STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0679

State of Minnesota,
Respondent,

vs.

Edward Leon Fields,
Appellant.

Filed February 24, 2014
Affirmed
Stoneburner, Judge

Hennepin County District Court
File No. 27CR1230708

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Young Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Appellate Public Defender, St. Paul, Minnesota (for appellant)

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

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

STONEBURNER, Judge

Appellant challenges his convictions of felony domestic assault and felony violation of an order for protection, arguing that (1) the evidence is insufficient to support

the convictions; (2) the district court erred by admitting testimony about his abusive conduct toward another girlfriend as relationship evidence; and (3) the district court and the prosecutor improperly urged jurors to misuse the relationship evidence as propensity evidence. We affirm.

FACTS

On a September afternoon in 2012, Z.A. called 911 from the intersection of Lyndale Avenue North and Dowling Avenue North in Minneapolis and reported that appellant Edward Leon Fields, the father of her children, had assaulted her when she went to his house to see their children. At the time of the assault, Z.A. and Fields had dated intermittently for eight years, had two children together, and Z.A. was eight-months pregnant with their third child. In a 911 call interrupted several times by sounds of distress and crying, Z.A. told the 911 operator that the incident had happened just before she called. In the middle of the call, Fields's mother, M.B. came on the line, described Z.A.'s injuries, and pleaded for law enforcement to respond.

Officer David Honican arrived within minutes of the 911 call and found Z.A. emotional, with injuries to her face and forehead. Z.A. told Officer Honican that Fields had assaulted her, hitting her in the face three to six times and kicking her in the stomach. M.B. confirmed Z.A.'s report, and told Officer Honican that she had witnessed the assault. After he took photographs of Z.A.'s injuries, Officer Honican called an ambulance, and Z.A. was taken to a hospital. She later testified that she "probably" told medical personnel that Fields assaulted her.

After speaking to Z.A. and M.B., who provided the address where the assault occurred, Officer Honican went to the address to find Fields. When no one responded to his knock, Honican entered the house with a key provided by M.B. He found Fields but no other adults in the house. He arrested Fields.

Fields was charged with felony domestic assault in violation of Minn. Stat. §§ 609.2242, subd. 4, and .101, subd. 2. Later, the state amended the complaint, adding a charge of felony violation of an order for protection (OFP) under Minn. Stat. § 518B.01, subd. 14(a), (d)(1).

Two days after his arrest, Fields made a telephone call from jail. The call was recorded, according to standard jail procedures. Fields asked the answering party, who has not been identified, whether an unnamed female had been contacted. Fields concedes that the reference was to Z.A. Fields asked the party to "text them again" because "really all they gotta do is not show." He asked the party to "tell her that . . . I truly am sorry . . . . That wasn't me. I don't know who the f-ck that was. Tell her I'm truly, truly sorry. If she can find it somewhere in her heart to forgive me and let's move past this stupid sh-t." He explained that Z.A. "don't have too much of a right to be mad at me because of what she did to me. . . . [S]he threw sh-t at me [and] I never hit her in her stomach." He concluded by telling the other party that "all I really need is for her not to come to none of the dates . . . 'cuz if they ain't got no none of that sh-t they gonna dismiss this sh-t anyway."

Later in September, Z.A. told a prosecutor's investigator that it was Fields who had assaulted her. But in October, she recanted. In letters to the district court and

Fields's counsel, she claimed that her injuries were caused by a fight with an unidentified woman she encountered at Fields's house, that she and the other woman were fighting over Fields, and that she had accused Fields because she was angry at him for not taking her side in the fight. M.B. also recanted, telling a defense investigator that she had lied to police.

In spite of the recantations, the state proceeded with the prosecution. On the witness stand, Z.A. established foundation for the 911 recording, which was admitted into evidence and played for the jury without objection. At the time the call was admitted, Z.A. had not testified to anything inconsistent with her statements in the 911 call. Fields did not request, and the district court did not give, an instruction limiting the purpose for which the call was admitted. After the jury heard the 911 call, Z.A. testified that she identified Fields as her attacker to the responding officer, and probably identified Fields as her attacker to medical personnel who examined her on the day of the assault, and that she later confirmed to a prosecutor's investigator that Fields had assaulted her. She then testified that an unidentified woman, rather than Fields, had assaulted her and that she recanted because she "wanted the truth to be told."

