STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0619

State of Minnesota,
Respondent,

vs.

Justin Anthony Kudla,
Appellant.

Filed February 11, 2013
Affirmed
Bjorkman, Judge

Sherburne County District Court
File No. 71-CR-10-607

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Kathleen A. Heaney, Sherburne County Attorney, Dawn R. Nyhus, Assistant County Attorney, Elk River, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Bjorkman, 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

BJORKMAN, Judge

Appellant challenges his terroristic-threats and domestic-assault convictions, arguing that the district court abused its discretion by (1) admitting as relationship evidence voicemail messages he left for a girlfriend he dated after his relationship with the victim ended and (2) denying his request for a substitute public defender. Appellant also asserts error in the district court's jury instructions. We affirm.

FACTS

In April 2009, W.L. reported to law enforcement that her ex-boyfriend, appellant Justin Kudla, had threatened her three times between November and December 2008; she did not recall the order of the incidents but knew that they occurred in the winter before she ended their relationship in December 2008. One incident started with an argument. Kudla chased W.L. into his bedroom, grabbed a baseball bat, swung it at her, but missed W.L. In another incident, Kudla was cleaning a shotgun, became angry with W.L., and pointed the gun at her, telling her that he would kill her if she left him. A third incident also involved the shotgun. Kudla and W.L. were arguing and Kudla said, "[D]on't leave or I'll kill you," while pointing the gun at her. W.L. did not immediately report the incidents because Kudla had threatened to hurt or kill her if she ever talked about them.

The state charged Kudla with three counts of making terroristic threats and three counts of domestic assault based on the three incidents. At trial, the state admitted as relationship evidence a recording of three threatening voicemail messages that Kudla left for T.T., whom he dated after W.L. The district court instructed the jury about the

limited role of the relationship evidence; it repeated the cautionary instruction at the end of trial.

The jury found Kudla guilty of two counts of terroristic threats and two counts of domestic assault, acquitting him on the other two charges. The district court stayed imposition of sentence and placed Kudla on probation. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by admitting the voicemails Kudla left for T.T.

A district court may admit evidence of a defendant's "similar conduct" against the alleged victim of domestic abuse, "or against other family or household members," unless the probative value of the evidence is "substantially outweighed by the danger of unfair prejudice" to the defendant. Minn. Stat. § 634.20 (2012). Such evidence is offered to illuminate the relationship between the defendant and the alleged victim. *See State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004). We will not reverse a district court's decision to admit relationship evidence unless the appellant establishes that the district court abused its discretion and that appellant was thereby prejudiced. *State v. Lindsey*, 755 N.W.2d 752, 755 (Minn. App. 2008), *review denied* (Minn. Oct. 29, 2008).

Kudla challenges the district court's admission of a recording containing the following three voicemail messages, which he left for T.T. on January 30, 2011, shortly after their relationship ended:

> [1] Don't know what comin' to her. Cuz I'm screaming one-eight-seven loud and clearly. One-eight-seven n--ger you don't get it b--ch.

> [2] Better be scared of f---in' going home cuz I'll be waiting around that f---in' corner. You f---in' wait b--ch. You will fall. . . . I'm gonna f---in' grab a f---in' hook and put it in your f---in' c--ch and hang you by it.
>
> [3] . . . I hate you. Go to h-ll and watch out for my family, cuz you're gonna f---in' die, okay? That's all I gotta say.

Kudla argues that the district court abused its discretion by admitting the voicemails as relationship evidence because (1) T.T. is not W.L.'s family or household member, (2) Kudla left the messages after his relationship with W.L. ended, and (3) the evidence is unfairly prejudicial. We address each argument in turn.

