STATE OF MINNESOTA
IN COURT OF APPEALS
A11-861

State of Minnesota,
Respondent,

vs.

Manuel Rosillo, Jr.,
Appellant.

Filed May 14, 2012
Affirmed in part and remanded
Worke, Judge

Ramsey County District Court
File No. 62-CR-10-5701

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

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

David W. Merchant, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Worke, Judge; and Connolly, Judge.

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

WORKE, Judge

Appellant challenges his domestic-assault-by-strangulation, domestic-assault, and third-degree-assault convictions, arguing that (1) the district court failed to instruct the

jury that it must unanimously agree on which act caused substantial bodily harm; (2) the prosecutor committed misconduct by eliciting relationship evidence; (3) the district court used improper grounds to impose an upward durational departure; and (4) remand is necessary to correct the indication in the warrant of commitment that appellant was convicted of a felony. We affirm appellant's convictions, but remand to the district court to correct the warrant of commitment.

FACTS

Following an incident on July 19, 2010, appellant Manuel Rosillo, Jr. was charged with domestic assault by strangulation, domestic assault, and third-degree assault. The victim, M.H., testified that on that day, appellant called her names, such as "b***h, wh**e, c**t, [and] s**t," grabbed her around the neck, and slammed her against the wall. M.H. testified that she had trouble breathing and found herself in the basement, although she could not recall how she and appellant ended up there. She was "wedged in [a] corner" and appellant punched her, kneed her in the face, kicked her, and slammed her head into the ground. During the assault, appellant was calling M.H. "stupid f***ing b***h" and telling her that she "had it coming" and that it was her "fault."

M.H. freed herself and went upstairs, where appellant continued to yell at her and call her names. During the assault, appellant and M.H.'s daughter was in an adjacent room where she could hear M.H. screaming through a vent. M.H. testified that she could hear her daughter crying and screaming throughout the assault. After the assault, M.H. left the home, pulling her daughter in a wagon over three miles to a friend's house.

M.H. sought medical attention that night. X-rays did not show any fractures. But within a couple of weeks, M.H. experienced sharp pains in her chest, and her left wrist hurt, which required her to wear a brace for two months. M.H. returned to the hospital in September 2010. Dr. Richard Levey, a radiologist, testified that a new x-ray showed a lump on one of M.H.'s ribs, which is the result of a healing fracture. Dr. Levey testified that it is not uncommon for some fractures not to be visible at the time that they occur, and that a lump associated with a healing fracture usually becomes visible around two weeks after the injury and remains visible for a long time after. Dr. Levey stated that he had "no doubt" that the lump was a result of a fracture.

Prior to appellant's trial, the state indicated its intent to introduce evidence of incidents between appellant and M.H. as relationship evidence. Before this evidence was introduced by way of M.H.'s testimony, the district court instructed the jury:

> the State is about to introduce evidence of conduct by [appellant] which occurred earlier than the date of the offense for which he is charged. This evidence is being offered for the limited purpose of demonstrating the nature and extent of the relationship between [appellant] and [M.H.] in order to assist you in determining whether [appellant] committed those acts with which [appellant] is charged in the complaint. [Appellant] is not being tried for and may not be convicted of any behavior other than the charged offenses. You are not to convict [appellant] on the basis of conduct which occurred earlier in 2010, to do so might result in unjust double punishment.

M.H. testified that she and appellant had been in an on-and-off relationship for approximately four years. M.H. testified that during a past argument, appellant slammed her face into the window sill, causing severe swelling and bruising. During another

argument, appellant picked M.H. up and slammed her shoulders down several times onto the basement floor. The prosecutor asked M.H. if she had anything else in mind regarding appellant being physical. She stated that there had been "several instances" when she was pregnant. The prosecutor asked M.H. if July 19 was the first time appellant had assaulted her in that way. M.H. replied that appellant had grabbed her around the neck "well over 50" times.

During deliberations, the jury asked the district court if it needed "to be unanimous on what specific type of substantial bodily harm was inflicted or just that there was substantial bodily harm?" The district court instructed the jury to reread the third-degree-assault instruction because that was all the information it needed. The jury found appellant guilty of all charges. The district court sentenced appellant on the third-degree-assault conviction. The district court determined that a sentencing departure was appropriate based on the jury finding that M.H.'s daughter saw, heard, or otherwise witnessed part of the offense and that appellant used derogatory language during the offense. The district court sentenced appellant to 24 months in prison, but stayed execution of the sentence, placing him on probation for five years. The district court filed appellant's warrant of commitment, which indicates that appellant was convicted of "Domestic Assault-Felony." This appeal follows.

