STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1428

State of Minnesota,
Respondent,

vs.

Darryl Chris Brown,
Appellant.

Filed August 5, 2013
Affirmed
Toussaint, Judge[*]

Hennepin County District Court
File No. 27-CR-11-37760

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Stauber, Judge; and Toussaint, 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

TOUSSAINT, Judge

Appellant challenges his felony order for protection (OFP) violation conviction, arguing that the district court erred by (1) admitting evidence of his relationship with the alleged victim; (2) admitting unfairly prejudicial evidence of a conversation he had with a third party; and (3) improperly instructing the jury as to the subject crime's mens rea. We affirm.

FACTS

M.R. obtained an OFP against appellant Darryl Brown on July 26, 2010, after Brown twice punched M.R. in her stomach while she was over six months pregnant with Brown's child. That OFP prohibited Brown from contacting M.R. The district court on August 30, 2011, per M.R.'s request, removed the OFP's no-contact provision; M.R. made her request because she wanted her son to know his father. But M.R., in October 2011, requested reintroduction of the no-contact provision due to "[m]ore abuse." The district court amended the OFP on October 25, 2011, scheduling the OFP to expire on July 26, 2012, and ordering Brown to not domestically abuse; contact; or, "EVEN IF INVITED," go to the residence of M.R. The order states that Brown was present at the OFP hearing and "personally served."

Respondent State of Minnesota on December 6, 2011, charged Brown with one felony OFP-violation count under Minn. Stat. § 518B.01, subd. 14(a), (d)(1) (2010). During the March 2012 trial, M.R. testified as follows. Between October 25 and December 3, 2011, M.R. had contact with Brown and Brown came to and spent the night

at her home. On December 2, after Brown asked M.R. whether he could visit their son at her home, M.R. did not want him to do so but told him that he could visit at 2:15 a.m.—December 3—because she believed that he would be unable to make it due to "[l]ong nights of drinking." Brown called M.R. repeatedly between 2:30 a.m. and 2:45 a.m. At approximately 4:00 a.m., Brown came to M.R.'s home while drunk; knocked, banged, pounded, and kicked the home's door for over 45 minutes; and told M.R. to open the door. M.R. told Brown from the kitchen window that M.R. would call the police if he did not leave; M.R. pretended to call the police to make Brown leave; Brown called M.R. additional times; and Brown shattered the passenger side of M.R.'s truck's windshield with "a big piece of debris" before leaving in a cab. M.R. then called the police.

M.R.'s roommate—who observed the December 3 incident—testified, substantially corroborating M.R.'s testimony. The district court permitted the prosecutor to play for the jury two phone calls made by Brown from jail, one made on December 3 to M.R. after the incident and one made on December 8 to a third party. The December 3 recording revealed Brown stating that "tonight, it wasn't my fault"; "I made my mistake, . . . I'm sorry"; and "I was out there with no . . . coat on." The December 8 recording indicated that a woman—identified by M.R.'s first name—gave Brown a time to go to her home and that Brown told the third party that Brown was not worried about his alleged OFP violation because "they didn't catch me there." That recording also revealed that, after the third party stated his belief that the OFP no longer was in effect, Brown explained that M.R. "went and got it where it was okay that we could have

contact . . . [but] . . . after that incident had happened she went down there and got it again."

The jury found Brown guilty. This appeal follows.

D E C I S I O N

Relationship Evidence

Brown challenges the district court's admission of "a very cursory description" of his and M.R.'s relationship "turning violent" to permit the state to explain why M.R. had previously requested modification of the OFP. A district court's admission of relationship evidence under Minn. Stat. § 634.20 (2010) is subject to abuse-of-discretion review. *State v. Matthews*, 779 N.W.2d 543, 553 (Minn. 2010). "To obtain a reversal of [a] district court's evidentiary ruling, [the defendant] must prove that the ruling was erroneous and prejudicial." *State v. Davis*, 820 N.W.2d 525, 536 (Minn. 2012) (quotation omitted).

