STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1833

State of Minnesota,
Respondent,

vs.

Joseph Montgomery,
Appellant.

Filed April 28, 2009
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 06063585

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Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

JOHNSON, Judge

A Hennepin County jury found Joseph Montgomery guilty of attempted first-degree murder based on evidence that he forced his former wife to ingest large quantities of pills, which nearly caused her death. The district court sentenced him to 180 months of imprisonment. On appeal, he challenges his conviction and sentence on multiple grounds. We affirm.

FACTS

This prosecution arose from events that occurred one night in September 2006 in the home that Montgomery shared with his former wife, K.M. The couple divorced in 2004 but resumed living together with their three children after the divorce.

According to the evidence presented by the state, K.M. was in bed at approximately 9:30 or 10:00 p.m. when Montgomery borrowed her cellular telephone. Montgomery found text messages from a man with whom K.M. recently had begun a relationship. Montgomery became enraged. He threw K.M. to the ground and punched her multiple times while asking her questions about her relationship with the other man.

After beating her and questioning her for 15 to 20 minutes, Montgomery told K.M. that she was going to die that night. Montgomery told K.M. that she could choose either to jump off a bridge into the Mississippi River or to take pills. K.M. testified that Montgomery talked about the two choices for 15 to 20 minutes. Montgomery told her that if she did not make a choice, he would strangle her. K.M., who had medical training,

chose pills, which she believed would give her a better chance of survival. Montgomery repeatedly told K.M. that he would kill her if she tried to run or scream for help.

Montgomery forced K.M. to retrieve various bottles of pills that were in the house, including children's ibuprofen, extra-strength Tylenol, and Tylenol PM. K.M. hid the Tylenol PM under her pillow because she believed that it was most likely to cause her to fall asleep and die. Over a period of 45 to 60 minutes, at Montgomery's instructions, K.M. slowly took as few pills as possible, with at least fifteen glasses of water, which she also believed would increase her chances of survival. During this time, she wrote a farewell note to her children, which Montgomery argued at trial was evidence that K.M. had attempted suicide. During the night, K.M. tried to stay awake while pretending to be asleep. Montgomery periodically checked to see whether K.M. was still alive, but K.M. did not respond to him. Eventually K.M. fell asleep.

K.M. awoke at daybreak, vomiting. She told Montgomery that she needed to go to the hospital. Montgomery agreed to take her to the hospital if she agreed to say that she had been attacked while jogging. She agreed, and they went to the hospital at approximately 7:00 a.m. K.M. initially told emergency room personnel that she had been attacked while jogging. After Montgomery left the hospital, however, K.M. promptly told a nurse that Montgomery had beaten her and forced her to consume Tylenol. The nurse and a physician testified at trial that K.M. had toxic amounts of Tylenol in her blood, which might have led to liver failure if she had not received treatment.

Hospital personnel contacted the police, and the police obtained consent from K.M. to enter her home. They found blood and vomit on the bedroom floor and the bed,

a bottle of Tylenol PM under a pillow, and pill bottles on the floor. The police also contacted Montgomery via telephone and asked him for information. Montgomery said that he was driving around to gather his thoughts. When Montgomery arrived at his house later that afternoon, Officer Brian Wentworth of the Champlin Police Department met him there and asked him to come to the police station to answer questions. During the course of the interview, Officer Wentworth decided that Montgomery was a suspect and arrested him.

The state charged Montgomery with one count of attempted first-degree murder in violation of Minn. Stat. §§ 609.17, .185(a)(1) (2006), and one count of third-degree assault in violation of Minn. Stat. § 609.223, subd. 1 (2006). Before trial, Montgomery moved to suppress evidence gathered as a result of the statement he gave to Officer Wentworth. The district court granted his motion in part, ruling that the *Miranda* warning that Officer Wentworth gave to Montgomery midway through the interview was defective and that statements made by Montgomery after that point were inadmissible. The district court ruled, however, that statements made during the pre-*Miranda* portion of the interview were admissible.

