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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1801**

State of Minnesota,
Respondent,

vs.

Willie Dumont White,
Appellant.

**Filed January 13, 2009
Affirmed
Ross, Judge**

Stearns County District Court
File No. 73-CR-07-121

Lori Swanson, Attorney General, Karen B. Andrews, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

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Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Huspeni, Judge.*

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

UNPUBLISHED OPINION

ROSS, Judge

Willie White appeals from his conviction for second-degree assault, domestic assault, and obstructing legal process. White challenges three of the district court's evidentiary rulings and asserts one instance of prosecutorial misconduct. Because the district court's evidentiary rulings were within the limits of its discretion, and because the alleged misconduct did not amount to plain error that affected White's substantial rights, we affirm.

FACTS

On February 10, 2007, Willie White's girlfriend (S.V.) suffered head and facial injuries when she was struck by a glass bottle. During White's criminal trial, he and the state offered conflicting explanations of how S.V. came to suffer her injuries. S.V.'s own explanation changed over time.

The night of the injury, a child dialed 911 from S.V.'s home and asked for help. A woman came on the line and asked the emergency operator for an ambulance because she was dizzy and bleeding from being struck on the head. Two St. Cloud police officers, Jeremiah Lund and Roger Baumann, responded. When they arrived, they found S.V. bleeding from her head. White was present. White did not obey the officers' instructions to move to another area of the house as they attempted to treat S.V.'s wounds. The officers arrested White for obstruction.

S.V. discussed the incident with Officer Lund and with the emergency room physician, John Mertz. In her conversations with Lund and Mertz, S.V. explained the

cause of her injury. She said that White came into the room where she lay in bed, picked up a bottle of hot sauce, and swung it at her like a bat. But S.V. was reluctant to testify against White. She ignored the prosecution's trial subpoena and was arrested. She ultimately testified that she did not recall her conversations with Officer Lund and Dr. Mertz, and that White merely had thrown the bottle at the wall, hitting her by accident. She claimed that her emergency-room statements were untrue, made out of anger. She also testified that a few days after the incident she told the county attorney that her injuries were accidental.

The prosecuting attorney presented evidence of S.V.'s contradictory accounts of the incident and evidence explaining the contradictions. The prosecutor asked S.V. about previous physically abusive incidents in the relationship, which she testified either did not occur or that she did not recall them. The prosecutor also called an expert to testify that victims of domestic abuse sometimes engage in "counterintuitive" behavior, including changing their stories. Despite S.V.'s exculpatory testimony, the jury found White guilty on all three counts. White appeals.

DECISION

White brings four challenges to the handling of his trial, three related to the district court's evidentiary rulings and one to prosecutorial misconduct. With respect to the evidence, White argues that the district court (1) should not have admitted S.V.'s statements to Officer Lund and Dr. Mertz, which contradicted her trial testimony, (2) should not have admitted expert testimony on the subject of "counterintuitive victim behavior," and (3) should not have allowed the prosecution to ask S.V. about prior

incidents of abuse knowing that she would deny they occurred. White also argues that the prosecution committed misconduct by implying in its closing argument that White posed a continuing threat to S.V.'s safety.

I

We first consider White's three challenges to the district court's evidentiary rulings. Evidentiary rulings are reviewed for abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). White bears the burden of establishing that the district court abused its discretion and thereby prejudiced him. *Id.* He does not meet that burden.

S.V.'s Prior Statements

White argues that the district court abused its discretion by concluding that S.V.'s out-of-court statements about the incident were reliable and admitting them into evidence. Out-of-court statements are hearsay and generally inadmissible to prove the truth of the matter asserted. Minn. R. Evid. 801; Minn. R. Evid. 802. But hearsay that exhibits sufficient "circumstantial guarantees of trustworthiness" under the residual hearsay exception is admissible. Minn. R. Evid. 807. In a criminal trial, a witness's prior inconsistent statements may be admitted under the residual hearsay exception when (1) the hearsay declarant testifies, permitting the accused to cross-examine; (2) no dispute exists concerning the declarant's identity or the statement's contents; (3) the reliability of the statement is enhanced because it was made against the declarant's interest in a relationship with the accused; and (4) the statement is consistent with the prosecution's other evidence of the accused's guilt. *State v. Plantin*, 682 N.W.2d 653, 659 (Minn. App.

