STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1145

State of Minnesota,
Respondent,

vs.

Abdirizak Hees Omar,
Appellant.

Filed April 29, 2013
Affirmed
Harten, Judge*

Stearns County District Court
File No. 73-CR-11-11250

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender; and

Daniel J. Supalla, Special Assistant State Public Defender, Briggs and Morgan, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Larkin, Judge; and Harten, Judge.

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* 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

HARTEN, Judge

Appellant challenges his conviction on the grounds that the district court abused its discretion in (1) admitting evidence of his prior assaults of the victim and of a hearsay statement under Minn. R. Evid. 807 and (2) sentencing him to an upward durational departure based on the jury's finding that children were present. Because we see no abuse of discretion, we affirm.

FACTS

In December 2011, D.R. lived in an apartment with her three sons, who were then eight years old, four years old, and seven months old. Although appellant Abdirizak Hees Omar, the father of D.R.'s youngest son, did not live in the apartment, he was there during the weekend of 9-12 December.

On 9 December, altercations between appellant and D.R. resulted in D.R. suffering a black eye and bruises on her arms, legs, and neck. On 12 December, about 3:30 a.m., appellant hit D.R. when she refused to go upstairs with him. A.N., a female friend of appellant and D.R., was present; appellant hit A.N. in the eye. Wali Ahmed, a male friend of appellant, was also present. After Ahmed came to A.N.'s defense, he and appellant went outside to fight. D.R. called the police, stating that appellant and Ahmed had a knife, although this was not the case. The police arrived, searched for but were unable to find a knife, and told appellant and Ahmed to leave. They departed in different directions; the police also left.

About twenty minutes later, Ahmed returned to the apartment, and D.R. let him in. Appellant then returned, but D.R. refused to let him in. Appellant began banging on the door and shouting. D.R. and A.N. went upstairs, entered the children's bedroom, locked the door, and put the children in the closet.

Appellant entered the apartment through a window he had broken, causing him to cut his hand. He went upstairs and attempted to force his way into the children's bedroom, while yelling at D.R. D.R. and A.N. called 911.

When the police arrived, they entered the apartment by breaking the front door. They went upstairs, where they found and detained Ahmed and appellant. Before Ahmed was released, he said the police should "charge [appellant] with burglary and threatening people . . . ." The police arrested appellant; they also called an ambulance because his hand was bleeding.

Appellant was charged with two counts of first-degree burglary. The state moved to admit into evidence appellant's earlier assaults of D.R. and Ahmed's statement to the police. The district court granted the motion. Following trial, a jury found appellant guilty on both counts and also found that children had witnessed the burglary. The state sought an upward durational departure, and appellant was sentenced to 120 months, an upward departure of 42 months.

Appellant now challenges his conviction, arguing that the district court abused its discretion in admitting evidence of his prior assaults of D.R. and of Ahmed's statement to the police; appellant also challenges his sentence, arguing that the district court abused its

discretion by imposing an upward durational departure because of the presence of children.

D E C I S I O N

1. Prior Assaults

"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." Minn. Stat. § 634.20 (2010). A district court's decision to admit relationship evidence under Minn. Stat. § 634.20 is reviewed for an abuse of discretion. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004). The state filed a pretrial motion in limine to introduce evidence of appellant's assaults of D.R. on 9 December and at around 3:30 a.m. on 12 December. Over appellant's objection, the district court granted the state's motion but "expressly reserve[d] the right to limit the amount of testimony . . . to minimize the potential for prejudice." Although appellant did not challenge the evidence at trial, he does so on appeal.

"[E]videntiary objections should be renewed at trial when an in limine or other evidentiary ruling is not definitive but rather provisional . . . ." *State v. Word*, 755 N.W.2d 776, 782-83 (Minn. App. 2008) (interpreting Minn. R. Evid. 103(a) ("Once the court makes a definitive ruling on the record admitting . . . evidence . . . a party need not renew an objection . . . to preserve a claim of error.")). In *Word*, "[t]he district court issued a qualified ruling that incorporated the statutory limits on the scope of the relationship evidence." *Id.* at 783. Because there was no objection at trial, this court reviewed the challenge to the evidence using the plain-error standard and concluded that

"the district court did not plainly err by not taking the initiative to exclude the relationship evidence at trial." *Id.* at 784.

Under plain-error review, an appellate court will reverse only if there is error, the error is plain, the error affected the defendant's substantial rights, and the error should be addressed to ensure fairness and the integrity of the judicial proceedings. *State v. Hayes*, 826 N.W.2d 799, 807 (Minn. 2013).

