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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1377**

State of Minnesota,  
Respondent,

vs.

Lor Yang,  
Appellant.

**Filed September 9, 2013  
Affirmed in part, reversed in part, and remanded  
Bjorkman, Judge**

Ramsey County District Court  
File No. 62-CR-11-312

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

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Considered and decided by Peterson, Presiding Judge; Stoneburner, Judge; and  
Bjorkman, Judge.

**UNPUBLISHED OPINION**

**BJORKMAN**, Judge

Appellant challenges his gross-misdemeanor convictions for violating a domestic-  
abuse no-contact order (DANCO) and an order for protection (OFP), arguing that (1) the

DANCO statute is unconstitutional; (2) the district court plainly erred by not instructing the jury on the knowingly violated element of the offenses; (3) sufficient evidence does not support his convictions; and (4) the district court abused its discretion by admitting relationship evidence and portions of a police officer's expert testimony. We affirm the district court's conclusion that the DANCO statute is constitutional. But because the district court plainly erred by failing to instruct the jury on the knowingly violated element of the offenses, we reverse and remand.

### **FACTS**

On September 10, 2010, appellant Lor Yang was convicted of second-degree assault with a dangerous weapon. The district court issued a DANCO and OFP prohibiting Yang from directly or indirectly contacting victim M.H.

On January 10, 2011, M.H. ran out of her house after family members overheard her tell someone on the phone that she was going to get her cell phone from Yang. O.Y., M.H.'s sister-in-law, called police and reported a possible violation of the orders.

Officers Daniel King and Heather Kuchinka went to M.H.'s home to investigate. After the officers arrived, O.Y. received a call and learned that M.H. and Yang were at a nearby residence. The officers drove to the address; as they pulled up to the residence, they saw two women and one man standing outside. Officer King testified that the individuals were standing around and looked like they were talking. Officer Kuchinka stated the individuals appeared to be speaking to each other; she could hear voices but did not know who was speaking.

As the officers approached the residence, the man ran away. Officer Kuchinka spoke with the two women, identifying one of them as M.H. M.H. was uncooperative and refused to answer Officer Kuchinka's questions. Officer King pursued the man, following footprints in the fresh snow, and found Yang hiding in a garage a few houses away.

Yang was charged with gross-misdemeanor violations of the DANCO and OFP and misdemeanor obstructing legal process. A jury trial was held. M.H. did not testify. Sergeant Sylvia McPeak testified that, in her experience with the family-violence unit, victims of domestic violence usually do not cooperate with investigations. Sergeant McPeak also expressed her belief that the state had the evidence to prove Yang violated the two orders without interviewing M.H.

The state offered testimony regarding the conduct underlying Yang's assault conviction as relationship evidence under Minn. Stat. § 634.20 (2010). Specifically, O.Y. testified that when M.H. was 16 or 17 years old and seven-months pregnant with Yang's child, Yang beat her with a metal stick, causing injuries that required emergency medical care.

Yang testified that M.H. is his girlfriend and the mother of his child. He stated that on January 10, he went to visit K.M. at her residence. But when he arrived, both K.M and M.H. came out of the house. K.M. had not told Yang that M.H. would be there. When Yang saw M.H., he immediately left without speaking to her. Yang testified that he did not see the police but ran away because of the DANCO and OFP. On cross-

examination, Yang admitted that when M.H. was 17 and pregnant with his child, he beat her with a metal rod and was convicted of second-degree assault.

Yang stipulated that he was subject to the DANCO and the OFP, knew of the orders, and had been convicted of a qualified domestic-violence-related offense within the past ten years. The district court instructed the jury that the elements of a gross-misdemeanor DANCO violation are

first, there was an existing domestic abuse no-contact order. In this case, that has been stipulated to by the parties. Second, the defendant violated a term or condition of the order. Third, the defendant knew of the existence of the order; again, that has been stipulated to by the parties. Fourth, the defendant's act took place on or about January 10, 2011, in Ramsey County.