2004) (modifying the test discussed in *State v. Ortlepp*, 363 N.W.2d 39, 44 (Minn. 1985), to apply to inconsistent statements made by domestic abuse victims), *review denied* (Minn. Sept. 29, 2004). White argues that S.V.’s statements to Officer Lund and Dr. Mertz were not reliable; but we are not convinced.

The third condition of the *Ortlepp* test concerns the statements’ reliability. The supreme court concluded that a statement has increased reliability when made against an accomplice’s penal interest. *Ortlepp*, 363 N.W.2d at 44. But statements made against other interests also have enhanced reliability. This court has extended the *Ortlepp* test in contemplation of precisely this circumstance. In *State v. Whiteside*, 400 N.W.2d 140 (Minn. App. 1987), *review denied* (Minn. Mar. 18, 1987), we determined that an inconsistent statement made by a witness “clearly hostile to the prosecution” and supportive of the defendant, along with other indicia of reliability, was sufficiently reliable to come in under the exception. *Id.* at 146. And in *Plantin*, we stated that a hearsay statement against the witness’s “interests in a relationship” with the defendant satisfied the reliability requirement of the *Ortlepp* test. 682 N.W.2d at 659. Like S.V., the witness in *Plantin* was an assault victim whose exculpatory testimony at trial contradicted her statement to police at the time of the incident. *Id.* at 657, 661. We conclude that the district court did not abuse its discretion when it determined that the statements were reliable and admitted them into evidence.

Expert Testimony

White argues that the district court abused its discretion when it allowed an expert to testify about “counterintuitive victim behavior.” He challenges the expert testimony as

irrelevant, unhelpful, and overly prejudicial. A district court may allow expert testimony when “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence.” Minn. R. Evid. 702. A district court’s decision to admit expert testimony will be upheld unless it was a clear abuse of discretion. *State v. Vance*, 685 N.W.2d 713, 718 (Minn. App. 2004), *review denied* (Minn. Nov. 23, 2004). The district court’s discretion must be guided by whether the expert testimony is relevant, helpful, and more probative than prejudicial. *State v. Grecinger*, 569 N.W.2d 189, 193 (Minn. 1997).

White asserts that the expert testimony was irrelevant and unhelpful because battered-woman syndrome could not be used to explain S.V.’s contradictory statements about the incident; the expert was not qualified to testify about battered-woman syndrome; the expert did not testify about battered-woman syndrome, but about “counterintuitive victim behavior;” and there was no evidence S.V. suffered from battered-woman syndrome. White describes the evidence as more prejudicial than probative because the prosecution used “the imprimatur of expert testimony to aggrandize the credibility of [S.V.’s] prior inconsistent statements.” The prosecution offered the expert testimony to help the jury understand S.V.’s contradictory accounts of the incident and to assist the jury to evaluate the credibility of her testimony in light of her contradictions.

After considering the expert witness’s occupational and educational background, the district court found that her knowledge and experience qualified her as an expert. It found that her testimony would be helpful in light of S.V.’s inconsistent accounts of the

incident. The district court's findings show that it considered whether the testimony was relevant, helpful, and probative. In light of its findings, the district court qualified the witness as an expert and the jury heard her testimony about counterintuitive victim behavior.

White's argument rests substantially on the premise that a material difference exists between battered-woman syndrome and counterintuitive victim behavior. He contends that expert opinion concerning battered-woman syndrome has historically been admitted to bolster the credibility of the victim-witness's testimony, not to provide a method for evaluating contradictory evidence. He asserts that testimony about battered-woman syndrome is admissible because it has been established as sufficiently scientific, but that testimony concerning counterintuitive victim behavior has not, and he argues that the state's expert was not qualified to express an expert opinion about battered-woman syndrome.

We agree with the state's contention that the distinction between battered-woman syndrome and counterintuitive victim behavior is irrelevant to the district court's analysis under rule 702. White's emphasis on the scientific nature of battered-woman syndrome is misplaced. Experts may be qualified based upon their "scientific, technical, *or other specialized knowledge*." Minn. R. Evid. 702 (emphasis added). The witness's qualification and testimony as an expert here rested on knowledge derived from her professional experience with victims of domestic violence, not from science. Her specialized knowledge could help the trier of fact to understand the contradictory evidence. The debate about the taxonomy of battered-woman syndrome and

counterintuitive victim behavior is immaterial to an analysis of whether the expert testimony may be admitted under rule 702.

