.**