Evidence was admitted on appellant's two prior assaults of D.R., the first a few days before the burglary and the second less than an hour before the burglary. Before evidence on either assault was offered (four times during the trial) the district court told the jury:

> This evidence is being offered for the limited purpose of demonstrating the nature and extent of the relationship between [appellant] and [D.R.] in order to assist you in determining whether [appellant] committed those acts with which [he] is charged in the complaint. [He] 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 that occurred on the weekend of December 9th through the 12th, 2011. To do so might result in unjust double punishment.

This was repeated to the jury at the end of the trial in the district court's instructions; the jury heard it five times.

Evidence on the first assault included D.R.'s identifying photos showing her bruises and her black eye and stating that these injuries resulted from the first assault on 9 December. Evidence on the second assault, about 3:30 a.m. on 12 December, included D.R.'s identifying a photograph of a wound inside her mouth inflicted during that assault

and describing the second assault; testimony from A.N.; and Ahmed's statement to the police.

Appellant first argues that the amount of evidence on these assaults was excessive. Because he did not object at trial, this court reviews the amount of evidence under a plain-error standard. *Word*, 755 N.W.2d at 784. When considered in light of the total amount of evidence presented to the jury, evidence on appellant's two prior assaults of D.R. was not excessive. The transcript of the trial is 384 pages long and does not include the transcript of Ahmed's statement to the police, which was played to the jury. D.R.'s testimony on the first assault was five pages; her testimony on the second assault was four pages. A.N.'s testimony about the second assault was two pages. The transcript of Ahmed's statement to the police was 13 pages; its only reference to the assault was two sentences: "He busted her lip . . . . He hit her in the face." Thus, only eleven pages and two sentences of the 397-page total pertained to appellant's first and second assaults of D.R.

Appellant also claims that the references to the prior assaults in the state's closing argument were excessive. The transcript of that argument is 37 pages long. Appellant quotes every reference to the prior assaults in the closing argument; the 11 references collectively cover about 1 1/2 pages. Appellant's view that "the prior alleged assaults were a focal point of the trial" is unsupported by the evidence.

Appellant argued at trial and argues on appeal that, because he had been charged with and was awaiting trial on the prior assaults, it was unfair to use those assaults as relationship evidence in the instant burglary trial because it forced him to "defend against

the prior alleged assault and burglary." But an understanding of the relationship between appellant and D.R. was crucial to the jury's understanding of why D.R. acted as she did during the burglary. The district court told the jury five times not to consider whether appellant was guilty of anything except the instant burglary charge because doing so could result in unjust double punishment. A jury can be presumed to follow the court's instructions. *State v. Vang*, 774 N.W.2d 566, 578 (Minn. 2009).

The district court did not commit plain error by admitting evidence of the prior assaults. Moreover, even if the harmless-error standard appropriate for challenged evidence were used instead of the more stringent plain-error standard, *see Word*, 755 N.W.2d at 782, appellant would not be entitled to a new trial because the jury's verdict is "surely unattributable" to the evidence of the prior assaults. *See State v. King*, 622 N.W.2d 800, 811 (Minn. 2001). Ample evidence supported the jury's findings that appellant committed burglary by unlawfully entering D.R.'s residence and committing an assault while in the residence.

2. Ahmed's Statement to the Police

Shortly before trial, the state learned that Ahmed claimed to remember nothing of the burglary incident or the prior assault. Citing Minn. R. Evid. 807, the state therefore moved to enter the recording and transcript of Ahmed's statement to the police officers who arrived at D.R.'s apartment after the burglary. Minn. R. Evid. 807 provides that hearsay evidence not admissible under any other exception may be admitted if: (1) it has "equivalent circumstantial guarantees of trustworthiness"; (2) it is offered as evidence of a material fact; (3) it is more probative than any other evidence the proponent could

procure through reasonable efforts; and (4) the general purposes of the Rules of Evidence and the interests of justice will best be served by admitting it. We review a ruling on whether hearsay evidence is admissible for an abuse of discretion. *Holt v. State*, 772 N.W.2d 470, 483 (Minn. 2009). A challenge to the admission of hearsay evidence must establish both an abuse of discretion and prejudice. *Id*.

"[C]ircumstantial guarantees of [a statement's] trustworthiness" include whether questions were non-suggestive, whether the content was recorded, whether the declarant had a motive to lie, and whether the statement was based on the declarant's personal knowledge. *See State v. Jones*, 755 N.W.2d 341, 352-53 (Minn. App. 2008), *aff'd*, 772 N.W.2d 496 (Minn. 2009). Here, the district court concluded that (1) the questions were open-ended; (2) the entire statement was recorded; and (3) Ahmed had no reason to falsely accuse appellant, who was his friend. Ahmed's statement met the criteria for trustworthiness.

