STATE OF MINNESOTA
IN COURT OF APPEALS
A11-31

State of Minnesota,
Respondent,

vs.

Brian Joseph Andvik,
Appellant.

Filed April 30, 2012
Affirmed
Halbrooks, Judge

Stearns County District Court
File No. 73-CR-10-17

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

HALBROOKS, Judge

Appellant challenges his convictions of second-degree assault with a dangerous weapon and domestic assault by strangulation, arguing that the district court committed reversible errors by denying his pretrial motion to change venue, admitting certain evidence, and imposing an enhanced sentence without a jury finding that he used a firearm. He also makes additional arguments in his pro se supplemental brief. Because the district court did not err in denying the venue motion or admitting evidence and because any error with respect to appellant's sentence is harmless, we affirm.

FACTS

On New Year's Eve, appellant Brian Joseph Andvik and his wife, A.A., went to two bars in Stearns County with friends. While at the second bar, M.W. approached Andvik and accused him of beating A.A. A.A. told M.W. that Andvik did not "hit me or punch me." Andvik became upset that A.A. did not say more to defend him, but his anger seemed to subside.

Andvik and A.A. returned home at approximately 2:00 a.m. When A.A. was in bed, Andvik attacked her. Andvik grabbed A.A. by the neck with his right hand and started to "strangle" her while screaming at her for not sticking up for him at the bar. Andvik told A.A. that she was not going to live to see their two children. After struggling for about one-half hour, Andvik reached under the bed and retrieved a gun. He pushed the gun against A.A.'s temples. He was holding the gun in one hand and strangling her with the other. Andvik then put the barrel of the gun in A.A.'s mouth and

pulled the trigger. The gun was not loaded. Andvik pulled the trigger again. He also kicked A.A. After more than an hour, Andvik began to tire, told A.A. that they should get divorced, and passed out in their bed. A.A. quietly snuck out of the house in her pajamas and called her brother's girlfriend, who picked her up from the street and took her to her brother's house. A.A.'s brother called the police, and Andvik was arrested.

Andvik was charged with second-degree assault and domestic assault by strangulation. Before trial, Andvik moved for a change in venue; his motion was denied. Andvik was convicted of both charges by a jury. The district court sentenced Andvik to 36 months in prison on the second-degree assault charge, the mandatory minimum sentence for second-degree assault with the use of a firearm, under Minn. Stat. § 609.11, subd. 5(a) (2010). This appeal follows.

D E C I S I O N

I.

We review a district court's decision to deny a defendant's change-of-venue motion under an abuse-of-discretion standard. *State v. Walen*, 563 N.W.2d 742, 748 (Minn. 1997). The district court is required to grant a defendant's change-of-venue motion "whenever potentially prejudicial material creates a reasonable likelihood that a fair trial cannot be had." Minn. R. Crim. P. 25.02, subd. 3. The district court found that there was no reasonable likelihood that a fair trial could not be held as a result of the publicity that this case received. The district court stated:

> I think [the prosecutor] has accurately . . . stated the standard that there has to be a reasonable likelihood that a fair trial cannot be held in Stearns County. And while I would

> concede that there is that possibility . . . I also do not believe that a sufficient standard has been—that standard has been met at least at this point.

Andvik asserts that the district court's concession of a possibility of an unfair trial is a finding that there was a reasonable likelihood that a fair trial could not be held. But Andvik's selective reading of only part of the district court's statements distorts its full findings.

Even if Andvik's reading were correct, his appeal would fail because he does not allege, much less prove, actual prejudice from the denial of his pretrial motion. *See Walen*, 563 N.W.2d at 748 ("Although the rule does not require a showing of actual prejudice before a trial court can grant a defendant's motion, this court must find actual prejudice before granting relief on appeal.").

II.