Admissible section 634.20 relationship evidence includes "[e]vidence of similar conduct by the accused against the victim of domestic abuse" that has probative value that is not "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." The purpose of admitting section 634.20 relationship evidence is "to illuminate the history of the relationship" between the accused and the alleged victim and "to put the crime charged in the context of the relationship between the two." *State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004).

M.R. testified that her relationship with Brown became violent about three months after she met Brown in 2006; the relationship was not always violent but was violent "when alcohol was involved"; M.R. remained with Brown because she loved him and wanted to help him; and M.R. had not previously assisted law-enforcement investigators after past arrests of Brown because Brown would call her from jail and say that he loved her, wanted to be with her, and would never do it again. M.R. further testified that she requested the OFP on July 26, 2010, after Brown twice punched her in her stomach when she was over six months pregnant, explaining that she knew: "I had to stand up for myself. Not only for myself, but for my child. My child could have died that day . . . . And it made realize that it's not going to get better until I make it better."

"[E]vidence of similar conduct in domestic abuse trials is relevant and admissible unless the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted). Brown argues that the district court abused its discretion by admitting the evidence because the evidence's probative value was limited because Brown did not dispute the OFP's existence during the December 3 incident and it was unfairly prejudicial because it indicated that "Brown assaulted a pregnant woman." We are not persuaded.

The supreme court concluded in *Bell*, in which Bell appealed a no-contact-order-violation conviction, that a district court did not abuse its discretion by admitting evidence of two prior OFP violations because the evidence was "probative of a material fact, namely, the history of [the victim] and Bell's relationship" and the court saw "nothing particularly inflammatory or unfairly prejudicial in the evidence." *Id.* at 637,

641 ("We have on numerous occasions recognized the inherent value of evidence of past acts of violence committed by the same defendant against the same victim." (quotation omitted)). Notably, the evidence that the court did not see as particularly unfairly prejudicial included the victim's testimony that the OFP violations' underlying facts 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[,] . . . had taken money from her," and refused to leave. *Id.* at 638.

Here, as in *Bell*, the relationship evidence provided by M.R.'s testimony was probative of M.R.'s relationship with Brown. Moreover, the evidence was probative of M.R.'s credibility and why she previously requested removal, and then reintroduction, of the OFP's no-contact provision. *See Matthews*, 779 N.W.2d at 549 ("Relationship evidence is relevant because it illuminates the history of the relationship between the victim and defendant and may also help prove motive or assist the jury in assessing witness credibility." (quotation omitted)). And the district court, both immediately after M.R. provided her subject testimony and during the court's final instructions, instructed the jury on the evidence's limited purpose, emphasizing: "You're not to convict the defendant on the basis of the acts occurring just in July of 2010." *See State v. Lindsey*, 755 N.W.2d 752, 757 (Minn. App. 2008) (concluding that district court did not abuse discretion by admitting section 634.20 relationship evidence when court provided cautionary instructions that "lessened the probability of undue weight being given by the jury to the evidence" (quotation omitted)), *review denied* (Minn. Oct. 29, 2008).

We conclude that the district court did not abuse its discretion by admitting M.R.'s subject testimony as section 634.20 relationship evidence.

December 8 Phone Call and Unfair Prejudice

Brown challenges under Minn. R. Evid. 403 the district court's admission of a recording of the December 8 jail call between Brown and the third party. The state argues that this court should apply plain-error review to the evidence's admission because Brown only objected to admission of statements made during the call *by the third party*, not Brown. *Cf. State v. Dao Xiong*, 829 N.W.2d 391, 395 (Minn. 2013) ("We apply the plain-error standard of review to claims of unobjected-to error."). We agree.

Generally, a defendant's attorney fails to preserve an evidentiary issue for appeal, even if the attorney objects, if the attorney "fails to state the specific ground for [the] objection . . . unless the ground for the objection is clear from the context of the objection." *State v. Brown*, 792 N.W.2d 815, 820 (Minn. 2011) (applying Minn. R. Evid. 103(a)); *see also State v. Rodriguez*, 505 N.W.2d 373, 376 (Minn. App. 1993) ("An objection must be specific as to the grounds for challenge."), *review denied* (Minn. Oct. 19, 1993). Here, Brown's attorney objected pretrial to the recording's admissibility based only on "a confrontation issue" as to the third party. His objection makes no other ground clear. But, now, Brown challenges the entire recording's admissibility under Minn. R. Evid. 403.