At a four-day trial in June 2007, Montgomery testified in his defense and presented a very different version of events. He testified that, on the night in question, he was not home between 10:00 p.m. and shortly after 3:00 a.m. because he had left the home after he and K.M. argued about money. He testified that when he returned, he promptly fell asleep on the couch without looking into K.M.'s bedroom. He testified that he awoke in the morning to a noise from the bedroom, went to check on K.M., and saw

that she was covered in blood. He testified that K.M. told him that she had been beaten while jogging and did not want to call the police.

At the conclusion of trial, the jury returned verdicts of guilty on both counts. The district court sentenced Montgomery to 180 months of imprisonment on the conviction of attempted first-degree murder, which is the presumptive sentence. Montgomery appeals.

D E C I S I O N

I. Sufficiency of the Evidence

Montgomery first argues that the evidence is insufficient to convict him of attempted first-degree murder. More specifically, he argues that the state did not prove the requisite intent to commit murder because he took K.M. to the hospital for treatment.

When considering a claim of insufficient evidence, this court conducts a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008). The reviewing court must "assume that the jury believed the State's witnesses and disbelieved contrary evidence." *State v. Hughes*, 749 N.W.2d 307, 312 (Minn. 2008), *cert. denied*, 129 S. Ct. 605 (2008). A reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, reasonably could conclude that the defendant was guilty of the charged offense. *State v. Clark*, 755 N.W.2d 241, 256-57 (Minn. 2008).

Montgomery was convicted of attempting to commit a violation of the following statute:

> (a) Whoever does any of the following is guilty of murder in the first degree and shall be sentenced to imprisonment for life:
>
> > (1) causes the death of a human being with premeditation and with intent to effect the death of the person or of another . . . .

Minn. Stat. § 609.185(a)(1). The statute criminalizing attempts provides, "Whoever, with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime is guilty of an attempt to commit that crime, and may be punished as provided in subdivision 4." Minn. Stat. § 609.17, subd. 1. Thus, the state was required to prove that Montgomery took a "substantial step" toward causing K.M.'s death with premeditation and intent to effect the murder. *See* Minn. Stat. §§ 609.17, subd. 1, .185(a)(1).

Montgomery argues that the evidence of intent is insufficient because "he either did not really want her to die or [he] abandoned that intent." But intent is a state of mind that must generally be proved by inference from the defendant's words and acts in light of surrounding circumstances. *State v. Thompson*, 544 N.W.2d 8, 11 (Minn. 1996). Montgomery points out that he did not ensure that the pills were toxic enough to cause death and that he brought K.M. to the hospital. But the evidence shows that Montgomery told K.M. repeatedly that she was going to die, that he forced her to ingest potentially fatal amounts of pills, and that he allowed her to suffer from the effects of the pills throughout the night. Intent requires only that the defendant believes that the act, if successful, would cause the proscribed result. *See* Minn. Stat. § 609.02, subd. 9(4) (2008). Assuming, as we must, that the jury believed the state's evidence, Montgomery

committed the offense of attempted murder before taking K.M. to the hospital because he already had taken a "substantial step" toward accomplishing the murder by forcing her to ingest pills. The fact that K.M. took some control over the pill-ingestion process does not diminish Montgomery's intent.

Montgomery's alternative theory is that, even if he had the requisite intent at one time, he later abandoned his plan to commit murder. Abandonment of an attempt is, by statute, an affirmative defense: "It is a defense to a charge of attempt that the crime was not committed because the accused desisted voluntarily and in good faith and abandoned the intention to commit the crime." Minn. Stat. § 609.17, subd. 3 (2006). The defendant bears the burden of production; if that burden is met, the state then has the burden of proving that there was no effective abandonment. *State v. Currie*, 267 Minn. 294, 306, 126 N.W.2d 389, 398 (1964); *see also State v. Cox*, 278 N.W.2d 62, 66 (Minn. 1979) (holding that attempt is not abandoned if defendant refrains from act because of intervening events, such as arrival of police).