Andvik challenges the admission of certain testimony elicited from his brother-in-law (K.S.), K.S.'s girlfriend (A.S.), Deputy Andrew Struffert, Officer Kevin Brown, A.A.'s friends (M.K. and D.P.), and A.A.'s mother (J.S.). All of the contested testimony regards statements made by A.A. outside of court, which Andvik argues is inadmissible hearsay.

Andvik and the state disagree about whether Andvik properly objected to each of the seven statements at issue during trial. If a statement was properly objected to at trial, this court reviews the district court's decision to overrule that objection under an abuse-of-discretion standard. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). But if the statement was not properly objected to at trial, this court reviews the admission of the

evidence under a plain-error standard. Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

But under both the abuse-of-discretion and plain-error standards, Andvik must make a threshold showing that the admission of the evidence was error. *Amos*, 658 N.W.2d at 203; *Griller*, 583 N.W.2d at 740. Accordingly, we first address whether the admission of each statement was error. The state concedes that all seven statements fit the general definition of hearsay and that hearsay is generally not admissible unless it fits into an exception. *See* Minn. R. Evid. 801(c), 802. The state asserts that all seven statements fit into either the excited-utterance exception to the rule that hearsay is inadmissible or the prior-consistent-statement exception to the definition of hearsay. We agree.

Excited-Utterance Exception

The state contends that four of the seven contested statements are admissible under the excited-utterance exception to the hearsay rule. The excited-utterance exception applies to "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Minn. R. Evid. 803(2). A statement fits in this exception if there is evidence from which the district court can reasonably find that the "declarant was sufficiently under the 'aura of excitement.'" *State v. Edwards*, 485 N.W.2d 911, 914 (Minn. 1992) (quoting *State v. Daniels*, 380 N.W.2d 777, 782 (Minn. 1986)).

We agree that the testimony of A.S., K.S., Deputy Struffert, and Officer Brown recounting A.A.'s statements just after the incident fit within this exception. When A.A.

talked to A.S. and K.S., it was within a few minutes of A.A.'s escape from Andvik. A.S. said that A.A. looked "[v]ery scared" and "she broke down crying" when she made the statements. K.S. said that A.A. was crying when she made her statements. Likewise, when A.A. talked to Deputy Struffert and Officer Brown, it was still within a short time of her escape. Deputy Struffert said that A.A. "was very emotional. She was crying. She was also shaking." Officer Brown said that A.A. "was . . . just shaking, crying, very distressed." From these descriptions, the district court could reasonably find that A.A. was under the "aura of excitement" when she made these statements. Therefore, the admission of these four statements, whether or not they were properly objected to, was not error.

Prior-Consistent-Statement Exception

The state contends that the other three contested statements are admissible as prior consistent statements of A.A and are therefore not hearsay. These statements came from the testimony of M.K., D.P., and J.S. Minn. R. Evid. 801(d)(1)(B) states, "A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness." The general elements of the rule are satisfied here. A.A. testified at trial consistent with her out-of-court statements, she was subject to cross-

examination regarding the truthfulness of those statements, and hearing the consistency in A.A.'s story was likely helpful to the jury in evaluating her credibility.[1]

But the analysis does not end there. In *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997), the supreme court held that "before the statement can be admitted, the witness'[s] credibility must have been challenged, and the statement must bolster the witness'[s] credibility with respect to that aspect of the witness'[s] credibility that was challenged." Under the *Nunn* interpretation, "the trial court must make a threshold determination of whether there has been a challenge to the witness's credibility." *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000) (citing *Nunn*, 561 N.W.2d at 909), *review denied* (Minn. Feb. 24, 2000).

The district court did not make an express finding that A.A.'s credibility had been attacked prior to admitting the prior consistent statements. Nevertheless, it is clear from the record that A.A.'s credibility was under attack throughout trial, starting with Andvik's opening statement, during which he urged the jury to "listen to both sides." The attack on A.A.'s credibility continued through cross-examination, as Andvik's attorney questioned A.A. for a length of time spanning 32 transcript pages. Moreover, the central issue of the case was whether A.A.'s story was true. *See id.* (observing, in a similar situation, that a witness's credibility was under attack where that witness "was the

[1] Andvik argues that the statements were not helpful to the jury because they were cumulative. But Andvik did not make this argument to the district court. Because there is no clear or obvious limit on the number of consistent statements that can be deemed helpful to a jury, we cannot conclude that the admission was plain error. *See Griller*, 583 N.W.2d at 740.

only witness to present firsthand evidence against [the defendant]"). The district court did not err by admitting these statements.

