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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0676**

State of Minnesota,
Respondent,

vs.

Jonquil B. Neal,
Appellant.

**Filed March 18, 2013
Affirmed
Rodenberg, Judge**

Ramsey County District Court
File No. 62-CR-11-6818

Lori Swanson, Attorney General, Thomas Ragatz, Assistant Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Charles F. Clippert, Special Assistant State Public Defender, Theodora K. Gaitas, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and
Rodenberg, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

On appeal from his conviction of multiple counts of assault and terroristic threats, appellant argues that the district court improperly admitted evidence of similar conduct by appellant with respect to the victim and with respect to other girlfriends. Appellant also argues that the district court erroneously admitted into evidence an application for an order for protection that contained inadmissible hearsay. We affirm.

FACTS

In August 2011, appellant Jonquil Bernard Neal, A.W., and A.W.'s four-year-old daughter were living together in an apartment in St. Paul. Appellant and A.W. were involved in a romantic relationship. A.W. was pregnant with appellant's child. T.T., who is A.W.'s aunt, resided in a different apartment in the same building.

On the evening of August 24, 2011, continuing into the early morning hours of August 25, 2011, appellant struck A.W. multiple times in the face with his hands, attacked her with a metal pull-up bar, threatened her with a knife, and choked her. When appellant fell asleep after taking some pills, A.W. took her daughter and escaped to T.T.'s apartment. T.T. called the police. Appellant was arrested and charged with multiple counts of domestic assault and terroristic threats.

The state moved in limine for permission to present extrinsic evidence of similar conduct by appellant against A.W. and four of appellant's other girlfriends pursuant to Minn. Stat. § 634.20 (2010). At a hearing on the motions in limine, the state made an offer of proof concerning assaults on other girlfriends. The district court ruled that the

state could present such evidence regarding three of the other girlfriends. The district court deferred ruling on the admissibility of evidence of appellant's similar conduct toward A.W.

At trial, the state elicited A.W.'s testimony about an order for protection (OFP) she sought following the August 25, 2011 assault. This evidence was preceded by a cautionary instruction by the district court directing the jury not to convict appellant of conduct that was not part of the present charges. The district court admitted the OFP application into evidence over appellant's objection that it was irrelevant under Minn. R. Evid. 402 and unfairly prejudicial under Minn. R. Evid. 403.

Later during the trial, the state offered the testimony of Officer Heroux of the St. Paul Police Department. During Officer Heroux's direct testimony, the following exchange occurred:

Q. Okay. So Officer, . . . you started describing her saying that she had been assaulted.

A. Yes. She told me that since she had been pregnant—
[DEFENSE COUNSEL]: Objection, hearsay.

THE COURT: Overruled.

Q. [PROSECUTOR]: You can answer.

A. She said that since she had been pregnant that he had assaulted her approximately four times, I believe. And she said that the incident that night was the most terrified she had been o[f] him.

Officer Schwab of the St. Paul Police Department also testified. During Officer Schwab's direct testimony, the following exchange took place:

Q. . . . Did she tell you whether he had assaulted her on any prior occasion?

A. Yes.

[DEFENSE COUNSEL]: Objection. Hearsay.

THE COURT: Counsel, approach, please.

(A discussion was had off the record.)

THE COURT: The objection is overruled.

Q. [PROSECUTOR] Officer, just generally, what did she say about prior assaults?

A. She said that she has been assaulted in the past.

Q. I should confirm, by [the appellant], is that correct, Officer?

A. Correct.

Q. Thank you. Continue.

A. She described being strangled by him in the past and being assaulted throughout the course of her pregnancy.

On the record, but outside the presence of the jury, appellant later stated the basis for the hearsay objection to Officer Schwab's testimony, arguing that the testimony was not elicited from A.W. and that testimony should have been elicited from A.W. before Officer Schwab was asked questions regarding prior assaults.

After the state's last witness had testified, the state offered a stipulation between the parties, reciting the minimal facts of appellant's three prior assault convictions against his former girlfriends, consistent with the district court's ruling on the motions in limine. The district court gave a cautionary instruction to the jury before the stipulation was read.

In its final instructions, the district court again cautioned the jury not to convict appellant of uncharged conduct. The jury found appellant guilty of all five counts of the complaint. This appeal followed.

DECISION

We review the evidentiary rulings of a district court for an abuse of discretion and the findings of fact underlying such rulings for clear error. *State v. Prtine*, 784 N.W.2d 303, 312 (Minn. 2010). The district court has broad discretion in weighing the probative

value of evidence against its prejudicial effect. *See State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993) (applying Minn. R. Evid. 403). Similarly, the district court’s determination that a statement meets the foundational requirements of a hearsay exception is reviewed for an abuse of discretion. *Holt v. State*, 772 N.W.2d 470, 483 (Minn. 2009). An appellant challenging a district court’s evidentiary rulings has the burden of proving that the district court abused its discretion and that the appellant was prejudiced thereby. *Id.*

I.

Minn. Stat. § 634.20 provides:

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.

