**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-0082**

State of Minnesota,
Respondent,

vs.

John Henry Larson,
Appellant.

**Filed March 24, 2009**
**Affirmed in part and reversed in part; motion denied**
**Stoneburner, Judge**

Ramsey County District Court
File No. 62K407002020

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, Ramsey County Government Center West, Suite 315, 50 West Kellogg Boulevard, St. Paul, MN 55102–1657 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

**STONEBURNER**, Judge

Appellant challenges his convictions of and sentences for second-degree assault and gross-misdemeanor domestic assault, arguing that the district court erred by (1) allowing his stipulation to a prior adjudication to be read to the jury; (2) failing to declare a mistrial; (3) insufficiently instructing the jury; and (4) sentencing him for two offenses that arose out of the same behavioral incident. Because the district court did not err or abuse its discretion with regard to evidentiary rulings, failing to declare a mistrial, or instructing the jury, we affirm the convictions. Because the district court erred by sentencing appellant for both second-degree and domestic assault, we vacate the sentence imposed for domestic assault.

## FACTS

After an altercation with his sometimes-girlfriend, T.B., appellant John Henry Larson was arrested and charged with two counts of burglary, assault, and domestic assault. Before trial, Larson stipulated that he had a prior conviction or adjudication of a crime that enhanced the current domestic-assault charge to a gross misdemeanor. The district court admitted evidence of at least four prior domestic incidents with T.B. to illuminate Larson's relationship with T.B. but excluded evidence of an order for protection (OFP) that T.B. had obtained against Larson. Witnesses were sequestered.

During her testimony at trial, T.B. mentioned the OFP in her answer to a question on direct examination. The district court instructed the jury to disregard the response

before either party objected. Larson's later motion for a mistrial based on TB's mention of the OFP was denied.

After T.B. testified inconsistently with statements that she had made at the time of the incident, a county-employed victim's advocate (advocate) had a conversation in the hallway with a police officer who was about to testify. The district court was informed of the conversation. The district court questioned the advocate, who admitted that, in addition to reminding the officer that the OFP was not to be mentioned, the advocate told the officer that she was worried about the case because "the victim didn't do a very good job." Larson's counsel stated that he would pursue the matter with the officer on cross-examination. The officer's response to questioning about this conversation was inconsistent with what the advocate had told the district court. The district court allowed Larson to call the advocate to impeach the officer's testimony about the conversation.

Larson requested that his stipulation concerning the enhanced offense remain a court exhibit. The state requested that the stipulation be read to the jury. The district court did not immediately rule on this issue. During the trial, after an unreported bench conference, the prosecutor read the stipulation to the jury.

The district court instructed the jury on second-degree assault as a lesser-included offense. The jury instruction on burglary included a definition of assault, but the instruction on second-degree assault did not include a definition of assault. The jury acquitted Larson of burglary but found him guilty of second-degree and domestic assault. The district court sentenced Larson to 39 months in prison for second-degree assault and a concurrent 12 months for gross-misdemeanor domestic assault. This appeal followed.

## D E C I S I O N

### I. Reading of stipulation to jury did not entitle Larson to a new trial

Larson argues that allowing his stipulation to a prior conviction to be read to the jury constitutes plain error that entitles him to a new trial. Plain error is (1) error; (2) that was plain; and (3) that affected substantial rights. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). "If those three prongs are met, we may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotations omitted).

In the context of a charge of felon in possession of a weapon, the supreme court has stated:

> [G]enerally . . . the defendant should be permitted to remove the issue of whether he is a convicted felon by stipulating to that fact. In the vast majority of such cases the potential of the evidence for unfair prejudice clearly outweighs its probative value. However, the door should be left open so that in appropriate cases where the probative value of the evidence outweighs its potential for unfair prejudice, the evidence may be admitted. One such case might be where the facts underlying the prior conviction are relevant to some disputed issue, making the evidence admissible under Rule 404(b). Prior convictions would still be useable under Minn. R. Evid. 609 to impeach the defendant if he testified.

*State v. Berkelman*, 355 N.W.2d 394, 396 (Minn. 1984). Because the record does not contain the discussion and analysis that led to the reading of the stipulation to the jury, we are not able to adequately review whether disclosure of the stipulation was error. But the admission of at least four specific prior incidents of domestic assault leads us to conclude that even if there was plain error in allowing the stipulation to be read to the

jury, the error did not affect Larson's substantial rights or affect the fairness and integrity of the judicial system. Larson is not entitled to a new trial based on the reading of the stipulation to the jury.

