STATE OF MINNESOTA
IN COURT OF APPEALS
A09-757

State of Minnesota,
Respondent,

vs.

Johnny Bernard Daniels, IV,
Appellant.

Filed May 18, 2010
Affirmed
Connolly, Judge

Dakota County District Court
File No. 19HA-CR-08-2211

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Cheri A. Townsend, Assistant County Attorney, Hastings, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Theodora Gaitas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Hudson, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant challenges his conviction of five offenses arising from his rape of his former girlfriend on the ground that expert witness testimony regarding battered-woman syndrome was improperly admitted at trial. Appellant also argues that his conviction of first-degree burglary under Minn. Stat. § 609.582, subd. 1(c) (2006), must be vacated for insufficient evidence because the prosecution failed to establish that appellant committed an assault during the course of the burglary. We affirm.

FACTS

Appellant Johnny Bernard Daniels IV and the victim, E.S., began dating in 2004, when E.S. was a junior in high school. Their relationship changed in the summer of 2005, when E.S. discovered that appellant had been seeing someone else. E.S. and appellant began to argue more, and appellant resorted to physical violence for the first time in the summer of 2006, striking E.S. on the lip.

After high school, appellant and E.S. enrolled in different colleges in St. Paul. Appellant became more verbally abusive and controlling at this point, and on more than one occasion punched E.S. hard enough to cause light bruising on both her face and her arms. E.S. felt that she had to lie to appellant in order to socialize with her friends, because she was afraid of how he would react if she told him the truth. In early March 2007, appellant summoned E.S. to his dorm room and confronted her about lying to him about going out with her friends. When she admitted that she had done so, appellant hit her in the eye hard enough to cause E.S. to black out, grabbed her neck and squeezed it,

grabbed her head, and hit it against a futon. E.S. testified that she blamed herself for the assault.

Later that month, E.S. met with appellant and told him she did not want to see him anymore. He then grabbed a glass jar, broke it over his own head, and refused to seek medical attention until E.S. agreed to take him back. Appellant eventually received stitches, after which he contacted E.S. at her dorm and told her that he wanted to see her. E.S. told him that she did not want to see him and asked him not to come to her campus. Appellant came to her campus anyway, resisted campus security's efforts to remove him, and finally left when campus security told him that they were going to call the police department. Shortly afterward, appellant agreed to end his relationship with E.S., and the two had no contact until July 2007.

In July of that year, appellant and E.S. began communicating over the Internet, and he convinced E.S. to begin seeing him again. The two began dating again, apparently without incident, until E.S. visited appellant's apartment, told him that she had received an ultimatum from her mother to stop seeing him, and attempted again to break up with him. She tried to leave appellant's apartment, but discovered that she had two flat tires, so she called a friend to pick her up while she waited with appellant in his apartment. When her friend arrived, appellant told E.S. to "come back," grabbed her sweatshirt and tried to drag her back, and took her cell phone in an attempt to get her to stay. E.S. told him that she could get a new cell phone, and appellant threw her phone into her friend's car. E.S. and her friend then drove away, but E.S. later returned to appellant's apartment to get her car. She noticed that the handle was missing from the

jack that propped up her car, and appellant told her the handle was inside his apartment. When she went inside to get it, appellant showed her a letter about how he wanted to keep the relationship going, and then pushed her into a wall, saying, "This is what you created. This is what you wanted." Appellant then held a knife against her throat, stabbed her in the hip, and told her that "If I can't have you, no one can" and that one of them would die that night. E.S. noticed that appellant had several steak knives by his bed.

E.S.'s mother discovered where she was, went to appellant's apartment door, and demanded that appellant let E.S. out. He did so and was soon arrested and charged with false imprisonment and making terroristic threats. As a result of these incidents, appellant pleaded guilty to one count of felony terroristic threats, and the false-imprisonment charge was dropped.

After this incident, E.S obtained an order for protection (OFP), prohibiting appellant from contacting her at a number of locations, including her father's house in Inver Grove Heights. When appellant was released from jail, he began calling E.S. on the phone in violation of the OFP. E.S. asked him to stop. On January 2, 2008, appellant called E.S. at her father's house, where she was staying, and asked if she would be mad if he did something "crazy." The two argued on the phone, and appellant hung up.