We conclude that Brown's objection inadequately preserved this rule 403 issue for appeal. But an appellate court may review an inadequately objected-to evidentiary ruling for plain error. *Brown*, 792 N.W.2d at 820. Under plain-error review, "[w]hen the

alleged error does not implicate prosecutorial misconduct, an appellant has the burden of proving (1) an error, (2) that the error is plain, and (3) that the plain error affects substantial rights." *Dao Xiong*, 829 N.W.2d at 395.

Whether a district court errs when admitting or excluding evidence under the first plain-error prong turns on whether it abused its discretion. *See State v. Jenkins*, 782 N.W.2d 211, 230-31 (Minn. 2010) (concluding in context of plain-error review that "the district court did not abuse its discretion or commit any error when it granted the State's motion to exclude the evidence on relevance grounds"); *see also State v. Hayes*, 826 N.W.2d 799, 808 (Minn. 2013) (declining to "consider the remaining prongs of the plain-error test" after concluding that "the district court did not abuse its discretion in admitting the challenged testimony"). Rule 403 permits a district court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Brown argues that the recording had little probative value to prove his alleged OFP violation. We disagree. The recording revealed that a woman—identified by M.R.'s first name—gave Brown a time to go to her home and that Brown told the third party that he was not worried about his alleged OFP violation because "they didn't catch me there."

Brown argues that the recording was unfairly prejudicial because it "seem[ed] to" record Brown asking the third party to contact M.R. on Brown's behalf. We disagree. "[U]nfair prejudice is not merely damaging evidence, even severely damaging evidence;

rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *Bell*, 719 N.W.2d at 641 (quotation omitted). Here, the recording—which occurred five days after Brown's alleged OFP violation—did not persuade by illegitimate means but rather further explained Brown's and M.R.'s relationship and further placed the alleged violation in context. *See State v. Kennedy*, 585 N.W.2d 385, 392 (Minn. 1998) ("Evidence that helps to establish the relationship between the victim and the defendant or which places the event in context bolsters its probative value."); *Lindsey*, 755 N.W.2d at 756-57 (applying *Kennedy* rule to relationship evidence arising *after* subject charges, concluding that evidence "had significant probative value in assisting the jury to judge witness credibility"). The recording records Brown asking, without explanation, "[W]hat she say man?" and the third party responding that he was unable to contact "her"; that the third party would "go over there"; and the third party saying that "[i]f you tell me if she got it I'll go [get] it." The recording records Brown later asking the third party to "just go over there and talk to her" to obtain some of the money and to tell "her" that Brown would not apologize for "that sh-t."

We conclude that the district court did not abuse its discretion by admitting the recording. We therefore need not and do not consider the remaining plain-error prongs. *See Hayes*, 826 N.W.2d at 808 ("Because we conclude that the district court did not abuse its discretion in admitting the challenged testimony, we need not, and do not, consider the remaining prongs of the plain-error test.").

Mens-Rea Jury Instruction

Brown challenges the district court's jury instruction that a felony OFP violation's mens rea is that a defendant "knew of the existence of the order." "Failure to object to jury instructions may result in waiver of the issue on appeal," "[b]ut [an appellate court has] discretion to review instructions not objected to at trial if the instructions contain plain error affecting substantial rights or an error of fundamental law." *State v. Scruggs*, 822 N.W.2d 631, 642 (Minn. 2012) (quotation omitted). An appellate court "will order a new trial only if all three prongs of the plain error standard are satisfied and the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation omitted).

