STATE OF MINNESOTA
IN COURT OF APPEALS
A10-337

State of Minnesota,
Respondent,

vs.

Tim Alan Becker,
Appellant.

Filed March 8, 2011
Affirmed
Halbrooks, Judge

Olmsted County District Court
File No. 55-CR-07-5791

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

Mark A. Ostrem, Olmsted County Attorney, Eric M. Woodford, Assistant County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

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

HALBROOKS, Judge

Appellant seeks a new trial on the ground that the district court erred by admitting certain evidence at trial. While we agree that the district court abused its discretion by

admitting certain portions of his statement and by denying his request to admit additional sections to show context, we conclude that these errors did not affect appellant's substantial rights. We therefore affirm.

FACTS

Appellant Tim Alan Becker and his wife, Peggy Becker (Becker), lived in an apartment in Stewartville with K.P., Becker's child from a previous relationship. On April 28, 2007, K.P. told Becker and appellant that she was going over to a friend's house for a bonfire and sleepover. But after the bonfire, K.P. spent the night at her boyfriend's house. K.P. had planned to return to her friend's house in the morning before her mother picked her up, but Becker arrived early and was told that K.P. was not there. K.P. arrived about ten minutes later "wearing different clothing, with a broken cell phone, a damaged iPod, [and] broken glasses." K.P. and Becker argued on the drive home. After arriving home, K.P. began packing her belongings, swearing, and telling Becker that she wanted to leave.

During the argument, appellant came home with an acquaintance, D.F. K.P. was in the bedroom, and Becker was standing in the bedroom doorway. Stefanie Ellingson, another acquaintance, also arrived at the apartment. Ellingson later testified that when she arrived, appellant was "pacing back and forth in the kitchen, upset" and that he looked angry.

Appellant began to get involved in the argument and started yelling and swearing at K.P. According to appellant, he was disappointed by K.P.'s actions. K.P. began yelling and swearing back at appellant, and she testified that appellant "[acted] very

angry and violent." Appellant then pushed through the others in the apartment and entered the bedroom. He hit K.P. multiple times on the back of her head with an open hand. Appellant testified that he "saw red" and lost it. Becker grabbed appellant and told him, "You can't hit her no matter what's going on."

Following this incident, K.P. left the apartment and stayed at her friend's house. K.P. briefly returned to a mobile home that Becker had moved into, but left about a week later when appellant moved in. At that point, K.P. went to a school counselor and reported the incident. K.P. subsequently went to live with her biological father and eventually moved in with her ex-stepmother, N.W.

Respondent State of Minnesota charged appellant with one count of gross misdemeanor domestic assault, pursuant to Minn. Stat. § 609.2242, subd. 2 (2006). The offense was charged as a gross misdemeanor because of appellant's prior conviction of a "qualified domestic violence related offense." Throughout trial, appellant argued that he disciplined K.P. with a reasonable use of force as authorized by Minn. Stat. § 609.06, subd. 1(6) (2006).

On December 26, 2008, the state moved to join the assault charge with a criminal-sexual-conduct charge based on K.P.'s allegations against appellant. Trial commenced on October 7, 2009, and the state dismissed its criminal-sexual-conduct charge against appellant. The state then moved "to preclude any reference to the criminal sexual conduct allegations" that were the subject of the dismissed complaint. Appellant did not object to this motion but reserved the right to inquire into the dismissed charges as necessary to explore any witness bias. The district court granted the state's motion.

During voir dire, appellant waived his right to a jury, and the case was tried to the district court.

The state called Detective Lee Rossman, who testified that he interviewed appellant after K.P. reported the assault. The state moved to offer the recording and transcript of appellant's interview. Both were received into evidence without objection, and the recording was played for the district court. During the interview, appellant admitted that he hit K.P. between four and five times on the back of her head. Appellant also stated that he calls K.P. a "dumb a--" and that he is "not nice to her. I don't want her to feel comfortable. I don't want her to stay."