At 8:30 a.m. on January 3, after her father had left the house, E.S. awoke to find appellant in her bedroom. When she asked him how he got in, he answered, "Don't worry about it. I have my ways." He laid down in bed with her, grabbed her, and tried to kiss her repeatedly while she asked him to stop. When she got out of bed, he followed

her around the house and watched her while she was on the phone. E.S. testified that she was terrified, and that she did not run away because she felt there was nowhere else to go. Appellant was in the house with her for approximately three hours before she got a call from her work telling her that she was needed there. She told appellant that she needed to go to work, and he tried again to kiss her. When she refused, he replied, "Are you trying to piss me off . . . ? You know how I get." E.S. then had sexual intercourse with him, and testified that she wanted to cry at that time, but didn't know how he would react. She ran into the bathroom, locked the door, and cried while taking a shower. She then went to work, dropping appellant off at his grandmother's house on her way. When she arrived at work she told her manager what happened. Her manager told her to call the police, but E.S. testified that she was afraid to do so because appellant's father was a police sergeant with the Inver Grove Heights Police Department.

E.S. did call the police at the end of her shift, reporting only that appellant had met her at her father's house in violation of the OFP. Later, when speaking with the prosecutor investigating the OFP violation, E.S. revealed that appellant had in fact raped her. The matter was then referred to the Dakota County Sheriff's Office, and appellant was charged with five counts: third-degree criminal sexual conduct, in violation of Minn. Stat. § 609.344, subd. 1(c) (Supp. 2007); first-degree burglary in violation of Minn. Stat. § 609.582, subd. 1(a) (2006) (burglary of an occupied residence); first-degree burglary in violation of Minn. Stat. § 609.582, subd. 1(c) (burglary with assault); engaging in a pattern of harassing conduct in violation of Minn. Stat. § 609.749, subd. 5(a), (b) (2006); and violating an OFP in violation of Minn. Stat. § 518B.01, subd. 14(c) (2006).

After a bench trial, the district court convicted appellant of all five counts, and sentenced him to concurrent prison sentences for two of the five counts: 68 months on the first-degree-burglary charge involving assault, and 88 months on the third-degree criminal-sexual-conduct charge. This appeal follows.

D E C I S I O N

I. The admission of expert testimony on battered-woman syndrome did not constitute reversible error.

Appellant argues that, under *State v. Hennum*, 441 N.W.2d 793, 799 (Minn. 1989), the state should not have been allowed to submit expert testimony that E.S. exhibited battered-woman syndrome. Respondent argues that appellant has waived this argument because he never objected to the admissibility of this testimony at trial. Rather, after the expert and two other witnesses testified, appellant's attorney stated to the district court that he would normally request a jury instruction as to the proper use of the expert's testimony, but that because the trial was a bench trial, he would simply presume that the district court would follow *Hennum* in evaluating the admissibility of her testimony. The state also provided the district court with a cite to a related case, *State v. Grecinger*, 569 N.W.2d 189 (Minn. 1997).

A defendant's failure to object to an error at trial forfeits consideration of the error on appeal. *State v. Darris*, 648 N.W.2d 232, 241 (Minn. 2002). And "[a]n objection must be specific as to the grounds for challenge." *State v. Rodriguez*, 505 N.W.2d 373, 376 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). But here, appellant's attorney alerted the district court to the issue of the admissibility of the expert's

testimony, and any prejudice resulting from the district court's lack of opportunity to address this issue in a timely manner was mitigated by the fact that this was a bench trial rather than a jury trial. *See State v. Burrell*, 772 N.W.2d 459, 467 (Minn. 2009) (stating that in a bench trial, as opposed to a jury trial, "the risk of unfair prejudice to [the defendant] is reduced because there is comparatively less risk that the district court judge, as compared to a jury of laypersons, would use the evidence for an improper purpose or have his sense of reason overcome by emotion"). Appellant's attorney did not object in a timely manner, however, and accordingly we review the admissibility of this testimony for plain error. *See State v. Bauer*, 598 N.W.2d 352, 359, 363 (Minn. 1999) (stating that party fails to make a timely objection when he does not object during the witness's testimony, and reviewing for plain error when an objection to a witness's testimony was brought after the witness had completed testifying).

To establish plain error, appellant must show that the ruling (1) was error, (2) was plain, and (3) affected appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Plain error is prejudicial if there is a "reasonable likelihood" that the error "had a significant effect on the verdict." *Id.* at 741 (quotation omitted). The defendant bears a "heavy burden" to demonstrate the third prong. *Id.*; *see also State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994) (placing the burden on the defendant to show a "reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.") To justify correction, the error must have been "so clear under applicable law at the time of conviction, and so prejudicial to the defendant's right to a fair trial, that the

defendant's failure to object . . . should not forfeit his right to a remedy." *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999) (quotation omitted).