The district court instructed the jury that a charge of gross-misdemeanor OFP violation requires the state to prove

first, there was an existing court order for protection. In this case, the parties have stipulated to that element. Second, the defendant violated a term or condition of the order. Third, the defendant knew of the existence of the order; in this case, they've stipulated as it relates to the third element. Fourth, the defendant's act took place on or about January 10, 2011, in Ramsey County.

The jury found Yang guilty as charged. The district court sentenced him to concurrent sentences of 365 days in jail for violating the DANCO and 90 days in jail for obstructing legal process. Yang appealed.<sup>1</sup> This court stayed the appeal and remanded for postconviction proceedings regarding the constitutionality of the DANCO statute. The district court denied Yang's postconviction petition, and we reinstated the appeal.

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<sup>1</sup> Yang did not appeal his obstructing-legal-process conviction.

## DECISION

### I. The DANCO statute is constitutional.

The constitutionality of a statute is a question of law, which we review de novo. *State v. Crawley*, 819 N.W.2d 94, 101 (Minn. 2012), *cert. denied*, 133 S. Ct. 1493 (2013). We presume a statute is constitutional, *State v. Bussmann*, 741 N.W.2d 79, 82 (Minn. 2007), and the party challenging a statute’s constitutionality must establish “beyond a reasonable doubt, that the statute violates a provision of the constitution,” *State v. Grossman*, 636 N.W.2d 545, 548 (Minn. 2001).

Yang argues that the DANCO statute violates procedural due process, is void for vagueness, and violates the separation-of-powers doctrine. Our supreme court recently rejected Yang’s first two arguments. *See State v. Ness*, 834 N.W.2d 177, 186 (Minn. 2013) (concluding the DANCO statute provides constitutionally sufficient notice and an opportunity to be heard and adequately limits the district court’s discretion when issuing the order). And we note Yang’s due-process concerns are diminished here because the DANCO was imposed after he pleaded guilty to and was convicted of second-degree assault.

Yang’s third constitutional challenge—that the DANCO statute violates the separation-of-powers doctrine because the legislature provided the judiciary no discretion over whether to issue a DANCO—is likewise unpersuasive. The Minnesota Constitution states:

The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments

shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

Minn. Const. art. III, § 1. The legislature declares what acts are criminal and establishes the punishment for such acts as substantive law. *State v. Lindsey*, 632 N.W.2d 652, 658 (Minn. 2001). And the judiciary decides “the method by which the guilt or innocence of one who is accused of violating a criminal statute is determined.” *Id.*

Yang’s separation-of-powers argument fails because the legislature did not require the district court to issue a DANCO. Rather, the express language of the statute provides that a DANCO “*may* be issued as a pretrial order before final disposition of the underlying criminal case or as a postconviction probationary order.” Minn. Stat. § 629.75, subd. 1(b) (2010) (emphasis added). Although Minn. Stat. § 629.75, subd. 1(c) (2010), states that a DANCO “shall be issued,” this subdivision merely establishes that, if a DANCO is issued, it must be done in a separate proceeding. Because the DANCO statute does not deprive the district court of discretion to issue the order, we discern no separation-of-powers violation.

**II. The district court plainly erred by not instructing the jury that Yang must knowingly violate the DANCO and OFP.**

Yang did not object to the jury instructions but argues on appeal that the district court should have instructed the jury on the knowingly violated element of gross-misdemeanor DANCO and OFP violations. We review unobjected-to jury instructions for plain error. *State v. Hayes*, 831 N.W.2d 546, 555 (Minn. 2013). In applying the plain-error analysis, we will reverse only if the district court (1) committed an error; (2)

that was plain; (3) that affected the defendant’s substantial rights; and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011).

**A. Error**

The district court has considerable latitude in formulating jury instructions. *State v. Mahkuk*, 736 N.W.2d 675, 681 (Minn. 2007). But instructions must define the crime charged and explain the elements of the offense. *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303, 311-12 (Minn. 2012). A jury instruction is erroneous “if it materially misstates the law.” *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005).

