STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1300

State of Minnesota,
Respondent,

vs.

Eldon JoJuan Sparkman,
Appellant.

Filed July 2, 2012
Affirmed
Schellhas, Judge

Stearns County District Court
File No. 73-CR-10-10562

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, 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 Schellhas, Presiding Judge; Ross, Judge; and Chutich, Judge.

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

SCHELLHAS, Judge

Appellant challenges his conviction of violation of order for protection, arguing that the district court erroneously admitted relationship evidence under Minn. Stat. § 634.20 (2010). We affirm.

FACTS

On December 16, 2008, R.S. obtained an order for protection (OFP) under Minn. Stat. § 518B.01, subd. 6 (2008), against appellant Eldon Sparkman. On appeal, Sparkman concedes that he "was present at the order for protection hearing and obtained notice of its existence." The OFP provided that Sparkman "shall have no contact, either direct or indirect, with [R.S. or her child] whether in person, with or through other persons, by telephone, letter, or in any other way," with no exceptions, and that the OFP "is effective for a period of 2 years from the date of this Order." Sparkman does not dispute that on September 20, 2009, he telephoned R.S. three times from the Minnesota Correctional Facility–Faribault, where he was serving a sentence for his conviction of third-degree assault against R.S. R.S. reported Sparkman's telephone calls to Officer Joan Lehmkuhl of the St. Cloud Police Department on November 30, 2009. As a result of Sparkman's telephone calls to R.S., respondent State of Minnesota charged Sparkman with four counts of felony violations of an OFP under Minn. Stat. § 518B.01, subd. 14(d)(1) (2008). The district court dismissed one count.[1]

[1] Sparkman stipulated pretrial that he has "a prior conviction for domestic assault" from May 2008 and "a prior conviction for assault in the third degree" from May 2009.

Before trial, the state moved to admit relationship evidence under Minn. Stat. § 634.20, consisting of Sparkman's conviction of third-degree assault against R.S. and other telephone calls to R.S. by Sparkman. The district court granted the state's motion, stating: "based on the definition of 'similar conduct' and 'domestic abuse,' . . . the evidence that the State seeks to admit . . . is evidence of similar conduct by [Sparkman] against the victim of domestic abuse as defined by Minn. Stat. § 634.20." The court further reasoned that the evidence

> is likely to have a high probative value because it can help to establish the relationship between [R.S.] and [Sparkman] and can place the incident in issue in context for the jury. . . . [A]ny potential prejudice that may possibly occur . . . can be effectively minimized by this Court giving the jury a cautionary instruction, which is what this Court intends to do.

At trial, R.S. testified that the OFP at issue was based on Sparkman's previous assault of her; that Sparkman called her three times on September 20, 2009; and that he did not threaten her during the calls. Investigator Susan Schema of the correctional facility testified that Sparkman made "127 call attempts [to R.S.] . . . between 9/1 and 12/1/2009." The district court gave the jury cautionary instructions regarding the relationship evidence before R.S. testified, before Investigator Schema testified, and during its final instructions. The jury found Sparkman guilty of three counts of felony OFP violations under Minn. Stat. § 518B.01, subd. 14(d)(1). The district court entered judgment against Sparkman on one count.

This appeal follows.

D E C I S I O N

Standard of Review

Sparkman argues that we should conduct a de novo review of the district court's admission of relationship evidence under Minn. Stat. § 634.20 because whether the three September 20 phone calls constituted "domestic violence" within the meaning of section 634.20 involves the construction of an evidentiary statute. The state argues that we should review the district court's determination for plain error because, although Sparkman objected to admission of the evidence before trial, he failed to object on the ground that his alleged violations of the OFP did not fall within the statutory definition of "domestic abuse." The state's argument is persuasive.