M.B. also testified at trial that there was an unknown woman in the house that day, and that the fight was between Z.A. and the unknown woman. M.B. acknowledged that her voice was on the 911 recording and that there are inconsistencies between the statements she made on the day of the assault and her trial testimony, but she said that she had lied to police because she was angry with her son for having another girlfriend and for taking that woman's side when the fight broke out.

The prosecution called three other witnesses. A deputy sheriff, whose testimony is not at issue here, established foundation for the jailhouse phone call. The recording of the telephone call was admitted into evidence and played for the jury without objection. Officer Honican testified about the statements Z.A. and M.B. made to him at the scene, noting that neither mentioned an unidentified woman being involved. Officer Honican testified that when he apprehended Fields there were no other adults in the house. The photographs that Officer Honican took of Z.A.'s injuries were admitted into evidence and shown to the jury without objections. Fields did not object to any part of Officer Honican's testimony or request any limiting instructions, and the district court did not give any instructions limiting the use of Officer Honican's testimony about statements made to him by Z.A. and M.B.

The state's final witness was M.P., who testified, over Fields's objections, about incidents of domestic abuse by Fields while she was in a significant romantic relationship with him in 2005. The district court overruled Fields's objections and admitted M.P.'s testimony as relationship evidence under Minn. Stat. § 634.20. The district court gave a limiting instruction before M.P. testified and repeated the instruction at the close of evidence before the jury started deliberations.

The district court's jury instructions included the standard instructions regarding impeachment and credibility determinations, including an instruction that prior inconsistent statements were admitted to impeach witness testimony. The jury convicted Fields on both counts, and he was sentenced. This appeal followed.

D E C I S I O N

I. Admission of out-of-court statements

Fields argues on appeal that there is insufficient evidence to support his convictions because Z.A.'s and M.B.'s out-of-court statements that he committed the assault could only be used to impeach their trial testimony, leaving no direct evidence that he assaulted Z.A. or violated the order for protection. But Fields failed to object to the out-of-court statements when they were admitted and failed to seek an instruction limiting admissibility to impeachment evidence. And "hearsay admitted into evidence without, or over, objection becomes substantive evidence in a trial." *State v. Jackson*, 655 N.W.2d 828, 833 (Minn. App. 2003) (explaining that this is because a party is limited on appeal to objections raised during trial proceedings). The supreme court has cautioned that:

> [t]he number and variety of exceptions to the hearsay exclusion make objections to such testimony particularly important to the creation of a record of the [district] court's decision-making process . . . . The complexity and subtlety of the operation of the hearsay rule and its exceptions make it particularly important that a full discussion of admissibility be conducted at trial.

State v. Manthey, 711 N.W.2d 498, 504 (Minn. 2006). But in the absence of an objection to admission of out-of-court statements as hearsay, we may review the admission of the evidence for plain error. *Id*. (citing Minn. R. Crim. P. 31.02).

The plain-error standard requires the party asserting error to show that there was an error, that it was plain, and that it affected the defendant's substantial rights. *Id*. (citations omitted). "If those three conditions are satisfied, we . . . determine whether it is

necessary to address the error to ensure the fairness and integrity of the judicial proceedings." *Id*. (citations omitted).

The state argues that there is no plain error because Z.A.'s and M.B.'s statements in the 911 call and to the responding officer were admissible as substantive evidence under the excited-utterance exception to the hearsay rule. We agree. The excited-utterance exception permits admission of a hearsay statement that "relat[es] to a startling event or condition [and was] made while the declarant was under the stress of the excitement caused by the event or condition." Minn. R. Evid. 803(2). "Relevant factors in determining whether an out-of-court statement qualifies as an excited utterance include 'the length of time elapsed, the nature of the event, the physical condition of the declarant, and any possible motive to falsify.'" *State v. Hogetvedt*, 623 N.W.2d 909, 913 (Minn. App. 2001) (quoting *State v. Daniels*, 380 N.W.2d 777, 782–83 (Minn. 1986)), *review denied* (Minn. May 29, 2001).