The district court instructed the jury that gross-misdemeanor DANCO and OFP violations require the state to prove that (1) there was an existing order, (2) Yang violated the order, (3) Yang knew of the order, and (4) the violation occurred in Ramsey County.<sup>2</sup> But the DANCO and OFP statutes require proof of an additional element—that the defendant knowingly violated the order. Minn. Stat. §§ 518B.01, subd. 14(c), 629.75, subd. 2(c) (2010).<sup>3</sup> Because the district court failed to instruct the jury on the “knowingly violated” element of the offenses, the instructions were erroneous. *See State v. Watkins*, 820 N.W.2d 264, 269 (Minn. App. 2012) (holding the district court committed plain error by not instructing the jury on the knowingly violated element of a felony DANCO

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<sup>2</sup> These elements constitute misdemeanor violations of a DANCO and OFP. *See* Minn. Stat. §§ 518B.01, subd. 14(b), 629.75, subd. 2(b) (2010).

<sup>3</sup> Effective August 1, the legislature removed the “knowingly” requirement from the DANCO and OFP statutes. 2013 Minn. Laws ch. 47, §§ 1, 5, at 203, 207.

violation), *review granted* (Minn. Nov. 20, 2012); *State v. Gunderson*, 812 N.W.2d 156, 162 (Minn. App. 2012) (holding the district court plainly erred by not giving the same instruction for a charge of felony harassment-restraining-order (HRO) violation).<sup>4</sup>

The state asserts that the instructions were proper because Yang stipulated that he was aware of the orders. We are not persuaded. Yang did not stipulate that he knowingly violated the orders. *See Watkins*, 820 N.W.2d at 268 (concluding the knowingly violated element requires more proof than that the individual knew of the order and violated it); *Gunderson*, 812 N.W.2d at 160-61.

## **B. Plain error**

An error is plain if it is clear or obvious, meaning it “contravenes case law, a rule, or a standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). “[F]ailure to properly instruct the jury on all elements of the offense charged is plain error.” *Vance*, 734 N.W.2d at 658.

The state argues that the district court did not commit plain error because it followed the model jury instruction in place at that time. We disagree. Jury instruction guides are not “precedential or binding.” *State v. Kelley*, 734 N.W.2d 689, 695 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007). When a model jury instruction conflicts with the statute defining an offense, the district court must instruct the jury

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<sup>4</sup> Although Yang was convicted of gross-misdemeanor DANCO and OFP violations, both felony and gross-misdemeanor level DANCO and OFP violations require proof that the defendant knowingly violated the order. *See* Minn. Stat. §§ 518B.01, subd. 14(c)-(d), 609.75, subd. 6(c)-(d), 629.75, subd. 2(c)-(d) (2010). Cases involving HRO violations are instructive when analyzing a DANCO violation because the statutes are substantially similar. *Watkins*, 820 N.W.2d at 268; *see also* Minn. Stat. § 609.748 (HRO).

according to the statute. *Gunderson*, 812 N.W.2d at 162. Because the DANCO and OFP statutes provide that a defendant must knowingly violate the orders, the district court plainly erred by not instructing the jury on that element of the offenses.

The state also contends that the error was not plain because we did not decide *Watkins* and *Gunderson* until after Yang's trial. But we held in *Watkins* that the district court plainly erred by not giving the same instruction even though *Gunderson* had not yet been decided. *Watkins*, 820 N.W.2d at 268 n.2. And "it is sufficient that the error is plain at the time of the appeal." *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002) (quotation omitted).

### **C. Substantial rights**

An error affects a defendant's substantial rights if "there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Milton*, 821 N.W.2d 789, 809 (Minn. 2012) (quotations omitted). Failing to instruct the jury on an element of an offense significantly affects the verdict "when the defendant submits evidence that tends to negate that element, and there is a reasonable likelihood that a properly instructed jury could have accepted the defendant's version of events." *Gunderson*, 812 N.W.2d at 162 (quotation omitted).<sup>5</sup>

Yang presented evidence that he did not know M.H. was at K.M.'s home and that he left as soon as he saw her. This testimony negates the knowingly violated element of the offenses because it suggests Yang did not know his actions would lead to contact with

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<sup>5</sup> *But see Watkins*, 820 N.W.2d at 269 (holding that "as a matter of law, omission of an element of a charged offense from the jury instructions affects a party's substantial rights").