Family or household member

Kudla first argues that the district court erred in interpreting Minn. Stat. § 634.20 to admit the voicemail messages to T.T. because the phrase "other family or household members" references the victim's family or household members, not those of the defendant. We disagree. This court considered and rejected the same argument in *State v. Valentine*, 787 N.W.2d 630, 636-37 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010). After examining the definition of "domestic abuse," the context of the statute, the plain meaning of the word "other," and caselaw interpreting similar statutory language, we concluded that Minn. Stat. § 634.20 "unambiguously authoriz[es] the admission of similar-conduct evidence against the accused's (not the victim's) family or household members." *Valentine*, 787 N.W.2d at 637-38. We decline Kudla's invitation to deviate from *Valentine*. *See State v. Lee*, 706 N.W.2d 491, 494 (Minn. 2005) (stating that courts should be reluctant to overturn their own precedents). Because it is undisputed that T.T. was a member of Kudla's family or household when he left the threatening voicemails,

the messages are similar incidents against a family or household member within the meaning of Minn. Stat. § 634.20.

Subsequent incident

Kudla next argues that the voicemail evidence lacks probative value because it involves an incident with "a future girlfriend." He contends that the voicemails cannot illuminate the history of his relationship with W.L., as envisioned in *McCoy*, because W.L. could not have known about them. We are not persuaded. Relationship evidence does not derive its probative value from the fact that the victim is aware of the other conduct. Rather, relationship evidence is probative because it "sheds light on how the defendant interacts with those close to him, which in turn suggests how the defendant may interact with the victim." *See Valentine*, 787 N.W.2d at 637. And Minn. Stat. § 634.20 contains "no temporal restriction," so relationship evidence may include conduct before or after the incident giving rise to the charged offense. *Lindsey*, 755 N.W.2d at 756. We conclude that the district court did not abuse its discretion by finding the voicemail messages probative of Kudla's conduct with W.L.

Unfair prejudice

Finally, Kudla contends that the evidence presents a significant risk of unfair prejudice that outweighs its probative value. Unfair prejudice does not refer to "merely damaging evidence" but evidence that "persuades by illegitimate means, giving one party an unfair advantage." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted). Relationship evidence should be excluded only if the probative value of the

evidence is "substantially outweighed by the danger of unfair prejudice" to the defendant. Minn. Stat. § 634.20. That standard is not met here.

The district court found the voicemail messages highly probative of "the relationship between Mr. Kudla and a domestic partner," specifically demonstrating Kudla's violent conduct toward a partner who seeks to end the relationship "over [his] objection," similar to the situation before the jury. And the district court found that the danger of unfair prejudice did not outweigh this probative value. The record supports that finding. While the violent and profane nature of the messages undoubtedly cast Kudla in a poor light, the prejudicial impact of the evidence was limited by its brevity and narrow scope; it comprised only one recording of no more than one minute, with limited contextualizing testimony. The district court's cautionary instruction also mitigated any danger of unfair prejudice. *See State v. Waino*, 611 N.W.2d 575, 579 (Minn. App. 2000). On this record, we conclude the district court did not abuse its discretion by admitting the voicemail messages as relationship evidence.

II. The district court did not abuse its discretion by denying Kudla's request for a substitute public defender.

An indigent defendant has a right to "be provided competent counsel in all criminal proceedings" but does not have "the unbridled right to be represented by counsel of his choice." *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977). A request for substitution of counsel will be granted "only if exceptional circumstances exist and the demand is timely and reasonably made," *id.*, and the defendant has the burden of showing the existence of exceptional circumstances, *see State v. Worthy*, 583 N.W.2d 270, 279

(Minn. 1998). We review for abuse of discretion the denial of a request for substitute counsel. *State v. Clark*, 722 N.W.2d 460, 464 (Minn. 2006).

Kudla discharged his public defender in November 2010. Three months later, he requested reappointment of the public defender, asking: "Is there a possibility I could get a different one? Me and him are clashing heads and stuff like that." The district court advised Kudla that he does not have the right to choose a particular public defender but that he could reapply and the public defender's office would "simply assign someone to represent [him]. It may be the same attorney, it may not." Kudla indicated he understood this but nonetheless wanted to reapply for a public defender. He subsequently was reassigned the same public defender and proceeded with that attorney through trial and sentencing without objection.

