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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2389

State of Minnesota,
Respondent,

vs.

Brent W. Kruse,
Appellant.

Filed March 31, 2009
Affirmed
Kalitowski, Judge

Stearns County District Court
File No. 73-CR-07-2556

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

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Considered and decided by Lansing, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

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

KALITOWSKI, Judge

Appellant Brent W. Kruse challenges his conviction of violating a harassment restraining order, contending that (1) the district court violated his right to a fair trial by refusing to accept his stipulation that there was an existing harassment restraining order prohibiting him from contacting or harassing the complainant and that he knew about the order, and (2) the district court committed plain error that was prejudicial by allowing the state to introduce the harassment restraining order without giving cautionary instructions to the jury. We affirm.

D E C I S I O N

I.

Appellant was charged with violating a harassment restraining order in violation of Minn. Stat. § 609.748, subd. 6(d) (2006). Appellant argues that he was denied his right to a fair trial because the district court refused to accept his stipulation that a harassment restraining order (HRO) was in place and that he knew of it, and also argues that the court erred in admitting into evidence an unredacted copy of the HRO under Minn. Stat. § 634.20. We disagree and conclude that the district court did not abuse its discretion in refusing to accept appellant's stipulation.

"We review for an abuse of discretion the district court's decision to admit evidence of similar conduct by the defendant against an alleged domestic-abuse victim under Minn. Stat. § 634.20." *State v. Lindsey*, 755 N.W.2d 752, 755 (Minn. App. 2008) (citing *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004)), *review denied* (Minn.

Oct. 29, 2008). On appeal, the appellant has the burden of establishing that the district court abused its discretion and that appellant was thereby prejudiced. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003); *see also McCoy*, 682 N.W.2d at 161 (holding that evidence admitted under section 634.20 need not meet the clear-and-convincing standard required for admission of character or *Spreigl* evidence, but need only be more probative than prejudicial). To prevail, an appellant must show error and the prejudice resulting from the error. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981).

Before his jury trial, appellant offered to stipulate that an HRO was in effect on the date of the incident and objected to the admission of the HRO because it contained information that appellant believed to be prejudicial and irrelevant. The district court overruled appellant's objection to the admission of the HRO, finding that it was admissible as relationship evidence of similar conduct by the defendant. The district court further determined that whether a restraining order was issued and personally served on appellant are elements of the crime, and therefore the state was permitted to offer both the order and proof of personal service on appellant. The state introduced an unredacted copy of the HRO into evidence, and at the close of trial, neither appellant nor the state requested a limiting instruction for the jury's use of the HRO, nor did the district court give one. At the close of trial, the jury found appellant guilty of the charge.

A defendant's offer to stipulate generally does not take away the state's right to offer relevant evidence on an element of the offense. *State v. Carnahan*, 482 N.W.2d 793, 795 (Minn. App. 1992); *see State v. Davidson*, 351 N.W.2d 8, 10 (Minn. 1984) (stating that "[t]he reason for the general rule is that a defendant should not be able to

unilaterally control the issue of the need for relevant evidence by offering to stipulate"); *see also State v. Durfee*, 322 N.W.2d 778, 785-86 (Minn. 1982) (holding that the district court did not abuse its discretion by allowing proof of the victim's injuries, including photographs, regardless of the defendant's offer to stipulate that the victim suffered great bodily harm); *State v. Stillday*, 646 N.W.2d 557, 562 (Minn. App. 2002) (holding that the district court did not abuse its discretion by admitting evidence related to a prior conviction for terroristic threats despite the defendant's offer to stipulate to his prior conviction, when the stipulation did not provide all of the evidence about that incident relevant to the charged crime of pattern of harassing conduct), *review denied* (Minn. Aug. 20, 2002); *State v. Matelski*, 622 N.W.2d 826, 832-33 (Minn. App. 2001) (holding that the district court did not abuse its discretion in admitting gang-related evidence and testimony despite the defendant's offer to stipulate that he was a gang member, because such evidence and testimony was necessary to prove that the defendant aided and abetted the crime), *review denied* (Minn. May 15, 2001).

An exception to this general rule is made when the potential for unfair prejudice substantially outweighs the probative value of the evidence underlying a conviction, and the stipulation supplies all of the relevant information to a disputed issue. *See State v. Berkelman*, 355 N.W.2d 394, 396-97 (Minn. 1984) (holding that in a gross-misdemeanor DWI prosecution, the district court should have accepted the defendant's offer to stipulate to a prior conviction because it was unfairly prejudicial); *Davidson*, 351 N.W.2d at 11 (holding that in a felon-in-possession-of-a-handgun prosecution, the district court should allow the defendant to stipulate to being a convicted felon); *see also Old Chief v.*

United States, 519 U.S. 172, 190-91, 117 S. Ct. 644, 654-56 (1997) (holding that in a trial for possession of a handgun by a felon, it was an abuse of discretion to admit evidence of facts underlying the prior felony conviction when the defendant offered to stipulate to the conviction and the only relevance of the conviction was to show the defendant's status as a felon).