"The traditional view as expressed by most commentators is that abandonment is *never* a defense to a charge of attempt if the defendant has gone so far as to engage in the requisite acts with criminal intent." 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.5(b)(2), at 245 (2d ed. 2003).

> Assuming a defense of voluntary abandonment, does there come a point at which it is too late for the defendant to withdraw? Obviously there must be, for it would hardly do to excuse the defendant from attempted murder after he had wounded the intended victim or, indeed, after he had fired and missed.

LaFave, *supra*, at 249. Thus, the time for abandonment had passed by the time Montgomery took K.M. to the hospital. After Montgomery took a "substantial step" toward the offense of attempted murder, any subsequent action cannot, as a matter of law, constitute abandonment of the attempt. Therefore, the evidence is sufficient to support the jury's verdict that Montgomery attempted to murder K.M.

II. Abandonment Instruction

Montgomery next argues that the district court erred by not instructing the jury on the defense of abandonment. We ordinarily review a district court's selection of language for jury instructions for abuse of discretion. *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005). In this case, Montgomery did not request an abandonment instruction at trial. The failure to request such an instruction constitutes forfeiture of the issue on appeal. *State v. White*, 684 N.W.2d 500, 508 (Minn. 2004). Under the plain error doctrine, however, we may consider a forfeited issue if there is an error, the error is plain, and the error affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it is clear or obvious under current law, *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002), and an error is clear or obvious if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the first three requirements of the plain error test are satisfied, we "correct the error only if it seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005) (quotation omitted).

As stated above, abandonment of an attempt is, by statute, an affirmative defense. Minn. Stat. § 609.17, subd. 3. But Montgomery's defense was not focused on abandonment; rather, defense counsel focused on whether the state had proved the requisite intent. Thus, there was no reason for the district court to be alert to the need for an instruction on the affirmative defense of abandonment. Furthermore, as discussed above, abandonment does not apply as a matter of law after a defendant has taken a substantial step toward attempted murder. *See* LaFave, *supra*, at 249. Thus, the district court did not err by not instructing the jury about the concept of abandonment. *See Ramirez v. State*, 739 P.2d 1214, 1216-17 (Wyo. 1987) (holding that abandonment instruction was not warranted where defendant called ambulance after stabbing victim nine times because defendant already had committed crime).

III. Admission of Pre-*Miranda* Statement

Montgomery next argues that the district court erred by not suppressing his pre-*Miranda* statement to the police. In denying that part of Montgomery's motion to suppress, the district court observed:

> Officers were investigating an extremely confusing scene trying to determine whether or not it even was a crime scene. . . . The officers really didn't know if they were investigating a crime or not and were quite properly conducted an open-minded open investigation and just trying to find out what the situation was.

The district court reasoned that Montgomery was not a suspect and did not have reason to believe that he was in custody until the interview had progressed.

A *Miranda* warning advising a defendant of his Fifth Amendment protection against self-incrimination is required only for custodial interrogations, *i.e.*, only for "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966); *see also State v. Heden*, 719 N.W.2d 689, 694-95 (Minn. 2006). A person is in custody if there has been a "formal arrest or restraint on freedom of movement of the degree associated with formal arrest." *Minnesota v. Murphy*, 465 U.S. 420, 430, 104 S. Ct. 1136, 1144 (1984) (quotation omitted). "The test for determining whether a person is in custody is objective -- whether the circumstances of the interrogation would make a reasonable person believe that he was under formal arrest or physical restraint akin to formal arrest." *In re Welfare of D.S.M.*, 710 N.W.2d 795, 797-98 (Minn. App. 2006). Whether a defendant was "in custody" at the time of an interrogation is a mixed question of law and fact. *State v. Wiernasz*, 584 N.W.2d 1, 3 (Minn. 1998). On appellate review, this court examines the district court's findings of fact under the clearly erroneous standard of review but conducts a *de novo* review of the district court's custody determination and the need for a *Miranda* warning. *Id.*