The district court found appellant guilty of gross misdemeanor domestic assault. Appellant appealed, and we granted his motion to stay the appeal to allow him to file a postconviction petition. The postconviction petition sought to amend appellant's conviction to a misdemeanor on the ground that his prior harassment charge was not a qualified domestic-violence-related crime. The state conceded the issue. The postconviction court granted the petition and amended appellant's conviction and sentence accordingly. This reinstated appeal follows.

D E C I S I O N

I.

Appellant contends that the district court erred by admitting into evidence certain portions of his statement to police and argues that we must review this alleged error under the harmless-error standard of review. The state disagrees, contending that appellant did not timely object to the admission of the statement, and therefore any error

must be reviewed under the plain-error standard. "Error may not be predicated upon a ruling which admits evidence unless a timely objection or motion to strike appears of record." *State v. Fenney*, 448 N.W.2d 54, 61 (Minn. 1989) (quoting Minn. R. Evid. 103(a)(1)). An evidentiary objection must be made as soon as the grounds for inadmissibility appear. *Id.* "Otherwise, '[the error] is deemed waived since it is impossible for the [district] court subsequently to erase from the jury's memory the effect of the testimony.'" *Id.* (quoting *State v. Senske*, 291 Minn. 228, 231, 190 N.W.2d 658, 661 (1971)).

Here, appellant did not object to the admissibility of his statement until after it had been offered by the state, received into evidence, and played for the district court. At the time that it was initially offered, appellant was aware of the contents of the statement, including the fact that it referred to prior bad acts, included appellant's racist comments, and contained incomplete information regarding appellant's statements to the detective. But appellant did not raise a timely objection nor attempt to immediately correct the alleged contextual error and offer additional statements pursuant to Minn. R. Evid. 106. Therefore, because appellant failed to properly preserve this issue for appeal, we review his allegations for plain error. *See id.* (concluding that the appellant failed to timely object and reviewing the issue for plain error).

II.

A defendant's election to waive his right to silence and speak with police does not mean that everything said during that interrogation is admissible at trial. *State v. Hjerstrom*, 287 N.W.2d 625, 627 (Minn. 1979). But because of his failure to timely

object, appellant must demonstrate that the admission of his statement amounted to plain error. "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). If appellant satisfies these three prongs, we may correct the error only if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (quotation omitted).

Racist Comments

Appellant contends that the district court erred by admitting evidence of his racist statements at trial. Generally, evidence is admissible only if it is relevant. Minn. R. Evid. 402. Evidence is relevant when it logically tends to prove or disprove a material fact. *State v. Lee*, 282 N.W.2d 896, 901 (Minn. 1979). But even relevant evidence may be excluded if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Minn. R. Evid. 403. "[U]nfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005).

The recording of appellant's interview that was admitted at trial included racist comments. Specifically, appellant told the detective that he is "pretty much a racist," and that he started having problems with K.P.'s father because he "married this black gal," N.W. He stated, "I don't mind black people as long as black people are with black people. It really irks me when I see white chicks with a black guy though. You know? I don't agree with that at all." He also admitted that he called N.W. "a stupid n-gger." Appellant's racism and feelings toward N.W. had no relevance to whether appellant acted

reasonably in striking K.P.[1] Indeed, the focus of the state's questioning and arguments at trial related to appellant's relationship with K.P., not appellant's relationship with N.W. Therefore, these comments were not relevant to the issue of whether appellant acted reasonably. Furthermore, this evidence was highly prejudicial because it illustrated appellant's racist character. Because there was no probative value associated with this evidence and because the evidence was prejudicial, the district court erred by admitting these portions of appellant's recorded interview.

The next step in the plain-error inquiry is to determine whether the error is plain. "An error is plain if it was clear or obvious." *Strommen*, 648 N.W.2d at 688 (quotation omitted). This is the case when an error contravenes a rule. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). It is well-established that evidence is admissible only if it is relevant. Minn. R. Evid. 402. Thus, this error is plain.

But we must also determine whether the error affected appellant's substantial rights. "An error affects substantial rights if the error is prejudicial—that is, if there is a reasonable likelihood that the error substantially affected the verdict." *Strommen*, 648 N.W.2d at 688. The appellant bears the heavy burden of demonstrating that the error affected his or her substantial rights. *Ramey*, 721 N.W.2d at 302 (citing *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998)).