M.H. *See Watkins*, 820 N.W.2d at 268 (stating a defendant knowingly violates a DANCO when he is aware that his conduct violates the order). But the jury was never given an opportunity to consider this argument because it was not properly instructed. On this record, the erroneous instruction affected Yang’s substantial rights. *See Gunderson*, 812 N.W.2d at 163.

**D. Fairness, integrity, or public reputation of judicial proceedings**

Erroneous instructions compromise the fairness and integrity of the judicial proceedings “when the jury may not have considered a disputed element of the crime.” *Id.* (quotation omitted). The parties dispute whether Yang knowingly violated the statute, but the erroneous instruction prevented the jury from considering Yang’s arguments on the issue. Accordingly, the error affected the fairness and integrity of the proceedings. *See Watkins*, 820 N.W.2d at 269.

Because the DANCO and OFP instructions were plainly erroneous, affected Yang’s substantial rights, and compromised the fairness and integrity of the proceedings, we reverse Yang’s convictions and remand for a new trial.

**III. The record may contain sufficient evidence to support Yang’s convictions.**

When reviewing a sufficiency-of-the-evidence challenge, we carefully analyze the record to determine whether the jury could reasonably find the defendant guilty of the offenses charged based on the facts in the record and the legitimate inferences that can be drawn from them. *State v. Buckingham*, 772 N.W.2d 64, 71 (Minn. 2009). In doing so, we view the evidence in the light most favorable to the conviction, presuming the jury

believed the state's witnesses and disbelieved any contrary evidence. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999).

Yang argues that sufficient evidence does not support his convictions because there is no evidence that he knowingly violated the DANCO and OFP. We are not persuaded. Direct evidence was presented that Yang knew of the orders and was aware that they prohibited him from all contact with M.H. Officers King and Kuchinka saw Yang standing by M.H. and another woman. Officer King testified that he thought the three were having a conversation, and Officer Kuchinka stated that she heard voices and that the individuals appeared to be speaking to each other. And the fact that Yang ran when the police arrived at the residence suggests that he was aware that his conduct violated the orders. *See State v. Bias*, 419 N.W.2d 480, 485 (Minn. 1988) (“[E]vidence of flight suggests consciousness of guilt.”).

But we note Yang presented contrary evidence. Specifically, he testified that he did not know M.H. would be at the residence and that he left as soon as he saw her without speaking to her. It is the jury's duty to weigh this conflicting evidence and to make credibility determinations. *Gunderson*, 812 N.W.2d at 165. But because the jury was not instructed on the knowingly violated element of the offense, it had no opportunity to consider Yang's evidence. Accordingly, although the record may contain sufficient evidence to sustain a conviction, we reverse and remand for a new trial.

#### **IV. The district court abused its discretion by admitting relationship evidence and portions of Sergeant McPeak’s expert testimony.**

Evidentiary rulings are within the district court’s sound discretion and will not be reversed absent a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). A district court abuses its discretion by misapplying the law. *Johnson v. State*, 733 N.W.2d 834, 836 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007). Although we remand for a new trial, we address Yang’s evidentiary challenges in the interests of judicial economy. *See Midway Nat’l Bank of St. Paul v. Estate of Bollmeier*, 504 N.W.2d 59, 64 (Minn. App. 1993).

##### **A. Relationship evidence**

The state presented evidence of Yang’s assault of M.H. Yang argues that the district court abused its discretion by admitting this evidence under Minn. Stat. § 634.20. We agree. Section 634.20 provides that “[e]vidence of similar conduct by the accused against the victim of domestic abuse . . . is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice.” But this evidence is only admissible if the conduct underlying the current charge constitutes domestic abuse.<sup>6</sup> *State v. Barnslater*, 786 N.W.2d 646, 651 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010). A defendant engages in domestic abuse when he or she commits one of the following acts against a family or household member: (1) physical harm, bodily injury, or assault; (2) the infliction of fear of imminent physical harm, injury, or assault; or (3) terroristic threats, criminal sexual conduct, or interference with an emergency call.