When determining whether a person is in custody, the key question is whether a reasonable person in the suspect's position would believe that he or she is "in police custody of the degree associated with formal arrest." *In re Welfare of G.S.P.*, 610 N.W.2d 651, 657 (Minn. App. 2000). Circumstances indicating that a suspect is in custody include that the police interviewed the suspect at the police station, that the

officer told the suspect he or she was the prime suspect, that the officer restrained the suspect's freedom, that the suspect made a significantly incriminating statement, the presence of multiple officers, and that an officer pointed a gun at the suspect. *State v. Staats*, 658 N.W.2d 207, 211 (Minn. 2003). Circumstances indicating that the suspect is not in custody include that the questioning took place in the suspect's home, that the police expressly informed the suspect that he or she was not under arrest, that the suspect left the police station at the close of the interview without hindrance, the brevity of the questioning, the suspect's freedom to leave at any time, a nonthreatening environment, and the suspect's ability to make phone calls. *Id*. at 212.

Montgomery contends that he was in custody because police officers had orders to detain him and were preparing a search warrant and because his statement was taken in a manner that was essentially a police interrogation. Montgomery admits, however, that he voluntarily went to the police station and was in a "'soft' interrogation room used for non-suspects and from which a person could easily leave the station." There is no evidence that Montgomery knew that police officers were preparing a search warrant or that they had orders to detain him. Montgomery testified at the suppression hearing that he was not handcuffed, was not immediately taken to a "secured area" before his statement was taken, and was told "many times" that he was not under arrest. We conclude that a reasonable person in these circumstances would believe that he was not under formal arrest. *See D.S.M.*, 710 N.W.2d at 797-98. Thus, the district court did not err by admitting Montgomery's pre-*Miranda* statement.

IV. Exclusion of Victim's Medical Records

Montgomery next argues that the district court erred by ruling that K.M.'s psychiatric records were inadmissible and not discoverable. We review these rulings for an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

A crime victim's medical records generally are protected from disclosure by the physician-patient privilege. Minn. Stat. § 595.02, subd. 1(d), (g) (2006). But "the medical privilege, like other privileges, sometimes must give way to the defendant's right to confront his accusers." *State v. Kutchara*, 350 N.W.2d 924, 926 (Minn. 1984). "[T]he proper procedure is generally for the trial court to review the medical records at issue in camera to determine whether the privilege must give way." *State v. Reese*, 692 N.W.2d 736, 742 (Minn. 2005). "The in camera approach strikes a fairer balance between the interest of the privilege holder in having his confidences kept and the interest of the criminal defendant in obtaining all relevant evidence." *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992) (quoting *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987)).

This issue arose upon Montgomery's motion for discovery of K.M.'s psychiatric records. The state opposed the motion. Montgomery argues that K.M.'s psychiatric records display a history of suicidal ideations that lend support to his argument that K.M. attempted suicide. The district court conducted an *in camera* review of the records and concluded that they are inadmissible. The district court noted that there was only a single mention of suicide, which occurred in December 1999, when K.M. was pregnant and had recently learned that her husband was having an extramarital affair. The district court noted that there was "no indication anywhere in the records that there was ever any repeat

of these suicidal thoughts." In addition, "the circumstances of that particular suicidal ideations were unique. They were not repeated again. There's nothing to indicate that this was a thought pattern that ever occurred to her again. The references to suicidal ideations are vague. They are too distant in time." As a result, the district court ruled that the records "have no relevance to the particular proceeding, and I am not going to invade the physician-patient privilege by releasing those records."

The reasons stated by the district court reflect a proper exercise of discretion. In addition, the note that K.M. wrote to her children on the night of the crime was not strongly suggestive of suicide; the note simply expressed love for her children and family and her desire to be reunited with them someday. We conclude that, in light of the circumstances, the district court did not abuse its discretion in ruling that K.M.'s medical records were inadmissible and not discoverable.