It is undisputed that Z.A. and M.B. were under the stress of excitement caused by the event when they spoke to the 911 operator and Officer Honican. Their distress is evident in the 911 recording, and Officer Honican and Z.A. testified that Z.A. was in distress during their interaction. Though Z.A. and M.P. later claimed a motive to falsify, the other factors all favor admission. The length of time that elapsed between the assault and the statements is a particularly strong factor here. Z.A. made the 911 call immediately after the assault, and Officer Honican arrived within minutes of the 911 call. Minnesota courts have upheld admission of excited utterances after much longer periods. *E.g.*, *Daniels*, 380 N.W.2d at 783 (one hour); *State v. Berrisford*, 361 N.W.2d 846, 850

(Minn. 1985) (90 minutes); *Hogetvedt*, 623 N.W.2d at 913 (three hours). In view of these facts and circumstances, we conclude that Z.A.'s and M.B.'s out-of-court statements were admissible as excited utterances, and the district court did not commit plain error by admitting the statements as substantive evidence.

We find no merit in Fields's argument that, because the district court instructed the jury that prior inconsistent statements were admitted as impeachment evidence, all of Z.A.'s and M.B.'s statements were admitted only as prior inconsistent statements for impeachment. Fields is seeking to construe the use of this standard jury instruction as the district court's ruling on the basis for admission of the statements, citing *State v. Plantin*, 682 N.W.2d 653, 660 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004), to support this construction. Fields asserts that in *Plantin* we held that the giving of an impeachment-evidence instruction "was sufficient to preclude jurors from using witness' prior statements as substantive evidence." But he mischaracterizes the holding.

In *Plantin*, the district court had permitted three witnesses and a police interviewer to testify about the victim's out-of-court statements without explicitly ruling on how the jury could use the testimony. *Id*. Before deliberations began, the district court instructed the jury that some of the testimony was for impeachment only, read the impeachment-evidence instruction, and told the jury that "any statement [the victim] may have made to [the police interviewer] may be considered by you for all purposes." *Id*. We held that the instructions adequately distinguished between the impeachment-only testimony given by the three witnesses, and the for-all-purposes testimony of the police interviewer. *Id*. We

did not hold that giving an impeachment-evidence instruction limits the use of unobjected-to hearsay.

In this case, Z.A.'s statement to medical personnel on the day of the assault and later statement to the prosecutor's investigator identifying Fields as her assailant were not admissible as excited utterances, and the state has not advanced any other exception that would have permitted admission of these statements as other than prior inconsistent statements for the purpose of impeachment. But even if admission of these statements without a limiting instruction constituted plain error, that error could not have affected the verdict given the overwhelming evidence, including admissions in Fields's telephone call from the jail that Fields assaulted Z.A.

II. Admission of relationship evidence.

"We review for an abuse of discretion the district court's decision to admit evidence of similar conduct by the defendant against an alleged domestic-abuse victim under Minn. Stat. § 634.20." *State v. Lindsey*, 755 N.W.2d 752, 755 (Minn. App. 2008) (citing *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004)), *review denied* (Minn. Oct. 29, 2008). A defendant challenging a district court's decision to admit evidence must show that the decision was both erroneous and prejudicial. *State v. Bartylla*, 755 N.W.2d 8, 20 (Minn. 2008).