In *Hennum*, the supreme court limited expert testimony about battered-woman syndrome, which was introduced to support the defendant's self-defense claim, to "a description of the general syndrome and the characteristics which are present in an individual suffering from the syndrome." 441 N.W.2d at 800. The *Hennum* court cautioned that "[t]he expert should not be allowed to testify as to the ultimate fact that the particular defendant actually suffers from battered woman syndrome. This determination must be left to the trier of fact." *Id.* The supreme court extended this holding to prosecutorial use of such expert testimony in *Grecinger*, reasoning that the prosecutorial use of expert testimony on battered-woman syndrome may help the jury understand why a battered victim might act in a certain way, e.g., to not seek prosecution at the time of an assault. 569 N.W.2d at 196. But, taking into account the effect of such testimony on the rights of the alleged batterer, the court counseled that the prosecutorial use of such expert testimony should be weighed carefully under Minn. R. Evid. 403, which provides that such testimony "may be excluded if the probative value of such testimony is substantially outweighed by the danger of unfair prejudice or of misleading the jury." *Id.* Applying *Hennum*, the *Grecinger* court held that "the expert may not suggest that the complainant was battered, was truthful, or fit the battered woman syndrome. Likewise, the expert may not express an opinion as to whether the defendant was in fact a batterer." *Id.* at 197.

Here, the expert testified about battered-woman syndrome in general, and also testified in detail about her experiences in treating E.S. personally. She further testified

that E.S.'s conduct was "not uncommon . . . with people with . . . battery syndrome." And when the prosecutor asked her whether she had described E.S. as having symptoms consistent with battered-woman syndrome, she answered, "Right. Yes." We conclude that, in essentially testifying that E.S. exhibited battered-woman syndrome, the expert's testimony violated *Grecinger* and that its admission was therefore plain error.

But it does not appear that this error affected appellant's substantial rights. *See Griller*, 583 N.W.2d at 740 (requiring that plain error affect the defendant's substantial rights to justify reversal). In its written findings, the district court did not rely substantially on the expert's testimony, and references to her testimony in the findings do not pertain to battered-woman syndrome. The district court did recount the expert's testimony that E.S. "told her why she did not report the rape to the police," and the expert testified at trial that E.S. told her this was because she did not want to cause her parents any additional stress and because she was afraid of appellant. While this would appear to implicate battered-woman syndrome, E.S. testified at trial that the reason she did not report the rape was that she did not want to inform appellant's father, who was a sergeant with the Inver Grove Heights Police Department. And the district court apparently accepted E.S.'s testimony, finding separately that E.S. "was afraid to report the incident to the Inver Grove Heights Police Department since [appellant's] father is a sergeant with that police department." The district court's findings also recalled the expert's testimony that E.S. told her that she submitted to appellant "because she was afraid of what [appellant] would do to her if she did not submit." But this finding does not pertain to the failure to report the crime, a hallmark of the syndrome. *See Grecinger*, 569 N.W.2d at

196 (describing battered-woman syndrome as explaining why battered women are reluctant to report crimes against them).

Instead, the district court's findings indicate that it relied on other evidence in convicting appellant, such as E.S.'s testimony about the events on January 3 and evidence showing appellant's history of violence towards E.S. And notably, appellant's theory of defense was that he was in his grandmother's apartment at the time he was alleged to have raped E.S. The district court specifically found that appellant's grandmother's testimony on this issue was not credible, finding that (1) appellant's grandmother did not come forward with her alibi evidence until only two weeks before the trial, and (2) appellant's aunt, who during the time in question was in the bedroom of appellant's grandmother's apartment, an apartment described as "small," testified that she did not hear appellant until 2 p.m., when she heard appellant arguing with his grandmother and the sound of appellant breaking objects in the apartment. We conclude that there was not a "reasonable likelihood" that the erroneous admission of the expert's testimony in this case "had a significant effect on the verdict," *see Griller*, 583 N.W.2d at 741, and accordingly, we refuse to reverse appellant's conviction on this ground.

Appellant also argues that the expert improperly testified both as an expert witness about battered-woman syndrome in general, and as a fact witness as to her observations in treating E.S. In support of this argument, appellant cites Justice Stringer's special concurrence in *Grecinger*, in which he opined that the district court should prohibit "any expert who has examined the complainant from testifying as to the general nature of battered woman syndrome in order to assure that no prejudicial inferences can be drawn

that the complainant was in fact battered or suffered from battered woman syndrome." 569 N.W.2d at 199 (Stringer, J., concurring). But the majority in *Grecinger* did not adopt Justice Stringer's approach, and we refuse to do so here. *See State v. Fitzpatrick*, 690 N.W.2d 387, 392 (Minn. App. 2004) (stating that it is not the role of this court to extend existing law or create new law).

Appellant further argues that the expert's testimony (1) constitutes inadmissible hearsay, and (2) constitutes impermissible vouching testimony. Appellant did not raise either of these issues at any time before the district court, and therefore has waived them. *See Roby*, 463 N.W.2d at 508 (stating that failing to raise an argument before the district court constitutes waiver); *State v. Hamilton*, 268 N.W.2d 56, 63 (Minn. 1978) (stating that the failure to object to hearsay is a waiver of one's hearsay protections). Moreover, we conclude that any such error did not affect appellant's substantial rights and therefore would not justify reversal. *See Griller*, 583 N.W.2d at 740 (stating that unobjected-to error is reviewed for plain error, requiring that the defendant's substantial rights be affected to justify reversal).