Plain Error

"An error is 'plain' if it is clear or obvious," which occurs "when it contravenes a rule, case law, or a standard of conduct, or when it disregards well-established and longstanding legal principles." *Id.* (quotations omitted). "[F]ailure to instruct the jury on an element of a crime charged constitutes plain error." *State v. Milton*, 821 N.W.2d 789, 808 (Minn. 2012) (citing *State v. Vance*, 734 N.W.2d 650, 658 (Minn. 2007), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303, 311 (Minn. 2012)).

We agree with Brown that the district court plainly erred by instructing the jury that a felony OFP violation's mens rea is that the defendant "knew of the existence of the order." The mens rea for a *felonious* OFP violation is that the defendant "knowingly violates" the OFP; in contrast, the mens rea for a *misdemeanor* OFP violation is that the defendant simply "knows of the existence of the order." Minn. Stat. § 518B.01,

subd. 14(a)–(b), (d) (2010). We have twice concluded that a district court similarly plainly erred in the context of felony violations of a harassment restraining order (HRO), *State v. Gunderson*, 812 N.W.2d 156, 160-62 (Minn. App. 2012), and a domestic-assault no-contact order (DANCO), *State v. Watkins*, 820 N.W.2d 264, 268-69 (Minn. App. 2012), *review granted* (Minn. Nov. 20, 2012). The HRO and DANCO statutes in *Gunderson* and *Watkins*, like the OFP statute here, predicate felony violations on the defendant "knowingly violat[ing]" the order. Minn. Stat. § 518B.01, subd. 14(d) (OFP); Minn. Stat. § 629.75, subd. 2 (2010), *cited in Watkins*, 820 N.W.2d at 267; Minn. Stat. § 609.748, subd. 6 (2008) (DANCO), *cited in Gunderson*, 812 N.W.2d at 160 (HRO). In *Gunderson*, the erroneous instruction was that the required mens rea was that a defendant "knew of the order," 812 N.W.2d at 160, and, in *Watkins*, the erroneous instruction was that the required mens rea was that the defendant "knew of the existence of the order," 820 N.W.2d at 266. Similarly, here, the erroneous instruction was that a felony OFP violation's required mens rea is that "the defendant knew of the existence of the order."

We note that, when the district court improperly instructed the jury in March 2012, it did so consistent with the then-current jury instructions contained in 10 *Minnesota Practice*, CRIMJIG 13.54 (Supp. 2010). But, "'when the plain language of the statute conflicts with the CRIMJIG, the district court is expected to depart from the CRIMJIG and properly instruct the jury regarding the elements of the crime.'" *Watkins*, 820 N.W.2d at 268 (considering 2009 version of CRIMJIG 13.54) and (quoting *Gunderson*, 812 N.W.2d at 162); *see State v. Koppi*, 798 N.W.2d 358, 364 (Minn. 2011) (concluding that a district court abuses its discretion by "instructing [a] jury on the . . . element of [a

crime] in accordance with the language of" a model jury instruction when the jury instruction "is an erroneous statement of the law").[1]

We conclude that, in light of the OFP statute, *Milton*, *Vance*, *Gunderson*, and *Watkins*, the district court's felony OFP mens-rea instruction was plainly erroneous.

Brown's Substantial Rights

Generally, for a defendant to prevail under the plain-error test's third prong, the defendant bears the "heavy burden of proving that the error was prejudicial" by proving that a "reasonable likelihood [exists] that the error had a significant effect on the jury's verdict." *Milton*, 821 N.W.2d at 809 (quotations omitted). We note that we recently concluded in *Watkins* that, "as a matter of law, omission of an element of a charged offense from the jury instructions affects a party's substantial rights" and, consequently, that the district court's plainly erroneous felony DANCO mens-rea instruction affected Watkins's substantial rights. 820 N.W.2d at 269.[2]

A defendant feloniously violates an OFP by "knowingly violat[ing] [the OFP] . . . within ten years of the first of two or more previous qualified domestic violence-related offense convictions." Minn. Stat. § 518B.01, subd. 14(a), (d)(1). Pretrial, Brown stipulated to having the requisite convictions. Consequently, to prevail under this plain-error prong, Brown must satisfy his heavy burden to prove that a

[1] We note that the current version of 10 *Minnesota Practice*, CRIMJIG 13.54 (2012) correctly provides that a district court should instruct a jury to determine whether a defendant "*knowingly violated* the terms of the order." (Emphasis added.)