Minn. Stat. § 634.20 (2012) provides that "[e]vidence of similar conduct by the accused against a 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." Section

634.20 adopts the definition of "family or household members" found in the Minnesota Domestic Abuse Act, Minn. Stat. §§ 518B.01–.02 (2012). *Id*. That definition includes "persons involved in a significant romantic or sexual relationship." Minn. Stat. § 518B.01, subd. 2. Evidence admitted under section 634.20 need not meet the clear-and-convincing-evidence standard required for admission of character or *Spreigl* evidence, but need only be more probative than prejudicial. *McCoy*, 682 N.W.2d at 161.

In *McCoy*, the supreme court expressly adopted section 634.20 as a rule of evidence. *Id*. There, the evidence in question involved acts of abuse toward the same victim. *Id*. at 156. Fields asserts that the supreme court did not adopt section 634.20 to the extent that it might authorize admission of similar acts of abuse against a third party, and urges this court "not to extend *McCoy*'s holding." But *McCoy*'s holding has already been extended. In *State v. Valentine*, this court held that when a defendant was charged with domestic abuse against one of his two girlfriends, section 634.20 authorized admission of abusive incidents involving his other girlfriend because the statute relates to family or household members of the accused, not of the victim. 787 N.W.2d 630, 637–38 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010). Fields is effectively asking us to reverse *Valentine*. We decline to do so.

Fields also argues that the probative value of M.P.'s testimony was substantially outweighed by the potential for unfair prejudice because it did not involve his relationship with Z.A. But this is precisely the issue we resolved in *Valentine*, in which we noted that "evidence showing how a defendant treats his family or household members, such as his former spouses or other girlfriends, sheds light on how the

defendant interacts with those close to him, which in turn suggests how the defendant may interact with the victim." *Valentine*, 787 N.W.2d at 637. We conclude that the district court did not abuse its discretion by admitting evidence of Fields's relationship with a former girlfriend.

III. Sufficiency of the evidence.

When considering a claim of insufficient evidence, our review is limited to a painstaking analysis of the record to determine whether the evidence, viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We 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, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004). We must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). We do not review a jury's credibility determinations. *State v. Watkins*, 840 N.W.2d 21, 31 (Minn. 2013).

The only element of the crime of felony domestic assault at issue here was the identity of Z.A.'s assailant. Because Z.A.'s and M.B.'s identifications of Fields as the attacker were admissible for all purposes, the evidence was plainly sufficient to prove that element. Fields's telephone call from the jail corroborates much of what Z.A. told

the responding officer and the relationship evidence was consistent with Z.A.'s account of the incident and Fields's conduct after the incident.

Fields makes a separate argument that the evidence is insufficient to support his OFP-violation conviction. To prove that offense, the state had to prove, in relevant part, that Fields "knowingly" violated the OFP. Minn. Stat. § 518B.01, subd. 14(d) (2012). In other words, the state had to show that Fields "intentionally engaged in prohibited contact, knowing that such contact was prohibited." *State v. Gunderson*, 812 N.W.2d 156, 158 (Minn. App. 2012). Fields specifically argues, based on his contention that there is insufficient evidence to support his assault conviction and some evidence that Z.A. came to his house believing that he would not be present, that the evidence does not show a knowing violation of the prohibition from having contact with Z.A. But because there is sufficient evidence to prove that Fields physically assaulted Z.A., the same evidence is sufficient to prove that Fields knowingly and intentionally violated the OFP.

IV. Jury instructions and prosecutorial conduct.

Fields argues that the district court erred by admitting M.P.'s testimony "because the court and prosecutor urged jurors to misuse the evidence as propensity evidence." This argument is misplaced because it relates to the use, rather than the admission of the relationship evidence. We therefore consider this argument as a challenge to the jury instructions and an assertion of prosecutorial misconduct.

A. Jury instructions.

Before M.P. testified, the district court proposed CRIMJIG 2.07 as a limiting instruction. Fields did not object or comment, and the district court gave this instruction:

> Members of the jury, the State is about to introduce evidence of alleged conduct by the defendant, Mr. Fields, in 2005. This evidence is being offered for the limited purpose of demonstrating the nature and extent of the relationship between the defendant, Mr. Fields, and [M.P.][,] [i]n order to assist you in determining whether Mr. Fields committed those acts for which he is charged in the complaint. The defendant, Mr. Fields, is not being tried for [] and may not be convicted of any behavior other than the charged offenses. You are not to convict the defendant on the basis of conduct occurring between himself and [M.P.]. To do so might result in unjust double punishment.