II. There was sufficient evidence to convict appellant of first-degree burglary under Minn. Stat. § 609.582, subd. 1(c).

Appellant also argues that there was insufficient evidence of an element of first-degree burglary under Minn. Stat. § 609.582, subd. 1(c), i.e., that appellant committed an assault during the burglary. "Due process requires that every element of the offense charged must be proven beyond a reasonable doubt by the prosecution." *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). When reviewing a sufficiency-of-the-evidence

claim in a criminal appeal, an appellate court views the evidence in the light most favorable to the verdict and assumes that the factfinder disbelieved any contrary evidence. *State v. Leake*, 699 N.W.2d 312, 319 (Minn. 2005). "The verdict will not be overturned if, giving due regard to the presumption of innocence and the prosecution's burden of proving guilt beyond a reasonable doubt, the [factfinder] could reasonably have found the defendant guilty of the charged offense." *Id.* The district court's findings in a bench trial are given the same weight as a jury verdict and will not be set aside unless clearly erroneous. *Walker v. State*, 394 N.W.2d 192, 196 (Minn. App. 1986), *review denied* (Minn. Nov. 26, 1986).

First-degree burglary under Minn. Stat. § 609.582, subd. 1(c), requires that the defendant enter a building without consent and assault someone in the building. *See State v. Holmes*, 758 N.W.2d 326, 331 (Minn. App. 2009) (stating that a single incident can be used to satisfy both the assault and crime requirements under Minn. Stat. § 609.582, subd. 1(c)), *aff'd* 778 N.W.2d 336 (Minn. 2010). Assault is defined as "(1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. § 609.02, subd. 10 (2006). The intent to cause fear of immediate bodily harm or death may be determined by the defendant's words and actions under the circumstances. *State v. Kastner*, 429 N.W.2d 274, 275 (Minn. App. 1988), *review denied* (Minn. Nov. 16, 1988). Both parties agree that appellant's rape of E.S. was the assault at issue here, and the record contains no evidence that any other act of appellant satisfied the assault element of his first-degree burglary conviction.

Appellant argues that although the district court concluded that appellant committed third-degree criminal sexual conduct, no specific act of assault was alleged by the prosecution or specified by the district court. In finding that appellant had committed third-degree criminal sexual conduct, the district court found that appellant had "used force or coercion" to accomplish the intentional sexual penetration of E.S. It appears that appellant used coercion rather than force in this case. Coercion is defined as

> the use by the actor of words or circumstances that cause the complainant reasonably to fear that the actor will inflict bodily harm upon the complainant or another, or the use by the actor of confinement, or superior size or strength, against the complainant that causes the complainant to submit to sexual penetration or contact against the complainant's will. Proof of coercion does not require proof of a specific act or threat.

Minn. Stat. § 609.341, subd. 14 (2006).

Given this definition, coercion does not necessarily constitute "the intentional infliction of or attempt to inflict bodily harm upon another" or "an act done with intent to cause fear in another of immediate bodily harm or death." Minn. Stat. § 609.02, subd. 10. And while a defendant's words alone could constitute coercion under this definition, they generally would not constitute assault. *See Johnson v. Sampson*, 167 Minn. 203, 205, 208 N.W. 814, 815 (1926) ("[M]ere words or threats do not constitute an assault unless accompanied by an offer of physical violence."); *see also State v. Nelson*, 199 Minn. 86, 93, 271 N.W. 114, 118 (1937) (citing *Johnson* in the context of criminal assault).

But here, appellant broke into E.S.'s father's house, repeatedly attempted to kiss her against her will, and followed her around the house. The record indicates that E.S. feared appellant because of her violent past relationship with him, specifically feared appellant hurting her on the day of the incident as he had in the past, and therefore submitted to sexual contact with him against her will. And E.S. testified that before appellant raped her, he warned her not to anger him and stated, "You know how I get," after which she feared that she would get hurt if she did not submit. Given appellant's abusive history with E.S. and his behavior on January 3, his warning to her could reasonably be found to constitute an "offer of physical violence." *See Johnson*, 167 Minn. at 205, 208 N.W. at 815. Taking the prosecution's burden of proof and the presumption of appellant's innocence into account, we conclude that the district court could reasonably have found that appellant's conduct constituted an act committed with the intent of putting E.S. in reasonable fear of immediate bodily harm. Accordingly, we affirm appellant's conviction of first-degree burglary under Minn. Stat. § 609.582, subd. 1(c).

Affirmed.