"Error may not be predicated upon a ruling which admits . . . evidence unless . . . a[n] . . . objection . . . appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context." Minn. R. Evid. 103(a)(1); *State v. Brown*, 792 N.W.2d 815, 820 (Minn. 2011) ("[W]e look to the context of the objection at issue in this case to determine if the specific ground for the objection is clear."). The only "specific ground[s]" on which Sparkman objected to the admission of the evidence of the assault against R.S. and the other phone calls to R.S. were that the evidence (1) was irrelevant, (2) would unfairly prejudice Sparkman, and (3) was insufficiently similar to the conduct charged in this case. Sparkman did not argue before the district court that his alleged OFP violations against R.S. did not constitute "domestic abuse" under the relationship-evidence statute nor, on appeal, does Sparkman explain how the context of his objections renders this argument "apparent." We therefore review

the district court's admission of the relationship evidence for plain error. *See* Minn. R. Evid. 103(d). ("Nothing in this rule precludes taking notice . . . of plain errors affecting substantial rights although they were not brought to the attention of the court."); *Brown*, 792 N.W.2d at 820 ("If the specific ground for the objection is not clear from the context, then we review the admission of evidence under a plain-error analysis.").

Plain Error

"The plain error analysis allows an appellate court to consider an unobjected-to error that affects a criminal defendant's substantial rights." *State v. Kuhlmann*, 806 N.W.2d 844, 852 (Minn. 2011); *see* Minn. R. Crim. P. 31.02 (permitting review of plain error). "Under plain error analysis, we must determine whether there was error, that was plain, and that affected the defendant's substantial rights. If each of these prongs is met, we will address the error only if it seriously affects the fairness and integrity of the judicial proceedings." *Kuhlmann*, 806 N.W.2d at 852–53 (citation omitted).

Whether There Was Error

Sparkman argues that the district court erred by admitting the relationship evidence under section 634.20 because his alleged September 20 OFP violations against R.S. did not render R.S. a "victim of domestic abuse as defined by statute." Based on this court's holding in *State v. Barnslater*, 786 N.W.2d 646 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010), we agree. Section 634.20 provides in relevant part:

> 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

See also State v. McCoy, 682 N.W.2d 153, 161 (Minn. 2004) ("[W]e expressly adopt Minn. Stat. § 634.20 as a rule of evidence for the admission of evidence of similar conduct by the accused against the alleged victim of domestic abuse."). The purpose of admitting relationship evidence under the statute is "to illuminate the history of the relationship [and] to put the crime charged in the context of the relationship between the two." *Id.* at 159. Section 634.20 provides that "'[d]omestic abuse' . . . [has] the meanings given under section 518B.01, subdivision 2," which defines domestic abuse in the following ways, not expressly including an OFP violation:

> (1) physical harm, bodily injury, or assault;
> (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or
> (3) terroristic threats, within the meaning of section 609.713, subdivision 1; criminal sexual conduct, within the meaning of section 609.342, 609.343, 609.344, 609.345, or 609.3451; or interference with an emergency call within the meaning of section 609.78, subdivision 2.

Minn. Stat. § 518B.01, subd. 2(a) (2008). In *Barnslater*, we held that the appellant's

> charge and subsequent conviction of violation of an order for protection did not involve domestic abuse as defined in Minn. Stat. § 518B.01 because it was based on [the appellant's] attempt to contact J.B. through her friend, which did not include the infliction of imminent harm, terroristic threats, or other conduct that meets the definition of "domestic abuse."

786 N.W.2d at 652 n.1. But we rejected the appellant's argument that restraining-order violations cannot satisfy section 634.20's definition of domestic abuse because

> [t]he admissibility of relationship evidence under section 634.20 does not depend on the particular offense charged in

> the case in which the evidence is offered. Rather, section 634.20 requires that the evidence address similar conduct by the accused against "the victim of domestic abuse." The applicable definition of "domestic abuse" focuses on the defendant's conduct rather than on a list of offenses that represent "domestic abuse."

Id. at 651.