D E C I S I O N

Jury Instructions

Appellant first argues that the district court erred in failing to instruct the jury that it must unanimously agree on which injury constituted substantial bodily harm. Because

appellant failed to object to the jury instructions, this court reviews only for plain error. *See State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). Plain error exists if there is error, the error is clear or obvious, and the error affects substantial rights. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Even if these three elements are met, this court has discretion whether to address the error and will do so only if necessary to ensure the fairness and integrity of the judicial proceedings. *Id.*

District courts are allowed "considerable latitude" in the selection of language for the jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). "An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001). "The jury's verdict must be unanimous in all cases." Minn. R. Crim. P. 26.01, subd. 1(5). But the jury need not unanimously agree on "the facts underlying an element of a crime in all cases." *State v. Pendleton*, 725 N.W.2d 717, 731 (Minn. 2007). Nor must the jury unanimously agree on "which of several possible means the defendant used to commit the offense." *State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002).

Appellant argues that the jury verdict was not necessarily unanimous because the jury, by asking its question, clearly had difficulty agreeing on what type of substantial bodily harm was inflicted. Appellant claims that this case is similar to *State v. Stempf*, in which the state charged one count of controlled-substance crime, but introduced evidence of two instances of possession. 627 N.W.2d 352, 354 (Minn. App. 2001). In that case, the state presented evidence of two distinct acts—possession of methamphetamine in the appellant's workplace and possession of methamphetamine in his truck—to support one conviction for possession. *Id.* In closing argument, the state asserted that the jury "could

convict if some jurors believed [that] appellant possessed the methamphetamine found on the premises while others believed he possessed the methamphetamine found in the truck." *Id.* at 358. This court held that the failure to give the jury a unanimity instruction violated the appellant's right to a unanimous verdict. *Id.*

In *Stempf* there were two different incidents. But here, there was only one incident. This case is similar to *State v. Infante*, in which the appellant was charged with second-degree assault, and he argued that the district court failed to instruct the jury that it had to unanimously agree on whether the act of putting a gun to his wife's head or loading the gun while looking her in the eye constituted the assault. 796 N.W.2d 349, 351-53 (Minn. App. 2011). This court determined that the jury did not have to agree on which act caused the appellant's wife to fear for her safety as long as it unanimously concluded that the state proved that the appellant assaulted her. *Id.* at 358.

Here, appellant was charged with third-degree assault. "Whoever assaults another and inflicts substantial bodily harm" is guilty of third-degree assault. Minn. Stat. § 609.223, subd. 1 (2008). "Substantial bodily harm" is "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member." Minn. Stat. § 609.02, subd. 7a. (2008). Like *Infante*, in which the jury had to agree that the appellant assaulted his wife, without the requirement of agreeing on which act constituted the assault, the jury here had to unanimously agree that appellant caused substantial bodily harm, without having to agree on which injury constituted the substantial bodily harm. There was evidence that M.H. suffered bruising,

lacerations, a wrist injury, a fractured rib, and potentially a brief loss of consciousness. This is substantial evidence supporting the conclusion that M.H. suffered substantial bodily harm. The district court did not err in instructing the jury.

Prosecutorial Misconduct

Appellant next argues that the prosecutor committed misconduct by eliciting relationship evidence. Again, appellant failed to object to this alleged error. Failure to object ordinarily forfeits the right to appellate review. *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984). However, we have discretion to review unobjected-to prosecutorial misconduct if plain error is established. Minn. R. Crim. P. 31.02; *Ramey*, 721 N.W.2d at 299. Appellant must demonstrate that plain error occurred. *Ramey*, 721 N.W.2d at 302. If appellant meets his burden of establishing plain error, the burden shifts to the state to demonstrate that the error did not affect substantial rights. *Id.*

Appellant argues that it was improper for the prosecutor to elicit testimony from M.H. that appellant assaulted her during her pregnancy and that he had strangled her more than "50 times" during their relationship. Minn. Stat. § 634.20 (2008) states, "Evidence 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, confusion of the issue, or misleading the jury." The statute requires that the evidence be "similar" to the charged conduct and makes such evidence presumptively admissible. Minn. Stat. § 634.20. Evidence of domestic abuse depicts the relationship between the accused and the alleged victim and provides context for the jury to "better judge the credibility" of the individuals. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn.

