STATE OF MINNESOTA
IN COURT OF APPEALS
A10-200

State of Minnesota,
Respondent,

vs.

James Earl Bailey,
Appellant.

Filed January 25, 2011
Affirmed
Worke, Judge

Olmsted County District Court
File No. 55-CR-09-2460

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

Mark A. Ostrem, Olmsted County Attorney, James S. Martinson, Assistant County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

WORKE, Judge

Appellant challenges his convictions of violation of an order for protection (OFP), terroristic threats, and fleeing a police officer, arguing that the district court plainly erred

in admitting relationship evidence, allowing rebuttal testimony, and failing to instruct the jury that its verdict had to be unanimous regarding which act constituted the violation of the OFP. Appellant also argues that the district court abused its discretion by ordering an unnecessary, obtrusive courtroom-control method. We affirm.

FACTS

T.S. had an OFP against appellant James Earl Bailey, with whom she had a previous romantic relationship. In March 2009, T.S. was staying with her sister, M.F. One night when appellant continuously called T.S., M.F. began answering the calls. M.F. knew that appellant was calling because "Biz Natch" showed up on the caller ID, which is a name T.S. used to refer to appellant, and M.F. recognized appellant's voice. Appellant then sent text messages. One text message from "Biz Natch" read: "Im gonna shoot myself in the head baby. I loved u t baby"; this message included a picture of a gun. Another message from "Biz Natch" read: "U bogus. U told them I was at home then ur born drunk sis think I waz born on seseame [sic] street." A third message "Biz Natch" sent read: "Okay hoe, Your si[s] did all this. Whatever I got u. Remember when they gone who kept wolfin." Finally, "Biz Natch" sent a text message that read: "Mel im a kill u." M.F. is "Mel." Shortly thereafter, M.F. saw appellant outside of the apartment building and called 911. A responding officer saw a male matching appellant's description walking up stairs at the apartment building. The officer instructed appellant to stop, but appellant fled; he was eventually located and arrested.

During appellant's jury trial, the state sought to admit relationship evidence and provided the district court with certified records of appellant's convictions, sentencing

orders, and complaints, which provided the underlying factual basis of the offenses. Appellant's attorney initially challenged the evidence, but ultimately agreed to the admission of redacted complaints, and appellant admitted that he was convicted of violating OFPs, a pattern of harassing conduct, and terroristic threats.

On the last day of trial, outside the presence of the jury, the district court stated that it received information regarding possible disruptive behavior on the part of appellant. Appellant's attorney stated that he believed that deputy sheriffs overheard a discussion between him and appellant that lead to the precaution of fitting a device around appellant's leg that was neither visible nor mentioned in the jury's presence. Appellant's attorney indicated that appellant no longer "inten[ded] to cause any disruptions." The district court also noted that a request was made for a deputy to stand near appellant when he testified. Appellant's attorney objected, claiming that appellant was already wearing a device on his leg and that a deputy in close proximity to appellant would be prejudicial. The district court and appellant's attorney, however, agreed on placement for a deputy near appellant. The deputy was in position before the jury entered the courtroom to avoid drawing attention to any change made in response to appellant testifying. Appellant's attorney had no further objection.

Appellant denied sending text messages and testified that he did not know that T.S. was at the apartment building. Appellant claimed to be there visiting a friend and asserted that he was with his friend the entire evening in his friend's apartment. But a probation-officer supervisor, called as a rebuttal witness, testified that appellant's friend was on probation at the time, and records showed that he was in an inpatient treatment

center in March 2009. The supervisor testified that there was no record of a furlough being issued for appellant's friend to leave the inpatient center. The jury found appellant guilty of terroristic threats, violation of an OFP, and fleeing a peace officer. This appeal follows.

D E C I S I O N

Evidence

Appellant argues that the district court committed plain error in admitting redacted complaints as relationship evidence. The state presented relationship evidence, under Minn. Stat. § 634.20 (2008).

> 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, violation of an order for protection . . . [and] violation of a harassment restraining order.

Although the relationship evidence was discussed during the trial, appellant did not object to the admission of redacted complaints, and admitted that he was convicted of violating OFPs, a pattern of harassing conduct, and terroristic threats. Appellant now challenges the evidence, arguing that it violated his rights under the Confrontation Clause.

The failure to object to the admission of evidence generally waives the right to raise the issue on appeal. *State v. Williams*, 525 N.W.2d 538, 544 (Minn. 1994); *see also*

State v. Gullekson, 383 N.W.2d 338, 340-41 (Minn. App. 1986) ("Generally, issues not raised in the [district] court, even constitutional ones, will not be addressed on appeal."), *review denied* (Minn. May 16, 1986). And while we may review the admission of the evidence under the plain-error test, *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006), we decline to do so in this matter because not only did appellant fail to object, but his attorney agreed to the admission of the evidence. Plain-error review is reserved for those cases involving genuine, significant issues. *See State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999) (stating that 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"). Here, appellant's prior conduct is the precise conduct contemplated under Minn. Stat. § 634.20 and was admissible; therefore, there was no error and no need for further analysis.