Because there was no error with respect to the admission of the seven statements, we do not need to determine whether proper objections were made or whether the admitted evidence prejudiced Andvik.

III.

Prior to trial, the district court ruled that evidence of earlier fights between Andvik and A.A. was admissible as relationship evidence under Minn. Stat. § 634.20 (2010), which states:

> 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.

One such fight, the district court observed, "followed an altercation between [Andvik] and [K.S.]," and "[Andvik] was angry because [A.A.] sided with [K.S.]." Andvik does not challenge the admission of evidence regarding the fight between himself and A.A. Instead, he challenges the additional evidence admitted during trial describing the fight between Andvik and K.S. that precipitated the fight between Andvik and A.A. He argues that his fight with his brother-in-law is other-act evidence that is inadmissible under *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965). Specifically, he challenges the admission of testimony by K.S. that K.S. and Andvik had gotten into a fight during which

Andvik put "one hand around [K.S.'s] neck" and "punched [K.S.] in the face a few times."

Andvik did not object to the admission of this evidence at trial. Therefore we must review the admission of this evidence under a plain-error standard of review. *Griller*, 583 N.W.2d at 740. The state argues that the evidence is plainly admissible as "relationship evidence" under Minn. Stat. § 634.20. But for relationship evidence to be admissible under section 634.20, the similar conduct must have been perpetrated against the *accused's* family or household members. *State v. Valentine*, 787 N.W.2d 630, 637 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010). A brother-in-law is not included under the definition of "family of household member" provided in Minn. Stat. § 518B.01, subd. 2(b) (2010). We do not need to decide at this time whether this evidence would have been admissible as relationship evidence because, even if the admission of this evidence was plain error, the evidence did not affect Andvik's substantial rights. *See Griller*, 583 N.W.2d at 740 (stating that the third prong of the plain-error test is whether the error affected the defendant's substantial rights). An error affects a defendant's substantial rights if it "was prejudicial and affected the outcome of the case." *Id.* at 741. Considering all of the evidence admitted at trial, including photographs of A.A. depicting her as battered and bruised and evidence of Andvik fighting M.W. at the bar earlier in the night, the admission of evidence that Andvik also fought his brother-in-law on one occasion did not affect the outcome of this case.

IV.

Andvik argues that the district court erred by allowing six witnesses to testify about the same relationship evidence admitted under Minn. Stat. § 634.20, because he was prejudiced by its cumulative nature. The state correctly observes that the issue of the number of witnesses testifying, as opposed to the content of the evidence, was not objected to at trial. We therefore review the issue under a plain-error standard. *See Griller*, 583 N.W.2d at 740. Under that standard, this court will only review the error, if we first conclude it is "(1) error; (2) that is plain; and (3) the error must affect substantial rights." *Id.* Then we will "assess[] whether [we] should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.*

Most of the admitted evidence was not overly cumulative. Of the six incidents the district court pre-approved as admissible relationship evidence, two were described only by A.A., three were described by A.A. and one other witness, and one was described by A.A. and two other witnesses. The incident described three times was an incident during which Andvik threw a bassinette across a bedroom, knocking a hole in the wall. But even if the evidence of the bassinette incident was arguably cumulative, constituting error that was plain, Andvik is also required to show that the error affected his substantial rights—that is, it affected the outcome of the case. *Id.* at 740-41. Andvik fails to show how the fact that three witnesses testified about the bassinette (as opposed to two or one) affected the verdict.

V.