The court repeated this instruction before the jury started deliberations.

In the absence of an objection, we review jury instructions for plain error. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001). Plain error exists only where an error affects substantial rights, and this requirement is satisfied only if the error affected the outcome of the case. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). The defendant bears a "heavy burden" on this point. *Id*. District courts are allowed substantial latitude in the selection of language for the jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). "An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2010).

The instruction given did not reference propensity evidence or instruct the jury *not* to use M.P.'s testimony as such. But the instruction did not materially misstate the law because the instruction is consistent with section 634.20 and the appellate courts' interpretations of that section. *See* Minn. Stat. § 634.20 (providing for admission of

evidence of prior incidents of domestic abuse); *McCoy*, 682 N.W.2d at 161 (adopting section 634.20 as a rule of evidence); *see, e.g.*, *Valentine*, 787 N.W.2d at 637 (permitting relationship evidence from relationships with third parties because such evidence may illuminate how a defendant treats those close to him, including the victim).

Additionally, Fields has failed to show that this instruction affected the outcome of the trial. *See Griller*, 583 N.W.2d at 741 (relief based on plain error warranted only if error affected the outcome). Fields points to no facts suggesting that this instruction affected the outcome, asserting only that the prosecutor's closing argument, "combined with the district court's deficient instruction, virtually assured that jurors misused [M.P.]'s improperly-admitted testimony as propensity evidence when finding Fields guilty." Fields has failed to establish that the district court committed plain error by giving this instruction.

B. Prosecutorial conduct.

The prosecutor's complained-of use of the relationship evidence occurred in closing argument. After discussing the recantations of Z.A. and M.P., and their revised story that Z.A.'s injuries were caused by an unidentified woman in Fields's home, the prosecutor turned to the relationship evidence:

> And that's where you need to look at the testimony of [M.P.], . . . because she gave you some more insight into her relationship with [Fields], and how he acts or how he acted at the time they were together. And she described—she called it a wishy-washy relationship. And remember [Z.A.] described her relationship with this defendant, up and down, on and off. It's because he would cheat on them, it's because he would abuse them that it was on and off. And [M.P.] described a whole host of abusive actions by this defendant: Emotional,

> physical, mental. And she finally, after a year, had enough. But she stayed with him for a while even knowing about [Fields's ongoing relationship with Z.A.]. She thought he would change.
>
> And just like the defendant in his phone call from the jail, "Tell her I'm sorry. If she could just forgive me and we can get past this." This is the cycle of his relationship with women. He abuses them, begs for their forgiveness, and we move on. And they all thought that that's what would happen this time, but you can't go on and cause the injuries that he caused and have somebody not say, You know what enough is enough. There was nobody else in that house.

Fields did not object. Because he did not, we review this claim under the *Griller* plain-error standard as modified by *State v. Ramey*, 721 N.W.2d 294, 299–300 (Minn. 2006). Under this modified standard, we determine whether there was an error and whether the error was plain, meaning whether it was "conduct the prosecutor should know is improper." *Id.* If there was plain error, we assume that the error affected the defendant's substantial rights and the burden shifts to the state to show that the error *did not* affect substantial rights. *Id*.

Here, the prosecutor encouraged the jury to use the relationship evidence in a manner consistent with *Valentine*, in which we held that "evidence showing how a defendant treats his family or household members, such as his former spouses or other girlfriends, sheds light on how the defendant interacts with those close to him, which in turn suggests how the defendant may interact with the victim." 787 N.W.2d at 637. Because encouraging a use of evidence that is consistent with caselaw does not rise to the level of "conduct the prosecutor should know is improper," we conclude that no clear

error occurred and we need not consider whether the defendant's substantial rights were affected.

Affirmed.