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<sup>6</sup> Effective August 1, the legislature substituted “domestic conduct” for “domestic abuse” in Minn. Stat. § 634.20. 2013 Minn. Laws ch. 47, § 7, at 208.

Minn. Stat. §§ 518B.01, subd. 2(a), 634.20 (2010). None of the conduct underlying the current offenses constitutes domestic abuse. Accordingly, details of the assault are not admissible under Minn. Stat. § 634.20.

The state argues that the evidence is admissible under the common law, which recognizes an independent basis for admitting relationship evidence that “show[s] the ‘strained relationship’ between the accused and the victim [and] is relevant to establishing motive and intent.” *State v. Loving*, 775 N.W.2d 872, 880 (Minn. 2009) (second alteration in original) (quotation omitted); see *State v. Hormann*, 805 N.W.2d 883, 890 (Minn. App. 2011), *review denied* (Minn. Jan. 17, 2012). Relationship evidence may also be probative when it places the charged offense into the proper context. *Loving*, 775 N.W.2d at 880. To admit relationship evidence, the district court must determine that there is clear and convincing evidence that the defendant committed the prior act and that the probative value outweighs any potential for unfair prejudice. *State v. Mills*, 562 N.W.2d 276, 285 (Minn. 1997).

Here, the evidence regarding Yang’s prior assault against M.H. is potentially admissible to show the strained relationship between them and to put the offenses in context. But the evidence is only marginally relevant to the pivotal issues of whether Yang knew M.H. was at the residence and was aware his conduct violated the orders. And the brutal nature of Yang’s assault against then-pregnant M.H. has the potential to be highly prejudicial. Yet, the district court admitted the evidence without expressly weighing its probative value against its potential for unfair prejudice. We direct the district court on remand to make this determination.

## **B. Sergeant McPeak's expert testimony**

Admitting expert testimony is within the broad discretion of the district court. *State v. Xiong*, 829 N.W.2d 391, 395 (Minn. 2013). Police officers generally may provide expert testimony “concerning subjects that fall within the ambit of their expertise in law enforcement.” *State v. Carillo*, 623 N.W.2d 922, 926 (Minn. App. 2001), *review denied* (Minn. June 19, 2001). But expert testimony must be helpful to the jury. Minn. R. Evid. 702; *Xiong*, 829 N.W.2d at 396. “If the issue can be resolved by applying principles of general or common knowledge and the jury is in as good of a position to resolve an issue as the expert, then expert testimony would be of little assistance to the jury and should not be admitted.” *State v. DeShay*, 669 N.W.2d 878, 885 (Minn. 2003) (quotation omitted). Opinion testimony about a legal conclusion or mixed questions of law and fact does not assist the jury and should not be admitted. *State v. Valtierra*, 718 N.W.2d 425, 434-35 (Minn. 2006).

Yang first argues that the district court abused its discretion by admitting Sergeant McPeak's testimony that victims of domestic violence commonly do not cooperate with investigations. We disagree. Sergeant McPeak's testimony regarding how victims react to police investigations is outside the jury's common knowledge and provides background regarding the investigation of the charge against Yang. Specifically, this testimony helped jurors by explaining why M.H. did not cooperate with Officer Kuchinka or testify at trial. *See State v. Obeta*, 796 N.W.2d 282, 291 (Minn. 2011) (stating explanation of counterintuitive behaviors of abuse and assault victims can aid jurors in their fact-finding).

Yang next asserts that the district court abused its discretion by not striking Sergeant McPeak's testimony that "I believed that we had the evidence from the family members to prove that a violation occurred, and therefore, I did not need to speak with the victim." We agree. This testimony not only explains why Sergeant McPeak did not question M.H. but goes on to provide a legal opinion that the state did not need to get information from M.H. because it already had sufficient evidence to prove Yang's guilt. Because the testimony addressed both questions of law and fact, the district court abused its discretion by admitting the testimony.

**Affirmed in part, reversed in part, and remanded.**