[1] On appeal, the state argues that appellant's racist comments were relevant to prove appellant's motive in striking K.P. The state suggests that "[b]ecause appellant claimed that he was acting reasonably when he struck [K.P.], it was not error for the district court to receive evidence tending to show that appellant was motivated to strike [K.P.] by his racial animosity toward [N.W.]." But we are not persuaded by the state's assertion that these racist comments had any relevance at trial.

Appellant's substantial rights were not affected by this error. First, there was ample evidence to support the district court's verdict. The testimony of the witnesses demonstrated that appellant was angry and agitated as a result of the argument between K.P. and Becker. The witnesses and appellant, himself, testified that he pushed past the others in the apartment and struck K.P. multiple times. And appellant testified that he "lost it" and "saw red" before he struck K.P. Second, the prosecutor did not refer to these racist comments again during the trial or closing argument. Finally, we note that appellant's case was tried to the district court. While the risk may have been greater had the evidence been presented to a jury, we are confident that the district court was able to disregard these inadmissible references and discharge its duties according to the law. *See State v. Sailer*, 587 N.W.2d 756, 764 (Iowa 1998) (stating that a reviewing court should place "great confidence" in judges' ability to follow the law and should not assume that evidence was considered for an improper purpose without a clear showing), *cited with approval in State v. Burrell*, 772 N.W.2d 459, 467 (Minn. 2009). We therefore conclude that appellant failed to meet his burden of proving that this error affected his substantial rights.

Prior Bad Acts

Appellant argues that the district court also erred by admitting references to his prior bad acts. A defendant's references to prior crimes during a police interrogation should generally not be admitted into evidence. *State v. Hall*, 764 N.W.2d 837, 842 (Minn. 2009). "Any reference to a defendant's prior record has great potential for unfair prejudice." *State v. Stafford*, 404 N.W.2d 918, 920 (Minn. App. 1987) (quotation

omitted), *review denied* (Minn. June 26, 1987). As such, evidence of a defendant's prior bad acts or criminal convictions is inadmissible except in certain delineated circumstances. *See* Minn. R. Evid. 404(b) (providing for the admissibility of prior bad-acts evidence for the purpose of demonstrating motive, intent, identity, etc.). In some situations, references to prior bad acts may be admissible to show the context of the defendant's statement. *See State v. Czech*, 343 N.W.2d 854, 856-57 (Minn. 1984) (holding that it was not error to fail to redact the defendant's references to prior crimes because they provided context as to why the undercover officers were speaking with the defendant).

Here, in addition to relevant information regarding the charged offense, the recording also contained references to appellant's prior bad acts. Specifically, appellant discussed a restraining order involving K.P.'s father, the fact that appellant had been in jail, that he has a "thick" record that includes "assaults and disorderly conducts," and an incident where he "popped a cop in Waterville." None of these prior acts has any relevance to the charged offense, and the state does not argue that these references had any probative value to its theory of the case. Because there was no probative value associated with this evidence and because the prejudicial effect was high, we conclude that the district court erred by admitting these portions of appellant's statement into evidence.

Furthermore, it is well-settled in Minnesota that evidence of a defendant's prior bad acts is not admissible unless the evidence is relevant to a permissible purpose such as motive or identity. Minn. R. Evid. 404(b). Because there is no dispute that the reference

to appellant's prior bad acts had no relevance and because those prior bad acts were prejudicial in that the acts dealt mostly with assaultive behaviors and portrayed appellant as a violent person, this was plain error. *See Strommen*, 648 N.W.2d at 688 (holding that when evidence of the defendant's prior bad acts was "clearly irrelevant and highly prejudicial," the error was plain).

But we are unable to conclude that appellant has met his burden of proving that the error in admitting evidence about his prior bad acts affected his substantial rights for the same reasons articulated above. The evidence against appellant was substantial, and the prosecutor did not refer to these bad acts at any other point during the trial. And we again note that appellant's case was tried to the district court, which considerably lessened the risk that the fact-finder was persuaded by these inadmissible references. *See Sailer*, 587 N.W.2d at 764. Therefore, appellant has failed to meet his burden of proving that this error affected his substantial rights.