## II. The district court did not abuse its discretion by denying a mistrial based on T.B.'s reference to the OFP or the advocate's interaction with a witness.

### a. Reference to OFP

Larson asserts that the prosecutor failed to adequately instruct T.B. not to mention the OFP and intentionally questioned her about specific dates that resulted in her reference to the OFP. Larson argues that the reference to the OFP was prejudicial and that the district court abused its discretion by denying his motion for a mistrial.

"We review a trial court's denial of a motion seeking a mistrial for an abuse of discretion." *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). The state has an obligation to caution its witnesses against making prejudicial statements. *See State v. Underwood*, 281 N.W.2d 337, 342 (Minn. 1979) (stating that to avoid the problem occasioned by a witness blurting out objectionable testimony, the state has a duty to properly prepare its witnesses prior to trial). "The trial judge is in the best position to determine whether an outburst creates sufficient prejudice to deny the defendant a fair trial such that a mistrial should be granted." *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006).

A mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different absent the incident that prompted the motion for mistrial. *Id.* (quoting *State v. Spann*, 574 N.W.2d 47, 53 (Minn. 1998)). Here, we cannot

say that the district court abused its discretion in concluding that there was no reasonable probability that the outcome of this trial, which involved ample information about the combative nature of the relationship, would be affected by one unsolicited reference to an OFP, particularly in light of the fact that the district court immediately ordered the jury to disregard the remark and gave a corrective instruction.

**b. Advocate's interaction with witness**

Larson argues that the district court should have sua sponte declared a mistrial based on the conversation between the advocate and the officer before the officer testified. Because Larson did not move for a mistrial on this issue, we review it under the plain-error analysis described above. We conclude that Larson has failed to show error, let alone plain error, because Larson chose to address the matter in cross-examination of the officer, and the district court subsequently permitted the advocate to be called as a witness to impeach the officer's testimony. It was not error for the district court to defer to Larson's trial strategy in handling this incident. Additionally, Larson has not demonstrated how he was prejudiced by this strategy.

## III. The district court did not abuse its discretion in instructing the jury.

Larson argues that the district court abused its discretion by failing to define "assault" and "bodily harm" when it instructed the jury on the charge of second-degree assault.

District courts are allowed considerable latitude in the selection of language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). The instructions must be viewed as a whole to determine whether they fairly and adequately explain the

relevant law. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). "[T]he court's instructions must define the crime charged." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001). Generally, absent an argument that an unobjected-to instruction violated the right to a jury trial, the instruction is reviewed under the plain-error standard. *State v. Vance*, 734 N.W.2d 650, 655 (Minn. 2007).

In this case, the district court defined "great bodily harm" and "assault" in the instruction on the elements of the charged burglary but did not repeat those definitions in the instruction on the "lesser" charge of second-degree assault. "Assault" and "bodily harm" were also defined in the instruction on the charge of domestic assault. Larson argues that "[f]or the [district] court to have defined assault and bodily harm for one offense but not clearly defined the terms for the most serious offense confused the issue." We disagree. The district court instructed the jury on second-degree assault using 10 *Minnesota Practice* CRIMJIG 13.10 (2006). Larson has failed to show that the district court committed any error in the jury instructions or that the instructions were incorrect. We find his speculation that the instructions must have been confusing to be unsupported by the record.

## IV. The district court erred in sentencing Larson for both second-degree assault and domestic assault arising out of the same incident.

Larson argues that the district court erred by imposing separate sentences for his convictions of second-degree assault and domestic assault. The state concurs. We agree. A defendant who commits multiple offenses against the same victim in a single behavioral incident may only be sentenced for one of those offenses. Minn. Stat.

§ 609.035, subd. 1 (2008); *State v. Bookwalter*, 541 N.W.2d 290, 293 (Minn. 1995). We therefore vacate the one-year sentence imposed for domestic assault. *See* Minn. Stat. § 244.11, subd. 2(b) (2008) (granting this court the power to vacate a sentence that is inconsistent with statutory requirements); *State v. Kebaso*, 713 N.W.2d 317, 324 (Minn. 2006) (stating that "the imposition of a sentence within those limits [set by the legislature] is a judicial function") (citation omitted). Because we affirm the convictions, respondent's motion to take judicial notice of family court records is denied as moot.

**Affirmed in part and reversed in part; motion denied.**