Kudla contends that the district court should have inquired further after he explained that he and his attorney were "clashing heads and stuff like that." We disagree. Only when a defendant raises "serious allegations of inadequate representation" may a district court deem it necessary to conduct a searching inquiry into the request for substitute counsel. *See id.* And a reference to "clashing heads" does not signal concern about an attorney's "ability or competence to represent the client," *see State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001), let alone seriously inadequate representation under *Clark*. Rather, it indicates the type of personal tension between attorney and client that the supreme court has expressly held does not constitute exceptional circumstances. *See State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999); *Worthy*, 583 N.W.2d at 279.

Kudla also argues that the district court erred by not allowing him to "specifically outline" his concerns about his attorney. We disagree. The record does not indicate that Kudla was deprived of that opportunity. He stated that he wanted to resume representation by the public defender's office but preferred a different attorney. When the district court declined to appoint a particular public defender, Kudla did not object or articulate any deep-seated concerns about his original attorney; nor did he at any point after that attorney was reappointed. On this record, we conclude that the district court did not abuse its discretion by denying Kudla's request for substitute counsel.

III. The jury instructions accurately state the law.

District courts are allowed "considerable latitude in selecting the language of jury instructions." *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). Instructions must be viewed in their entirety to determine whether they fairly and adequately explain the law of the case. *State v. Smith*, 674 N.W.2d 398, 400 (Minn. 2004). We generally review the district court's formulation of jury instructions for abuse of discretion. *State v. Koppi*, 798 N.W.2d 358, 361 (Minn. 2011). But when a defendant does not object to the jury instructions, we apply a plain-error standard of review. *Smith*, 674 N.W.2d at 400. "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). An error affects substantial rights if "there is a reasonable likelihood that the error substantially affected the verdict." *State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002). If these three prongs are satisfied, we may correct the error to ensure fairness and the integrity of the judicial proceeding. *Strommen*, 648 N.W.2d at 686.

Kudla challenges the following unobjected-to portion of the district court's final instructions to the jury:

> The final test of the quality of your service will be in the verdict that you return to this court, and not in the opinions that any of you may have as you retire to begin your deliberation. Have in mind that you make a definite contribution to the efficient judicial administration and to justice in this state if you arrive at a just and proper verdict.
>
> To that end, I will remind you that in your deliberations in the jury room, there can be no triumph except in the declaration of truth. Remember that this case is important to both sides. It is important in the respect that a person who is guilty of the commission of a crime be brought to justice and be punished. It is equally important that a person who is not guilty of the commission of a crime should not be punished for something that they did not do.

Kudla argues that these instructions diluted the state's burden of proof by implying that "only people who are factually innocent should be found not guilty," and improperly invited the jury to consider punishment. We agree that references to "truth," factual innocence, and punishment could misdirect a jury. *See State v. Carridine*, 812 N.W.2d 130, 148 (Minn. 2012) (stating, in addressing prosecutorial misconduct, that shifting the burden of proof "to the defendant to prove his innocence [is] improper"); *State v. Chambers*, 589 N.W.2d 466, 474 (Minn. 1999) (stating that "sentencing is not a proper consideration for the jury"). But we consider the instructions in their entirety to determine whether the district court abused its broad discretion. *See Smith*, 674 N.W.2d at 400.

Viewed as a whole, the district court's instructions accurately explain that Kudla is presumed innocent until proven guilty, and that the state bears the burden of proving each

element of each offense beyond a reasonable doubt. The district court also reminded the jury of the state's burden with its instruction as to the elements of the charged offenses, repeating six times: "If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty."

There is no reasonable likelihood that the jury, having been instructed in this manner, would have been so distracted or confused by the challenged portion of the instructions as to have "substantially affected the verdict." *See Burg*, 648 N.W.2d at 677. Indeed, the jury's acquittal of Kudla on two charges indicates that it understood and held the state to its burden. *See State v. Dick*, 638 N.W.2d 486, 491 (Minn. App. 2002) (holding that jury's acquittal on one charge indicated proper consideration of charges despite error in instructions), *review denied* (Minn. Apr. 16, 2002). Because we discern no plain error with respect to the jury instructions, Kudla is not entitled to reversal on this basis.

Affirmed.