Andvik contends that the district court erred by imposing a mandatory minimum 36-month sentence for second-degree assault with a firearm under Minn. Stat. § 609.11, subd. 5 (2010), without first obtaining a finding by the jury that Andvik, in fact, used a firearm. He argues that the imposition of this sentence, which is an upward durational departure from the sentencing guidelines for second-degree assault, violates his Sixth Amendment rights under *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 2537 (2004). Whether a *Blakely* error occurred is a constitutional question, which this court reviews de novo. *State v. Dettman*, 719 N.W.2d 644, 648-49 (Minn. 2006).

The jury was never directly asked whether Andvik used a firearm; it was only asked whether he used a dangerous weapon. The jury was instructed that in order to find Andvik guilty of second-degree assault, it must find that he "used a dangerous weapon[. A] firearm, whether loaded or unloaded, or even temporarily inoperable, is a dangerous weapon." A jury, following this instruction, could have convicted Andvik of second-degree assault without finding that he used a firearm. Therefore, Andvik is correct that the jury did not make a specific finding that he used a firearm. The lack of such a finding is a *Blakely* violation. *State v. Barker*, 705 N.W.2d 768, 773 (Minn. 2005).

Having found error, this court must conduct a harmless-error analysis to determine whether reversal of Andvik's sentence is required. *See State v. Chauvin*, 723 N.W.2d 20, 30 (Minn. 2006) (applying harmless-error analysis to *Blakely* violation). A *Blakely* error is not harmless beyond a reasonable doubt if it increased the length of Andvik's sentence

and if this court "cannot say with certainty that a jury would have found the aggravating factors used to enhance [the] sentence had those factors been submitted to a jury in compliance with *Blakely*." *Dettman*, 719 N.W.2d at 655. We conclude that although Andvik's sentence was increased, the *Blakely* violation is harmless error because, in view of the record, we can say with certainty that a jury would have found the aggravating factor used to enhance the sentence. A firearm was the only dangerous weapon that the jury could have found to be consistent with some of A.A.'s injuries—specifically, the bruises from the gun barrel on her temple and forehead and the scratch inside her cheek.

VI.

Andvik makes three arguments in his pro se supplemental brief. First, Andvik argues that the evidence at trial, some of which was contradicted, was insufficient to convict him. In particular, he claims that the lack of saliva on the gun and the expert's testimony stating that Andvik could not have pulled the trigger twice without cocking the gun in between, show that A.A. was lying about what happened. Andvik's sufficiency-of-the-evidence argument fails because, when reviewing the sufficiency of the evidence, we are required to believe the state's witnesses and disbelieve contrary evidence. *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). Here, A.A. testified to all of the elements of the offenses, and this court must assume that the jury believed her testimony and rejected any conflicting evidence. *See id.*

Andvik also argues that the district court erred by permitting jurors to continue to serve after hearing about the case on the radio. But the record shows that the two jurors who remained on the case only heard that jury selection had started on the case and

nothing more. Because the two jurors who remained were already on the jury, they already knew that jury selection had begun. Therefore Andvik cannot show that the jurors' continued service prejudiced him at trial.

Finally, Andvik argues that evidence that he asked his attorney to present would have exonerated him. This included evidence that the gun case would not have fit under the bed (as alleged by A.A.) and a physician's opinion that A.A. was not choked. By noting that his attorney failed to present the evidence, Andvik is essentially making an ineffective-assistance-of-counsel claim. The test for ineffective assistance of counsel has two prongs: a deficiency in counsel's performance and prejudice to the defendant. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999). Andvik fails to establish an ineffective-assistance-of-counsel claim because he fails to show that his attorney's performance was deficient. Andvik's attorney's decision not to present the evidence that Andvik wanted him to present was a tactical decision. "What evidence to present to the jury, including which defenses to raise at trial and what witnesses to call, represent an attorney's decision regarding trial tactics which lie within the proper discretion of trial counsel and will not be reviewed later for competence." *Id.*

Affirmed.