2004) (reasoning that a history of domestic abuse may prevent victim from testifying truthfully). Relationship evidence is unfairly prejudicial when it persuades by illegitimate means. *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006).

Appellant appears to suggest that the prosecutor committed misconduct by not abiding by requirements for the admission of *Spreigl* evidence. But relationship evidence is treated differently than *Spreigl* evidence, partly because "[d]omestic abuse is unique in that it typically occurs in the privacy of the home, it frequently involves a pattern of activity that may escalate over time, and it is often underreported." *McCoy*, 682 N.W.2d at 161. Thus, the stringent procedural requirements of Minn. R. Evid. 404(b) do not apply to relationship evidence admitted under section 634.20. *State v. Meyer*, 749 N.W.2d 844, 849 (Minn. App. 2008). Evidence of similar conduct by the accused is admissible unless it fails to meet a balancing test that considers whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *McCoy*, 682 N.W.2d at 159.

The state indicated at an earlier hearing that it would be introducing relationship evidence, and the district court indicated that it would make a ruling on its admissibility at the time it was introduced at trial. When it was introduced at trial, appellant did not object, so the district court did not rule on whether the probative value was outweighed by the danger of unfair prejudice. But a review of the evidence supports its admission. M.H. testified that appellant assaulted her during her pregnancy and strangled her over 50 times during their relationship. These incidents involved conduct against the victim in the course of the relationship and therefore were similar to the assault that occurred on

July 19 for purposes of Minn. Stat. § 634.20. Further, the evidence of prior conduct was not unfairly prejudicial because, although it described serious acts of abuse it did not overshadow the evidence of the significant assault against M.H. on July 19. Finally, the district court instructed the jury on how to use the evidence of prior conduct. Therefore, the prosecutor did not commit misconduct by eliciting the relationship evidence.

Sentence

Appellant also argues that the district court abused its discretion in relying on improper grounds to impose an upward durational departure. A district court must order the sentencing guidelines' presumptive sentence unless there are "identifiable, substantial, and compelling circumstances" to justify an upward departure. Minn. Sent. Guidelines II.D (2009). "'Substantial and compelling' circumstances are those showing that the defendant's conduct was significantly more or less serious than that typically involved in the commission of the offense in question." *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). Whether a particular reason for an upward departure is permissible is a question of law, which is subject to de novo review. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). A district court's decision to depart from the sentencing guidelines is reviewed for an abuse of discretion. *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001); *Dillon*, 781 N.W.2d at 595-96.

In imposing a durational departure, the district court relied on the jury finding that appellant committed the offense in the presence of a child and that he used derogatory language against M.H. during the offense. When a child sees, hears, or otherwise

witnesses through sensory perception some portion of the offense, there is a valid basis for departure. *See State v. Robideau*, 796 N.W.2d 147, 152 (Minn. 2011). Here, there was evidence that M.H.'s daughter was in an adjacent room when appellant yelled and strangled M.H. in the kitchen. There was also evidence that M.H.'s daughter could hear M.H. screaming through a vent. When M.H. went upstairs, her daughter was crying and screaming for her. There is sufficient evidence to support the district court's decision to depart from the presumptive sentence.

Appellant also argues that name-calling is common in all crimes, so it does not make this offense any more serious. But in *State v. Deschampe*, the supreme court determined that calling the victim by degrading names was one fact that compelled the conclusion that the offense was committed in a particularly cruel way. 332 N.W.2d 18, 20 (Minn. 1983) (stating that the defendant called the victim a "s**t" and other degrading names, which, among other things, compelled the conclusion that defendant committed the offense in a particularly cruel way); *see also State v. Smith*, 541 N.W.2d 584, 590 (Minn. 1996) (stating that a departure may be justified by taunts, threats, and degradation). There was evidence that appellant called M.H. several degrading names and told her that the assault was her fault. Therefore, the district court did not abuse its discretion in relying on this basis for departing from the presumptive sentence.

Warrant of Commitment

The warrant of commitment indicates that appellant was convicted of "Domestic Assault-Felony" under Minn. Stat. § 609.2242, subd. 4 (2008). But under this subdivision, the state had to prove "two or more previous qualified domestic violence-

related offense convictions." *See id.* The state concedes that it was not proven that appellant had at least two qualifying convictions. The parties agree that there is a clerical error in the warrant of commitment. Appellant's conviction is a misdemeanor rather than a felony; therefore, remand is necessary to correct this clerical error.

Affirmed in part and remanded.