Here, R.S. conceded during cross-examination that Sparkman did not threaten her during the September 20 telephone calls, and the state otherwise points to no conduct by Sparkman during the calls that constitutes domestic abuse under section 518B.01, subdivision 2. Instead, the state argues that "OFP violations in and of themselves constitute domestic abuse as that term is used in § 634.20" and asserts that this court should not apply the holding in *Barnslater* because it is contrary to this court's opinion in *State v. Word*, 755 N.W.2d 776 (Minn. App. 2008). We disagree. In *Word*, we were not yet required by *Barnslater* to explicitly analyze the conduct underlying a defendant's OFP violation because we decided *Word* before deciding *Barnslater*. *Compare Word*, 755 N.W.2d at 776, *with Barnslater*, 786 N.W.2d at 646. Moreover, in *Word*, the district court issued the OFP after Word "chased [the victim] in traffic, and later [his] girlfriend beat [the victim] as Word yelled instructions," and the conduct underlying the OFP violation included Word "following [the victim] in traffic[] and parking across the street from her home and workplace parking spot." 755 N.W.2d at 780.

The state also argues that the supreme court's decision in *State v. Bell*, 719 N.W.2d 635 (Minn. 2006), supports its argument that "OFP violations in and of themselves constitute domestic abuse as that term is used in § 634.20." We disagree. The

supreme court in *Bell* did not hold that OFP violations necessarily constitute domestic abuse but, rather, held that the two violations in that case "were probative of a material fact, namely, the history of [the victim's] and Bell's relationship." 719 N.W.2d at 641. Bell's victim testified that the facts underlying the violations were that (1) Bell "threw a ladder through a window" and "ramm[ed] his truck against the garbage cans of the back porch and against the cement porch of the house" and (2) the victim "came home from work, went to her bedroom, and found Bell was in her bed and had taken money from her" and refused to leave. *Id.* at 638 (quotation omitted).

In this case, based on our holding in *Barnslater*, we conclude that the district court erred by admitting the relationship evidence because Sparkman's conduct violating the OFP was not "conduct that meets the definition of 'domestic abuse'" under section 518B.01, subdivision 2.

Whether Error Was Plain

An error is plain if it is "clear or obvious," such as when the error "contravenes case law." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotations omitted). Sparkman argues that the error is plain under *State v. McCurry*, 770 N.W.2d 553 (Minn. App. 2009), *review denied* (Minn. Oct. 28, 2009). In *McCurry*, this court held that section 634.20 applies only to domestic-abuse cases, not to non-domestic-abuse cases. 770 N.W.2d at 559–61. The state argues that *McCurry* does not support a conclusion that the district court's error was plain because no Minnesota appellate court appears to have directly addressed whether OFP violations necessarily constitute "domestic abuse" within the meaning of section 634.20. But in *Barnslater* this court held that the appellant's

> charge and subsequent conviction of violation of an order for protection did not involve domestic abuse as defined in Minn. Stat. § 518B.01 because it was based on [the appellant's] attempt to contact J.B. through her friend, which did not include the infliction of imminent harm, terroristic threats, or other conduct that meets the definition of "domestic abuse."

786 N.W.2d at 652 n.1. The state argues that the holding in *Barnslater* is "merely dicta" because, in that case, the state did not dispute that the OFP violation was not included in the definition of domestic abuse under Minn. Stat. § 518B.01. We disagree. "Dicta are generally considered to be expressions in a court's opinion which go beyond the facts before the court and therefore are the individual views of the author of the opinion and not binding in subsequent cases." *State v. Timberlake*, 744 N.W.2d 390, 395 n.7 (Minn. 2008) (quotation omitted). The *Barnslater* holding was material to the court's analysis because the OFP violation was one of the potential grounds that could have rendered the victim a "victim of domestic abuse" under section 634.20, thereby permitting the admission of "[e]vidence of similar conduct by the accused against the victim" under section 634.20. *Barnslater*, 786 N.W.2d at 651, 652 n.1; *see Timberlake*, 744 N.W.2d at 395 n.7 (concluding that a judicial discussion was "not dictum" because it involved the interpretation of a statute "in order to guide the defendant's retrial following our remand").