Thus, whether the district court abused its discretion in refusing to accept appellant's stipulation depends on whether the stipulation supplies all of the relevant information and whether the potential for unfair prejudice substantially outweighs the probative value of the evidence underlying the conviction. *Berkelman*, 355 N.W.2d at 396-97. We conclude that because appellant's stipulation does not supply all of the relevant information on the facts underlying the charge and because the potential for unfair prejudice by admitting the HRO does not outweigh the probative value of the HRO, the district court did not abuse its discretion in refusing appellant's stipulation and admitting the HRO into evidence.

To convict appellant of violating a harassment restraining order, the state needed to prove that there was an existing court order restraining appellant from harassing D.K., that appellant violated a term or condition of the order, that appellant knew of the order, and that the violation happened on a certain date in a certain county. *See* Minn. Stat. § 609.748, subd. 6(d); 10 *Minnesota Practice*, CRIMJIG 13.63 (2006).

In addition,

> [e]vidence of similar conduct by the accused against the victim of domestic abuse . . . is admissible unless the probative value is substantially outweighed by the danger of

> unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. "Similar conduct" includes, *but is not limited to,* evidence of domestic abuse, violation of an order for protection under section 518B.01; violation of a harassment restraining order under section 609.748; or violation of section 609.749 or 609.79, subdivision 1. "*Domestic abuse"* . . . [has] the meaning[] given under section 518B.01, subdivision 2.

Minn. Stat. § 634.20 (emphasis added). Section 518B.01, in turn, states that "[d]omestic abuse means the following, if committed against a family or household member by a family or household member: (1) physical, harm, bodily harm, or assault; (2) the infliction of fear or imminent physical harm, bodily injury, or assault . . . ." Minn. Stat. § 518B.01, subd. 2(a) (2006). The admissibility of evidence of similar prior conduct depends only on (1) whether the offered evidence is evidence of similar conduct and (2) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *State v. Bell*, 703 N.W.2d 858, 861 (Minn. App. 2005), *aff'g as modified*, 719 N.W.2d 635 (Minn. 2006) (citing *McCoy*, 682 N.W.2d at 159).

Here, the state alleged that appellant violated an existing HRO by making a harassing phone call to D.K. Given the findings set forth in the HRO—that appellant made uninvited visits, harassing phone calls, and threats to D.K., and also that he frightened her with threatening behavior—and given D.K.'s testimony that after her separation from appellant, he began making harassing phone calls to her, we conclude that the district court did not abuse its discretion in determining that D.K. was a "victim of domestic abuse" for purposes of section 634.20. The information about appellant's behavior satisfies the statutory definition of domestic abuse. *See* Minn. Stat. § 518B.01,

subd. 2(a). Therefore, D.K. qualifies as a "victim of domestic abuse" for purposes of section 634.20.

The district court has broad discretion in determining what constitutes "similar conduct" for purposes of Minn. Stat. § 634.20. *Lindsey*, 755 N.W.2d at 755. Minnesota Statute section 634.20 states that "'[s]imilar conduct' includes, *but is not limited to*, evidence of domestic abuse, violation of an order for protection . . . [or] violation of a harassment restraining order." (Emphasis added.) Here, the HRO explained that there were reasonable grounds to believe that appellant made harassing phone calls to D.K., and D.K. testified that she obtained the restraining order in part because of these frequent, harassing phone calls. Therefore, we conclude that the district court did not abuse its discretion in determining that the charged harassing-phone-call incident, in violation of the HRO, was sufficiently similar to appellant's pre-restraining order conduct to satisfy section 634.20.

We conclude that appellant's stipulation to the HRO would not have provided all of the relevant information. The HRO here explicitly listed the reasons why the HRO was granted—that appellant harassed D.K. by making uninvited visits, made harassing phone calls and threats, frightened D.K. with threatening behavior, and stole property from her. Stipulating that the HRO existed would not provide the information regarding the reasons for the HRO, which the state used to show how appellant had previously harassed D.K. over the phone and that appellant was aware of the consequences of violating the HRO.

Appellant argues that even if evidence of appellant's prior conduct as stated in the HRO is admissible, the district court abused its discretion by admitting the evidence because the HRO's probative value was outweighed by its prejudicial effect. We disagree.

In deciding whether to admit evidence under section 634.20, the district court must also consider whether the probative value of the evidence is outweighed by the danger of unfair prejudice. *Lindsey*, 755 N.W.2d at 756 (citing *Bell*, 719 N.W.2d at 640). "Evidence that helps to establish the relationship between the victim and the defendant or which places the event in context bolsters its probative value." *Id.*; *see also McCoy*, 682 N.W.2d at 161 (holding that district court did not abuse its discretion in allowing relationship "evidence that, if believed by the jury, could have assisted the jury by providing a context with[in] which it could better judge the credibility of the principals in the relationship"). When balancing the probative value against the potential prejudice, unfair prejudice "'is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage.'" *Bell*, 719 N.W.2d at 641 (quoting *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005)).