[2] The supreme court granted review of *Watkins*, *State v. Watkins*, No. A11-1793 (Minn. Nov. 20, 2012) (order), but has not filed an opinion regarding *Watkins*. Therefore, in this opinion, we apply the general rule that subjects plain errors to a prejudice analysis.

reasonable likelihood exists that the verdict would have been different had the jurors been instructed that they could not find Brown guilty unless they found that he knowingly violated the OFP, not simply that he knew of its existence. *See Milton*, 821 N.W.2d at 809.

We conclude that Brown fails to satisfy that burden.

This court in *Gunderson*, to construe "knowingly" under the HRO statute, applied the Model Penal Code section 2.02(2)(b) (1985), to conclude that Gunderson would have violated the HRO if he "was aware" that his subject conduct "was prohibited." 812 N.W.2d at 160-61. We observed that "'[t]he proof of knowledge may be by circumstantial evidence,' which would include evidence that an individual was served with an HRO and that the HRO's terms clearly and unambiguously prohibit certain conduct." *Id.* at 161 (quoting *State v. Al–Naseer*, 734 N.W.2d 679, 688 (Minn. 2007)).

Here, the district court stated in the OFP that Brown was personally served with the OFP and present at the October 25 OFP hearing. The court in the OFP clearly and unambiguously ordered: "Respondent SHALL NOT GO TO OR ENTER the residence of Petitioner . . . or any future residences"; "RESPONDENT SHALL NOT ENTER OR STAY AT PETITIONERS [sic] HOME, EVEN IF INVITED BY PETITIONER OR ANY OTHER PERSON"; and "Respondent SHALL NOT CONTACT Petitioner in person, by telephone, by letter, by third party, or by any electronic means, such as pager, cell phone, e-mail, etc." The December 8 jail-call recording revealed that, after the third party stated that he believed that the OFP was no longer in effect, Brown explained that M.R. "went and got it where it was okay that we could have contact . . . [but] after that

incident had happened she went down there and got it again." *See Milton*, 821 N.W.2d at 809 (concluding that no reasonable likelihood existed that incomplete jury instructions had significant effect on the guilty verdict, reasoning that "[t]here was ample evidence presented at trial to support a finding by the jury that Milton" had the requisite mens rea).

Moreover, unlike *Gunderson* in which "whether Gunderson knew that his conduct was prohibited was closely contested by both parties" and "Gunderson submitted evidence that tended to negate that element of the crime," 812 N.W.2d at 163, here Brown put forth no evidence to negate the evidence of him violating the OFP *knowingly*. *Cf. Vance*, 734 N.W.2d at 661-62 (concluding that reasonable likelihood existed that omitted intent element from instruction significantly affected verdict when defendant "presented some evidence that tended to negate the omitted element of intent"). In *Gunderson*, "Gunderson vigorously disputed at trial that he knew the HRO prohibited" his conduct through his testimony and his mother's testimony; the state's witnesses testified that he "made no effort to hide or run away when observed at the garage and shed but instead approached them and engaged in casual conversation"; and "during closing argument, Gunderson read definitions for 'away' and 'residence' from a dictionary in his continued attempt to convince the jury of his position." 812 N.W.2d at 162-63. In contrast, neither Brown nor a defense witness testified, and Brown's dispute of the mens-rea element consisted of his brief argument to the district court judge when he moved for acquittal and cursory argument during closing argument.

We conclude that Brown fails to satisfy his heavy burden to show a reasonable likelihood that the erroneous instruction significantly affected the verdict. We therefore

do not reach the final plain-error-review step—considering the error's effect on judicial proceedings' fairness, integrity, and public reputation, *Scruggs*, 822 N.W.2d at 642—and conclude that reversal of Brown's conviction is unwarranted by the plain-error analysis.

Affirmed.