In this case, because the district court's admission of the relationship evidence contravened the holding in *Barnslater*, we conclude that the district court's error was plain.

Sparkman's Substantial Rights

"To show that the error affected substantial rights, the defendant bears the heavy burden of showing that the error was prejudicial . . . ." *State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002) (quotation omitted). "A plain error affects the substantial rights of the defendant when there is a reasonable likelihood that the error substantially affected the verdict. The court's analysis under the third prong of the plain error test is the equivalent of a harmless error analysis." *State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011) (quotation and citation omitted). To make this determination, we consider the following four factors: "(1) the manner in which the State presented the testimony, (2) whether the testimony was highly persuasive, (3) whether the State used the testimony in closing argument, and (4) whether the defense effectively countered the testimony." *Id.*

Sparkman argues that a reasonable probability exists that the district court's admission of the relationship evidence substantially affected the jury's verdict. We disagree. The jury found Sparkman guilty of three felony violations of an OFP under Minn. Stat. § 518B.01, subd. 14(d)(1). To prove an OFP felony violation under that provision, the state must prove that the defendant "knowingly violate[d] [an OFP] . . . within ten years of the first of two or more previous qualified domestic violence–related offense convictions." Minn. Stat. § 518B.01, subd. 14(d)(1). On appeal, Sparkman concedes that he "was at the order for protection hearing and obtained notice of its existence" and that he called R.S. three times on September 20, 2009, a date within the two-year no-contact period mandated by the OFP; at trial, the jury heard the three phone calls. Pretrial, Sparkman stipulated that he had "a prior conviction for domestic

assault" from May 2008 and "a prior conviction for assault in the third degree" from May 2009.

Moreover, the state did not specifically mention the erroneously admitted evidence during its closing argument. And the district court gave the jury cautionary instructions at three separate parts of the trial regarding the limited purpose of the relationship evidence: before Investigator Schema testified, before R.S. testified, and when the court gave instructions to the jury. *See State v. Gatson*, 801 N.W.2d 134, 151 (Minn. 2011) ("We presume that juries follow instructions given by the court." (quotation omitted)); *Word*, 755 N.W.2d at 785–86 ("Although the district court did not issue a cautionary instruction on the proper use of relationship evidence . . . the district court did provide a comprehensive set of instructions that warned the jury, in part, not to convict [the appellant] for his prior OFP violation. . . . This limited any potential prejudice to [the appellant] caused by the district court's failure to issue the cautionary instructions.").

Sparkman argues that the plain error prejudiced his substantial rights because, "[a]lthough there was direct and circumstantial evidence against [him], there was not an admission by him that he committed the violation," but Sparkman cites no law to support the proposition that a defendant must admit to having committed an OFP violation to be convicted of it. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) ("'An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.'" (quoting *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519–20, 187 N.W.2d 133, 135

(1971)). Sparkman further asserts that, because the jury heard the relationship evidence, it became "impossible for the jury not to assume that he was guilty of the current offenses based on the abundance of past violations" and that hearing the evidence "put the jury in the position of believing that additional punishment would be necessary based on his past violent acts," but Sparkman does not support these assertions with law or record evidence. *See id.*

Because we conclude that Sparkman does not satisfy the third element of the plain-error test, we need not inquire about whether the plain error seriously affected the fairness or integrity of the judicial proceedings. *See Kuhlmann*, 806 N.W.2d at 852–53.

Sparkman asks this court to "exercise its supervisory powers" to require "the Stearns County Attorney's Office [to] stop[] its practice of improperly introducing prejudicial information pursuant to section 634.20." But the record evidence does not support Sparkman's contention that the legal arguments of the county attorney office indicate such an improper practice.

Affirmed.