Appellant also argues that the district court committed plain error in allowing the probation-officer supervisor to testify that the person whom appellant claimed to be visiting on the day of the incident was in inpatient treatment during that time. Again, we decline to exercise our discretion to review this claimed error for plain error because, even if this was inadmissible evidence, such an error "does not automatically require reversal." *State v. Courtney*, 696 N.W.2d 73, 79 (Minn. 2005). Appellant claims that his rights under the Confrontation Clause were violated because he was not allowed to cross-examine the probation officer who wrote the report that the supervisor referenced in testifying that appellant's friend was in inpatient treatment and did not receive a furlough to leave the center. But alleged violations of the Confrontation Clause are subject to a

harmless-error analysis; reversal is not required if the error was harmless beyond a reasonable doubt. *Id.* at 79-80. An error is harmless beyond a reasonable doubt if the verdict was "surely unattributable to the error." *Id.* at 80 (quotation omitted). An examination of the record as a whole shows that the other evidence admitted at trial, including photos of the text messages from "Biz Natch" and M.F.'s testimony, supported the jury's guilty verdicts. Because any error was harmless, we decline to determine whether plain error occurred.

Jury Instructions

Appellant next argues that the district court failed to instruct the jury that its verdict had to be unanimous regarding which act was the violation of the OFP. Appellant contends that the evidence shows that he could have violated the OFP by calling T.S., texting T.S., or going to the apartment where she was staying with M.F.

Again, appellant failed to object to the jury instructions. Generally, the failure to object to the district court's jury instructions results in forfeiture of the right to appeal that issue, unless appellant can show plain error or an error of fundamental law. *State v. Vance*, 734 N.W.2d 650, 654-55 (Minn. 2007). Appellant's failure to object constituted a forfeiture of the right to appeal this alleged error because the failure to object could have been a tactical move posed by counsel. *See State v. Moore*, 274 N.W.2d 505, 507 (Minn. 1979) (stating that defense counsel may have deliberately failed to move to sever charges "based on reasons of strategy" in order to avoid having to defend in separate trials).

The evidence showed that appellant violated the OFP by calling T.S., texting T.S., and going to the apartment where she was staying. This was not an either-or case

because the evidence showed that appellant violated the OFP in three distinct ways. Because appellant did not object, the jury had to find that appellant violated the OFP in only one way in order to be found guilty of violating the OFP. *See State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002) ("[T]he jury need not always decide unanimously which of several possible means the defendant used to commit the offense in order to conclude that an element has been proved beyond a reasonable doubt."). If appellant objected, the state could have charged appellant with three OFP violations. By not objecting, appellant received a benefit by not being subject to three separate counts; thus, we decline to exercise discretion in analyzing this issue for plain error, because no error exists.

Reasonableness of Courtroom-Control Method

Appellant finally argues that the district court abused its discretion in attempting to control appellant by positioning a deputy near appellant when he testified. Defendants are not to be physically restrained while in court unless the district court finds the restraint reasonably "necessary to maintain order or security," and states the reasons for the restraint "on the record outside the hearing of the jury." Minn. R. Crim. P. 26.03, subd. 2(c). Once the necessity for a restraint has been shown, the court should order "the least coercive restraints reasonable under the circumstances." *State v. Stewart*, 276 N.W.2d 51, 61 (Minn. 1979). This court reviews the district court's decision to restrain a defendant for an abuse of discretion. *State v. Chambers*, 589 N.W.2d 466, 475 (Minn. 1999).

Appellant does not challenge the district court's ordering of a leg device; rather, appellant argues that the district court abused its discretion by positioning a deputy near

appellant when he testified. There was some explanation on the record regarding an exchange between appellant and his attorney that caused a deputy to become concerned that appellant would engage in disruptive behavior. Appellant's attorney acknowledged such an exchange and guaranteed to the district court that appellant would not engage in disruptive behavior. But in Minnesota, a "[district] court need not wait for a defendant to cause disruptions to require restraints." *Id.*

The district court ordered the deputy be in position before the jury entered the courtroom; thus, even if the jury noticed that the deputy was standing in a different place, there was no attention drawn to the fact that the deputy was standing there because appellant was going to testify. The district court did not abuse its discretion in positioning a deputy in close proximity to appellant in an attempt to maintain security and decorum in the courtroom.

Affirmed.