V. Prosecutorial Error

Montgomery next argues that the prosecutor committed prosecutorial error by referring to inadmissible evidence when cross-examining him.

A. Objection Preserved

Montgomery's first challenge is to a question posed by the prosecutor concerning an interview of one of Montgomery's children. The prosecutor asked, "Then you know, don't you, that your daughter [J.M.] said that she's seen bruises all over her mother and she thinks they're from you hitting her, don't you?" Defense counsel objected, stating that the prosecutor was referring to an "[o]ut of court statement not received in evidence." The prosecutor responded by stating that she was "not offering it for the truth

of the matter . . . [but] asking if he's aware that that's in the reports." The district court sustained the objection, and the prosecutor moved on to another line of questioning.

A prosecutor may not refer to inadmissible evidence in an effort to cause jurors to draw adverse inferences from the evidence. *State v. Mayhorn*, 720 N.W.2d 776, 788-89 (Minn. 2006). In this case, the prosecutor committed error. Regardless whether the reference to inadmissible evidence was intentional, the substance of the interview of the child was not in evidence.

In *State v. Wren*, 738 N.W.2d 378 (Minn. 2007), the supreme court stated that when a defendant has objected to prosecutorial error, an appellate court should apply a harmless error test that "varies based on the severity of the misconduct." *Id*. at 389-90 (citing *State v. Caron*, 300 Minn. 123, 127-28, 218 N.W.2d 197, 200 (1974)). The supreme court noted that *Caron* sets forth the following two-tiered test:

> [I]n cases involving unusually serious prosecutorial misconduct this court has required certainty beyond a reasonable doubt that the misconduct was harmless before affirming. . . . On the other hand, in cases involving less serious prosecutorial misconduct this court has applied the test of whether the misconduct likely played a substantial part in influencing the jury to convict.

Wren, 738 N.W.2d at 390 n.8 (quoting *Caron*, 300 Minn. at 127-28, 218 N.W.2d at 200); *see also State v. McCray*, 753 N.W.2d 746, 754 n.2 (Minn. 2008) ("leav[ing] . . . for another day" the question whether the *Caron* two-tiered approach should continue to apply).

We will assume for the moment that the prosecutor's error was of the more serious variety. *See Wren*, 738 N.W.2d at 393-94 & n.13. We apply a five-factor test to

determine whether the misconduct was harmless beyond a reasonable doubt: (1) how the improper evidence was presented; (2) whether the state emphasized it during trial; (3) whether the evidence was highly persuasive or circumstantial; (4) whether the defendant countered it; and (5) the strength of the evidence. *Id.* at 394.

First, the reference to statements not in evidence was contained in a single question. After the objection was sustained, the prosecutor moved on to other topics. Second, the prosecutor did not again refer to the statement of Montgomery's child regarding bruises on K.M. after the objection was sustained. The prosecutor did not mention the child's statement in closing argument. Third, the information was not highly persuasive in light of other evidence, including evidence regarding a previous abusive incident in 2003 between the parties and the children's testimony regarding fights between their parents. Fourth, Montgomery was able to counter the suggestive question by testifying that he had never punched or hit K.M. and that K.M. and the children were incorrect regarding the 2003 incident. And fifth, the evidence against Montgomery was strong without the prosecutor's improper question. K.M. testified that Montgomery beat her and forced her to take pills. T.M., who was four years old at the time of trial, testified that "[m]y dad was punching my mom." T.M. also testified that, on the next morning, he saw "throw up and blood on [K.M.'s] pillow and her blanket." Similarly, J.M., who was six years old at the time of trial, testified that she saw "puke all on the bed and . . . blood on the pillow." N.M., who was eleven at the time of trial, testified that she saw "puke on the bed and I saw an ibuprofen bottle on my mom's bed and . . . the covers were a mess . . . and then there was a blood spot on the pillow." N.M. also testified that the

home telephone was broken, which required her to go to a neighbor's home to use a different telephone to call her mother.