Evidence that S.V. suffered from battered-woman syndrome is not required for the expert's testimony to be relevant. The expert was not presented to testify about the characteristics of battered-woman syndrome, but about her experience with the behavior of victims of domestic violence. On cross-examination, after the defense counsel first mentioned battered-woman syndrome, the expert pointed out that she did not use the term and conceded that her knowledge of battered-woman's syndrome was limited.

The district court properly evaluated the relevancy, helpfulness, and probative nature of the expert's opinion evidence. White has not established that the district court abused its discretion when it admitted the testimony.

Similar Prior Conduct Evidence

White asserts that the district court erred by allowing the prosecutor to ask S.V. questions concerning White's prior abusive behavior. "Evidence of similar prior conduct by the accused" may be admitted against a defendant in a domestic abuse case if it is relevant and not "substantially outweighed by the danger of unfair prejudice." Minn. Stat. § 634.20 (2006).

White argues that the prosecutor's questions to S.V. about prior incidents were improper and unfairly prejudicial. The prosecutor's questions appear to be relevant because White's charge for felony domestic assault required the state to prove that he had been convicted of domestic assault twice in the previous ten years. Minn. Stat. § 609.2242, subd. 4 (2006). But White stipulated to two convictions of domestic assault

arising from incidents that occurred on September 24, 2004, and April 21, 2005. The district court therefore did not submit this element of the crime to the jury, and the convictions were not entered as evidence in the trial.

The district court nonetheless permitted the state to ask S.V. about three occasions when the police were called to her house, two of which gave rise to the stipulated-to convictions. In response to questions about the first occasion, S.V. testified that she could not remember it. In response to questions about the second occasion, she testified that “he pushed me because I was trying to hit him with the stroller.” And in response to questions about the third occasion, she testified that “[h]e didn’t do nothing to me that day.” When asked directly whether she acknowledged “that on prior occasions there has been violence in [her] relationship,” specifically including the pushing occasion, she answered “[n]o.” The state offered no additional evidence concerning White’s prior similar conduct.

The district court must weigh the probative value of prior similar conduct evidence against “the danger of unfair prejudice, confusion of the issue, or misleading the jury” Minn. Stat. § 634.20. In evaluating whether to admit evidence, a district court may consider inadmissible evidence. Minn. R. Evid. 104(a). In this case, though the jury was not aware of White’s prior domestic assault convictions, the court was aware of them and could consider them when evaluating the probative value of the similar conduct evidence. We conclude that in light of that knowledge, it was not an abuse of discretion to permit the state to solicit S.V.’s testimony about the events that led to White’s convictions. The questions also allowed the jury to observe first-hand how an alleged

domestic abuse victim covers for the assailant, bearing on the credibility of her once-inculpatory, then exculpatory recollection of events. The evidence had probative value, and because White conceded his guilt with respect to the prior incidents by stipulating to his convictions, it did not pose any risk of *unfair* prejudice.

II

White asserts that the prosecutor committed misconduct when, in closing argument, the prosecutor made the following statement:

Ladies and Gentlemen, victims of domestic violence are not idiots. They know the State cannot protect them. Violence occurs in the home, typically away from other people, of other witnesses. The State can't go home with them. Police can't go home with them. Their behavior is entirely rational.

Prosecutorial misconduct that is not objected to at trial will merit reversal when it constitutes plain error that affected the defendant's substantial rights. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). If the defendant establishes the misconduct was plain error, the state bears the burden of proving the error did not affect his substantial rights. *Id.* at 300. An error is plain if it is clear or obvious, such as a violation of law, rule, or standard of conduct. *Id.* at 302. If the purported misconduct occurs during closing argument, the argument must be read as a whole. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). An off-limits remark must have "played a substantial part in influencing the jury to convict the defendant." *Id.* White contends that the prosecution's statement regarding the state's inability to protect victims of domestic violence "likely concerned and possibly frightened the jury."

The portion of the argument immediately preceding the challenged statement justifies the statement in context. Immediately before making the challenged statement, the prosecutor discussed reasons why a victim of domestic abuse might change her story, refuse to testify with candor, and fail to cooperate with prosecutors. The prosecutor was not discussing a risk of future harm to S.V., but how a history of abuse might have affected her trial testimony as an attempt to protect herself. The statement, in context, would not cause a juror the concern suggested by White. In light of the entire closing argument, we conclude that the highlighted remark was not improper.

Because the trial court did not abuse its discretion in its evidentiary rulings, and because we do not find plain error in the prosecution's closing argument, we affirm.

Affirmed.