Here, before deciding to admit the HRO, the district court considered both parties' arguments on the probative value of the HRO versus its potential for prejudice. The HRO had significant probative value as to a material fact—namely, D.K. and appellant's prior relationship. And the Minnesota Supreme Court has recognized the inherent probative value in evidence of past acts of violence committed by the same defendant

against the same victim. *Id.* at 641. In *Bell*, the court affirmed the admission of two prior order-for-protection violations in a burglary prosecution, pursuant to section 634.20, in which the defendant's former girlfriend was the alleged victim. *Id.* The court concluded that the violations were probative of a material fact because it illuminated the history of the defendant and the victim's relationship. *Id.* And the court found that there was nothing "particularly inflammatory or unfairly prejudicial" about the evidence of the order-for-protection violations. *Id.*

Similarly, here there is nothing particularly inflammatory or unfairly prejudicial about the evidence of the HRO. The order does not describe in detail the nature of appellant's prior threats, visits, or phone calls to D.K. Rather, the order merely states that such threats and phone calls were made and that the order was granted based upon that alleged conduct. Thus, we conclude that the district court did not abuse its discretion in determining that the probative value of the HRO evidence was not outweighed by the danger of unfair prejudice.

Appellant contends that the relationship evidence at issue here was not helpful to the jury because it was in the form of a judicial finding and "conclusory" in nature. But the brevity or "conclusory nature" of the HRO's reference to appellant's prior harassment of complainant goes to the weight of the evidence, rather than its admissibility. Appellant argues that by admitting the HRO, which contained fact-findings, the district court was in effect vouching for D.K.'s testimony and credibility as a witness. But the district court did not comment about the HRO or discuss the restraining order's references to appellant's prior harassing conduct in front of the jury. We conclude that in

finding that the restraining order was admissible and not unfairly prejudicial under section 634.20, the district court did not give the state an unfair advantage, nor was the district court acting impartially or unfairly toward appellant. *See Bell*, 719 N.W.2d at 641 ("unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage").

We hold that the district court did not abuse its discretion in refusing appellant's stipulation offer and admitting the HRO as evidence of similar conduct under section 634.20.

II.

Appellant claims for the first time on appeal that he was denied a fair trial because the district court failed to caution the jury not to convict him for his past acts and therefore, he should be granted a new trial. We disagree.

Because appellant neither requested a cautionary instruction nor objected to the instructions on this ground, we apply a plain-error analysis on review. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001). Plain error exists when the district court commits an obvious error that affects the criminal defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Plain error will be corrected on appeal only if it affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

It is the preferred practice for a district court to instruct the jury regarding the use of section 634.20 evidence both when the evidence is received and in the final jury charge. *State v. Meyer*, 749 N.W.2d 844, 850 (Minn. App. 2008). But we have held that

failure to supply limiting instructions to the jury "does not *automatically* constitute plain error," particularly when other evidence offered during trial negates the allegation that the probative value of the similar conduct evidence is outweighed by its potential for unfair prejudice. *Id.* (quoting *State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006)), *review denied* (Minn. Jan. 24, 2007). In *Meyer*, this court held that in a trial for domestic assault, the district court's failure to give a limiting instruction with respect to evidence of three prior acts of domestic violence was not plain error, in view of the other independent evidence that supported the conviction. *Id.* at 850-51.

Here, as in *Meldrum* and *Meyer*, the record indicates that appellant's conviction is supported by other evidence that is more persuasive than the HRO. Three witnesses testified for the state: D.K., her boyfriend, and the sheriff's deputy who responded to D.K.'s call. D.K. testified that she had obtained a restraining order in 2006 against appellant in part because he had been calling and harassing her. D.K. and her boyfriend both testified that after the issuance of the restraining order, they recognized appellant's voice on the harassing voicemail message left on D.K.'s phone, and their testimony was corroborated by D.K.'s cell phone records. And the sheriff's deputy testified that he listened to the voicemail after D.K. identified the voice as appellant's, digitally recorded it, and had the message transcribed.

Moreover, the record indicates that all other jury instructions were properly given, including the presumption of appellant's innocence, the state's burden of proof beyond a reasonable doubt, and the definitions and elements of each charge. *See Meldrum*, 724 N.W.2d at 22 (concluding there was no plain error in a district court's failure to give a

limiting instruction where other evidence besides the "similar conduct" evidence supported the charge and all other jury instructions were properly given). And the record shows that the state did not extensively refer to, or summarize appellant's prior conduct that led to the issuance of the HRO, nor did the state suggest an improper use of the "similar conduct" evidence. *See id.* (determining that there was no plain error because the prosecutor "never suggested an improper use of other-crimes evidence").

Although the district court should have issued a cautionary instruction to the jury concerning the proper use of the HRO evidence, in light of the other evidence and testimony presented and considering the totality of the jury instructions, we conclude that the district court did not commit plain error affecting appellant's substantial rights by failing to issue a cautionary instruction.

Affirmed.