We conclude that the *Wren* factors weigh in favor of the conclusion that the misconduct concerning the child's prior statement was harmless beyond a reasonable doubt.

B. Objection Not Preserved

Montgomery's second challenge, contained in his pro se supplemental brief, is to the prosecutor's reference to statements made by Montgomery during the post-*Miranda* portion of his interview by police, which the district court ruled was inadmissible. "For unobjected-to prosecutorial misconduct, we apply a modified plain error test." *Wren*, 738 N.W.2d at 389; *see also Ramey*, 721 N.W.2d at 302. Under the modified plain error test, "the defendant must establish both that misconduct constitutes error and that the error was plain." *Wren*, 738 N.W.2d at 393. "The defendant shows the error was plain 'if the error contravenes case law, a rule, or a standard of conduct.'" *Id*. (quoting *Ramey*, 721 N.W.2d at 302). "The burden then shifts to the state to demonstrate that the error did not affect the defendant's substantial rights." *Id*.

Montgomery contends that the prosecutor engaged in misconduct by referring to two different statements he made during his interview by police. First, when cross-examining him, the prosecutor referred to his post-*Miranda* statement that he would always love K.M. The prosecutor referred to the same statement during closing argument. The prosecutor's question and argument contained statements made to Officer Wentworth after the defective *Miranda* warning. Thus, the prosecutor's statement is an

error that is plain. *See Mayhorn*, 720 N.W.2d at 788-89. But the introduction of the statement did not affect Montgomery's substantial rights because, during the same cross-examination, Montgomery already had admitted that he loved K.M. and continued to love her through the time of the incident in question. Thus, the improper question is not reversible error.

Second, when cross-examining him, the prosecutor also referred to another portion of Montgomery's post-*Miranda* statement in which he stated that he did not immediately take K.M. to the hospital because of his frame of mind. The question specifically referenced page 65 of the transcript of the interview, which is several pages after the defective *Miranda* warning. Thus, the prosecutor's question constitutes an error that is plain. *See Mayhorn*, 720 N.W.2d at 788-89. But again, the question did not affect Montgomery's substantial rights because Montgomery made essentially the same statement during the pre-*Miranda* portion of his statement, when he stated that he did not know what to do when K.M. was injured because he was "stunned and shocked." Furthermore, Montgomery already had testified that he was emotional when he saw K.M.'s injuries. Thus, this improper question also is not reversible error.

VI. Sentencing Departure

Montgomery next argues that the district court erred by denying his motion for a downward departure. "Departures from the presumptive sentence are justified *only* when substantial and compelling circumstances are present in the record." *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008); *see also* Minn. Sent. Guidelines II.D. A district court has broad discretion in determining an appropriate sentence, and reviewing courts

will not reverse a district court's denial of a request for a downward departure unless the district court has abused its discretion. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Even if there are reasons for departing downward, this court will not disturb the district court's sentence if the district court had reasons for refusing to depart. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006); *Kindem*, 313 N.W.2d at 7-8. Reversing a denial of a request for a downward departure is appropriate only in "rare" circumstances, *Kindem*, 313 N.W.2d at 7, such as when the district court incorrectly believed that it was constrained from exercising its discretion or otherwise failed to exercise its discretion, *see, e.g.*, *State v. Mendoza*, 638 N.W.2d 480, 484 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002).

Montgomery contends that his taking K.M. to the hospital was a mitigating factor that justified a downward departure. In denying Montgomery's motion for a downward departure, the district court stated as follows:

> Well, I'm going to deny [Montgomery's] motion. In my experience these are unique facts, but I do know there was testimony that the victim here had a toxic level of Ibuprofen in her system at the time she was taken to the hospital. She could well have died had Mr. Montgomery not taken her to the hospital, in which case he would have been looking at a completed murder charge.

The district court thus concluded that the presumptive sentence of 180 months was appropriate.