Appellant argues that the district court erred in concluding that appellant's friendship with Ahmed indicated that Ahmed had not lied, saying that

> Minnesota courts do not appear to have addressed whether hearsay statements made against a declarant's "friendship" interest are reliable. This Court should not establish that a statement made against a "friendship" interest indicates reliability. The consequences of possibly tarnishing a friendship are much different than, e.g. [sic], a statement made against a declarant's penal interest.

But "[a declarant's] statements do not have to be directly against her own penal interest because they were made against the interest of her relationship with appellant and his penal interest." *Jones*, 755 N.W.2d at 353 (finding no error in prosecutor's conduct

because statements made by a defendant's girlfriend against the defendant's penal interest were "properly elicited under Minn. R. Evid. 807"); *see also State v. Plantin*, 682 N.W.2d 653, 659 (Minn. App. 2004) (concluding that a statement did not need to be against the declarant's penal interest because it "was against her interests in a relationship with [the defendant]"). Here, the relationship between Ahmed and appellant was not boyfriend/girlfriend, but they were friends, and Ahmed's statement was against appellant's penal interest. Thus, the relationship of Ahmed and appellant may be considered as an indication of the trustworthiness of Ahmed's statement against appellant's interest.[1]

Appellant also argues that Ahmed's statement was not more probative than any other evidence because D.R. and A.N. testified to the same events. But only Ahmed saw appellant enter the house, an essential element of burglary, because D.R. and A.N. were upstairs behind the locked door of the children's bedroom when it occurred. While there is circumstantial evidence of appellant's illegal entry, i.e., the broken window, appellant's wound, and the bloodstains throughout the house, there is no direct evidence of it other than Ahmed's statement. Testimony of the police as to what they saw when they entered

[1] Appellant relies on *State v. Tovar*, 605 N.W.2d 717, 719 (Minn. 2000) (holding that "[a]n out-of-court statement that would tend to expose the declarant to criminal liability and that is offered to exculpate the accused is admissible only on a showing that the circumstances clearly indicate the trustworthiness of the statement"). But *Tovar* is distinguishable: it does not concern evidence admitted under Minn. R. Evid. 807, and Ahmed's statement was not offered to exculpate appellant.

the house corroborates Ahmed's statement, but by the time the police arrived, both Ahmed and appellant were upstairs: the police did not see appellant enter the house.

The admission of Ahmed's statement was not an abuse of discretion.

3. Upward Departure

"We review a sentencing court's departure from the sentencing guidelines for [an] abuse of discretion." *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003). "[T]his court must affirm the departure if the record contains valid and sufficient reasons to support the departure." *State v. Martinson*, 671 N.W.2d 887, 894 (Minn. App. 2003), *review denied* (Minn. 20 Jan. 2004).

Appellant's presumptive sentence was 78 months. Based on the jury's finding that children were present during the burglary, the district court sentenced him to 120 months, an upward departure of 42 months. Appellant argues that the district court "did not explain why that factor [i.e., the children's presence] was 'substantial and compelling' enough to warrant an upward durational departure of 42 month[s]." *See Rairdon v. State*, 557 N.W.2d 318, 326 (Minn. 1996) (while departures from presumptive sentences are reviewed under an abuse of discretion standard, there must be "substantial and compelling circumstances" in the record to justify a departure). The district court did not provide written findings, but told appellant:

> It's bad enough that you made her a victim but you also brought the children, three children into it as well, and that's why the *Blakely* issue was presented to the jury and the jury agreed and found that there is a basis for which the Court can go above the sentencing guidelines.

"[The] requirement to provide written reasons for departure [from the sentencing guidelines] is satisfied when the district court makes oral findings on the record." *Martinson*, 671 N.W.2d at 893. The district court orally found that, in addition to burglarizing D.R., appellant had victimized three children by burglarizing their home.

Moreover, the record "contains valid and sufficient reasons to support the departure." *See id.* at 894. The jury heard testimony that the three children, aged eight, four, and seven months, were in bed sleeping when they were awakened and moved into a bedroom closet by their mother and A.N., who closed the closet door and remained outside the closet. They heard appellant bang on the door of the room a few steps away from the closet and yell obscenities at their mother.

There is no basis to reverse either appellant's sentence or his conviction.

Affirmed.