Under the statute, “similar conduct by the accused” includes evidence of domestic abuse. *Id.* Domestic abuse includes assaults committed against family or household members. Minn. Stat. § 518B.01, subd. 2(a)(1). Section 634.20 permits the introduction of evidence of domestic assaults by the accused against the victim of the charged assault. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004). Section 634.20 also permits the introduction of evidence of domestic abuse by an accused against the accused’s other girlfriends. *State v. Valentine*, 787 N.W.2d 630, 638 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010).¹

¹ *Valentine* addressed the admission of evidence of a prior assault against another *current* girlfriend. 787 N.W.2d at 638. It did not address whether evidence of prior assaults

At trial, the state offered evidence of appellant's prior assaults against A.W. and three other girlfriends. That evidence is admissible under the statute, *McCoy*, and *Valentine* unless its probative value was "substantially outweighed by the danger of unfair prejudice." Minn. Stat. § 634.20; *see also McCoy*, 682 N.W.2d at 161; *Valentine*, 787 N.W.2d at 638. "Unfair prejudice" requires something more than just a showing that the evidence is severely damaging. *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006). Instead, it refers to evidence that "persuades by illegitimate means, giving one party an unfair advantage." *Id.* (quotation omitted).

Appellant's primary argument that he was unfairly prejudiced by the admission of similar conduct evidence appears to be that *any* Minn. Stat. § 634.20 relationship evidence is unfairly prejudicial. This argument is not supported by the statute nor by caselaw. *E.g.*, *McCoy*, 682 N.W.2d at 161 (adopting Minn. Stat. § 634.20 as a rule of evidence).

Appellant also argues that the state's evidence provided the jury with insufficient context or detail regarding the prior instances of similar conduct with respect to both A.W. and the other girlfriends. Appellant argues that, as a result, the probative value of the evidence was substantially outweighed by its prejudicial effect.

against *former* significant others was admissible under Minn. Stat. § 634.20. The record is silent on whether appellant maintained ongoing relationships with each of the three other girlfriends mentioned in the stipulation. However, the timeline suggests that he did not. In any event, the question of whether Minn. Stat. § 634.20 applies to evidence of similar conduct with respect to former significant others was not raised in this appeal and is not before us. This question remains open for consideration at a later date. *But see generally Sperle v. Orth*, 763 N.W.2d 670, 675 (Minn. App. 2009) ("[A] former relationship may qualify as a significant romantic or sexual relationship under the Domestic Abuse Act.")

Appellant's argument is unpersuasive. While the probative value of the evidence may have been reduced by the limited context and detail, this lack of detail concomitantly reduced the prejudicial effect of the evidence. *Cf. State v. Manthey*, 711 N.W.2d 498, 504–05 (Minn. 2006) (finding that appellant was not prejudiced by admission of arguably inadmissible hearsay where “the evidentiary value of the statements was so weak that their admission did not likely affect the verdict”). Accordingly, the district court did not abuse its discretion in balancing the probative value and prejudicial effect of the evidence.

Furthermore, the lack of detail as to appellant's conduct toward other girlfriends arises from its introduction in the form of a stipulation. At the pretrial hearing, the state indicated that it was prepared to introduce much of the detail appellant now complains was lacking. By entering the stipulation into evidence, appellant avoided the jury being presented with records of convictions, pictures of other victims, and transcripts of appellant's guilty pleas. *Cf. State v. Nelson*, 562 N.W.2d 324, 327 (Minn. App. 1997) (“While she did not waive her objection to the admission of the prior conviction evidence, appellant did waive her objection to its form . . . by her stipulation”).

Finally, we note that at the pretrial hearing, the district court considered each instance of conduct and both parties were permitted to argue the admissibility of each instance separately. The district court denied the state's motion to permit the introduction of evidence of appellant's conduct toward one of his other girlfriends.

The district court did not abuse its discretion by admitting the section 634.20 evidence.

II.

Appellant argues that A.W.'s statements in the OFP application were inadmissible hearsay. At trial, appellant did not object to the introduction of the OFP application on that basis, but instead argued that it was irrelevant under Minn. R. Evid. 402 and unfairly prejudicial under Minn. R. Evid. 403.

Where a hearsay objection to the admission of evidence is raised for the first time on appeal, this court reviews the admission of the statements for plain error. *State v. Smith*, 825 N.W.2d 131, 138 (Minn. App. 2012). The plain error standard is satisfied where the defendant demonstrates (1) an error (2) that was plain and (3) that affected the defendant's substantial rights. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)).

Given "[t]he number and variety of exceptions to the hearsay exclusion . . . objections to such testimony [are] particularly important to the creation of a record of the [district] court's decision-making process in either admitting or excluding a given statement." *Manthey*, 711 N.W.2d at 504. Thus, where the statements are not "clearly and obviously inadmissible hearsay," the admission of unobjected-to, arguably hearsay statements is not plain error. *Id.*

In *Smith*, we held that a declarant's out-of-court statements were not clearly and obviously hearsay because they were "reasonably consistent with [the declarant's] testimony." 825 N.W.2d at 138. Similarly, in this case, A.W.'s testimony was reasonably consistent with the statements in the OFP application. Therefore, admission of the statements was not plainly erroneous. *But see State v. Miller*, 754 N.W.2d 686,

702 (Minn. 2008) (“[B]efore such statements are admissible [as a prior consistent statement] . . . the witness’s credibility must be challenged and the statement must bolster the witness’s credibility with respect to the challenged aspect.” (quotation omitted)).

Even if the admission of the OFP application were considered to be plainly erroneous, given the abundant and graphic evidence of appellant’s guilt adduced at trial, appellant’s substantial rights were not prejudiced because “the evidentiary value of the statements was so weak that their admission did not likely affect the verdict.” *Manthey*, 711 N.W.2d at 504–05.

Affirmed.