The district court's rejection of Montgomery's motion for a downward departure is justified by Montgomery's actions. He punched K.M., forced her to choose a manner of death, forced her to ingest pills, and confined her to her bedroom. This is not one of

the rare cases in which a denial of a motion for a downward departure warrants reversal. *See Bertsch*, 707 N.W.2d at 668; *Kindem*, 313 N.W.2d at 7-8. Thus, the district court did not abuse its discretion in refusing to depart downward.

VII. Additional Pro Se Arguments

Montgomery raises three additional issues in his pro se supplemental brief.

A. Prior Incident of Domestic Abuse

Montgomery argues that the district court erred by admitting evidence of a prior incident of domestic abuse, which occurred in 2003. "Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion." *Amos*, 658 N.W.2d at 203.

The district court admitted the evidence in question pursuant to the following statute:

> Evidence of similar conduct by the accused against the victim of domestic abuse, or against other family or household members, 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. . . .

Minn. Stat. § 634.20 (2006). Montgomery argues that the state failed to provide a *Spreigl* notice. But the caselaw provides that evidence admitted pursuant to section 634.20 is not considered *Spreigl* evidence. *State v. McCoy*, 682 N.W.2d 153, 159-61 (Minn. 2004); *State v. Meldrum*, 724 N.W.2d 15, 20 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). Thus, the state was not required to give notice.

Montgomery also argues that the district court erred by failing to give a limiting instruction related to the relationship evidence. Because he did not request such an instruction, a plain error analysis applies. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001); *State v. Meyer*, 749 N.W.2d 844, 850 (Minn. App. 2008). As this court has explained,

> It is a 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. [*Meldrum*, 724 N.W.2d] at 22. But we have held that the failure to supply limiting instructions to the jury "does not *automatically* constitute plain error," particularly when other evidence shows that the probative value of the other-bad-acts evidence is not outweighed by its potential for unfair prejudice. *Id*.

Meyer, 749 N.W.2d at 850. Because the relationship evidence was more probative than prejudicial, there is no plain error in this case.

Montgomery further argues that the prosecutor committed error by referring to the 2003 incident in closing argument not as relationship evidence illuminating the relationship between him and K.M. but as evidence of his bad character. Because he did not object to the statement at trial, the modified plain error test applies. *Wren*, 738 N.W.2d at 389; *see also Ramey*, 721 N.W.2d at 302.

The prosecutor argued to the jury that, in both the prior incident and the current incident, Montgomery reacted abusively to the news that K.M. was involved with another man. The prosecutor did not refer to the prior incident of domestic abuse as it relates to Montgomery's character. Thus, the prosecutor's argument does not constitute plain error.

B. Sequestration of Victim Witness

Montgomery argues that the district court erred by permitting K.M. to remain in the courtroom while her children testified, in violation of the court's prior order for sequestration of witnesses.

At trial, the state asked the district court to lift the sequestration order so that K.M., who had already testified, would be permitted in the courtroom while her children testified. The defense objected. The district court ruled that it would not lift the sequestration order to allow K.M. to be in the courtroom. Nonetheless, Montgomery asserts that K.M. was present in the courtroom while her children testified. The state does not dispute that she was present then. Furthermore, the trial transcript reveals that, during the cross-examination of N.M., the defense attorney commented, without objection, "You don't need to look at your mom, okay?" Thus, it appears from the record that K.M. was present for the children's testimony.

"At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." Minn. R. Evid. 615. In addition, "Witnesses may be sequestered or excluded from the courtroom, prior to their appearance, at the discretion of the court." Minn. R. Crim. P. 26.03, subd. 7. A party seeking relief based on a violation of a sequestration order must show prejudice resulting from the violation. *State v. Erdman*, 383 N.W.2d 331, 334 (Minn. App. 1986), *review denied* (Minn. Apr. 24, 1986).