Redacted Recording

Appellant contends that the district court erred by denying his motion to admit his unredacted statement to police into evidence. Minn. R. Evid. 106 provides that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered." The rule expressly allows for the introduction of additional statements or portions of that statement at the time the evidence is first offered. Minn. R. Evid. 106. This allows the fact-finder to consider the evidence in context immediately and is "an exception to the general sequence of a trial

where responsive matters are brought out on cross-examination." 8 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice* § 32.53 (3d ed. 2001). The evidence must still be admissible under the other rules of evidence in order to be admitted. *Id.*

Appellant did not offer the unredacted statement at the time the redacted statement was admitted, but he did offer it during the cross-examination of Detective Rossman. Appellant argued that the redacted statement mischaracterized his comments to the detective and that he needed to refer to the criminal-sexual-conduct allegations in order to explain some of his comments about K.P. The prosecutor argued that the evidence was inadmissible as self-serving hearsay, and the district court denied appellant's request to admit the unredacted recording, reasoning that appellant could offer the statement during his own testimony.

First, we conclude that the additional portions of appellant's statement do not constitute inadmissible "self-serving hearsay." Under general hearsay principles, a defendant may not offer a statement that recites his or her version of the facts without testifying and being subject to cross-examination. See Minn. R. Evid. 801(c) (defining hearsay as an out-of-court statement introduced to prove the truth of the matter asserted). But if a statement is offered for another relevant purpose, it is not hearsay. *State v. Wembley*, 712 N.W.2d 783, 794 (Minn. App. 2006), *aff'd*, 728 N.W.2d 243 (Minn. 2007). As a preliminary matter, it is unclear whether appellant wished to introduce the detective's statements or his own. But nevertheless, the statements regarding the sexual-assault allegations were not being admitted to show the truth of the matter asserted, but instead were solicited in order to show the effect on appellant as the listener. *Cf. State v.*

Mills, 562 N.W.2d 276, 287 (Minn. 1997) (characterizing the defendant's statement to police that she "did not know how to shoot a gun" as self-serving hearsay and thus inadmissible in a first-degree murder trial). Appellant offered the evidence to show context and demonstrate why he appeared angry at K.P. and made harsh comments about her during his interview with Detective Rossman. Because appellant did not wish to show the truth of the sexual-assault allegations, this evidence was not hearsay.

Second, appellant should have been permitted to introduce additional portions of his statement during the officer's testimony. Rule 106 expressly allows the contemporaneous consideration of the originally admitted statement and the additional portions of that statement offered to show context. So long as the evidence appellant sought to present was otherwise admissible, the district court should have permitted appellant to introduce that evidence in order to demonstrate the context he sought.

Because the statements were admissible and because rule 106 allowed appellant to admit those statements during the examination of the officer, it was error to preclude appellant from introducing this evidence at the time of his motion. And because the law in Minnesota is clear on these issues, the error was plain.

But we conclude that appellant's arguments fail on the third prong of the plain-error test because he has failed to demonstrate that this error affected his substantial rights. Appellant's counsel was able to elicit responses from the investigator that provided context for some of appellant's statements, and the district court allowed appellant's counsel some leeway in his cross-examination, agreeing that context would be appropriate. Additionally, appellant was able to explain some of his statements in more

detail during the state's cross-examination of him, and appellant's counsel was able to provide some context for the statements during redirect. Specifically, appellant testified that he wanted K.P. out of the house because of "lies" that she told and that those lies related to the other allegations that he discussed with the investigator. He also testified that before his interview with the investigator, he did not want her out of the house. Further, the evidence provided by the other witnesses and by appellant's own testimony demonstrated the unreasonableness of appellant's actions to a substantial degree, such that there is no reasonable likelihood that the lack of perfect context for some of appellant's statements to the investigator substantially affected the verdict, even considered along with the failure to redact appellant's racist statements and references to his prior bad acts. We therefore conclude that the district court did not commit plain error by denying appellant's request to admit into evidence his unredacted statement to police.

Affirmed.