Our review is limited somewhat by the fact that the district court apparently permitted a violation of its sequestration order without any explanation. We assume that

the district court observed K.M. in the courtroom and permitted her to remain despite the sequestration order. It was within the district court's discretion to modify the order or to grant the state's request for an exception to its sequestration order. By permitting K.M. to remain in the courtroom, the district court's actions effectively were a modification of the sequestration order. Although it would have been preferable to have a record reflecting the reasons for the district court's decision not to enforce its order, its approach is nonetheless deserving of deferential review.

We need not determine whether the district court erred because, even if it did so, Montgomery has not established that he was prejudiced. He does not argue that K.M. coached the children or that her mere presence influenced their testimony; he merely makes general statements that her presence could have done so. Montgomery contends that T.M.'s testimony was different from what he previously had said in interviews. On cross-examination, defense counsel had an opportunity to impeach T.M. with the prior statements and did so. We note that the purpose of the sequestration rule -- to prevent a witness from hearing the testimony of other witnesses before taking the witness stand herself, *see State v. Ellis*, 271 Minn. 345, 364, 136 N.W.2d 384, 396 (1965) -- was upheld because K.M. had completed her testimony and was not later recalled to the witness stand. Thus, Montgomery has not established that he was prejudiced by any violation of the court's sequestration order such that a new trial is required.

C. Ineffective Assistance of Counsel

Montgomery last argues that his trial counsel provided constitutionally ineffective assistance by not gathering and introducing certain additional evidence. To prevail on his

claim, Montgomery "must affirmatively prove [first] that his counsel's representation 'fell below an objective standard of reasonableness' and [second] 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2068 (1984)).

Montgomery contends that his trial counsel was ineffective in five ways: (1) by failing to introduce into evidence a receipt showing that he was at Walgreens at approximately 3:00 a.m.; (2) by failing to obtain and offer Walgreens surveillance videotapes; (3) by failing to elicit testimony from the state's witnesses regarding whether his fingerprints were on the note that was written by K.M.; (4) by failing to introduce medical evidence of a deformity in his right hand; and (5) by failing to introduce into evidence K.M.'s cellular telephone.

Montgomery's arguments concerning the third, fourth, and fifth allegations of ineffectiveness do not satisfy either prong of the test for ineffective assistance of counsel. *See Gates*, 398 N.W.2d at 561. Montgomery has not adequately explained how trial counsel's failure to pursue those three forms of evidence "fell below an objective standard of reasonableness." *Id*. (quotation omitted). Furthermore, Montgomery has not adequately explained how there is a "reasonable probability" that the result of the trial would have been different if trial counsel had introduced such evidence. *Id*. (quotation omitted).

Montgomery's arguments concerning the first and second allegations of ineffectiveness may, as a prima facie matter, satisfy the first prong of the ineffectiveness test, but they do not satisfy the second. *See Gates*, 398 N.W.2d at 561. Even if Montgomery could prove that trial counsel's strategy decisions were below constitutional standards, which is difficult to prove, *see Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004), Montgomery could not prove that he was prejudiced by absence of the Walgreens receipt or videotapes. The Walgreens evidence is not inconsistent with the state's evidence and theory of the case. K.M. testified that Montgomery checked on her while she lay in bed and that she eventually fell asleep. The jury easily could have reconciled the evidence by concluding that Montgomery went to Walgreens after K.M. fell asleep. Thus, Montgomery cannot establish that, even if the evidence had been offered and admitted, the result of the trial would have been different. *See Gates*, 398 N.W.2d at 561.

If Montgomery's five allegations of ineffective assistance were alleged in a postconviction petition, he would not be entitled to an evidentiary hearing. *See* Minn. Stat. § 590.04, subd. 1 (2008); *McKenzie v. State*, 754 N.W.2d 366, 370 (Minn. 2008); *Gail v. State*, 732 N.W.2d 243, 248-49 (Minn. 2007). Thus, we conclude that Montgomery's trial counsel did not provide constitutionally ineffective assistance.

Affirmed.