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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1751

State of Minnesota,
Respondent,

vs.

Marvin Spencer,
Appellant.

Filed September 23, 2013
Affirmed
Halbrooks, Judge

Ramsey County District Court
File No. 62-CR-11-7537

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, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Schellhas, Judge; and Hooten, Judge.

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

HALBROOKS, Judge

Appellant challenges his conviction of violating an order for protection (OFP), arguing that the district court erred by refusing to instruct the jury on the lesser-included

offense of criminal contempt of court and by admitting relationship and hearsay evidence. In a pro se supplemental brief, appellant submits additional arguments. We affirm.

FACTS

On June 17, 2010, S.B. obtained an OFP against appellant Marvin Spencer. The OFP, which was served on Spencer the day it was issued, prohibited Spencer from having any contact with S.B. and from going near her home and workplace for a period of two years.

On August 26, 2011, S.B. was working at a security desk in the Alliance Bank Center in downtown St. Paul. The security desk is located near an escalator on the skyway level of the building. Early that afternoon, S.B. saw Spencer coming up the escalator with his cell phone in his hand. Spencer appeared to take a picture of S.B. with his phone and asked S.B. if they could talk. S.B. responded that they had nothing to talk about or that he was not supposed to talk to her. Spencer then left, and S.B. reported the incident to the police.

Spencer was charged with one count of violation of an OFP pursuant to Minn. Stat. § 518B.01, subd. 14(a), (d)(1) (2010). Prior to trial, Spencer stipulated to committing two prior violations of a domestic-abuse no-contact order (DANCO). The state moved, pursuant to Minn. Stat. § 634.20 (2010), to admit as "relationship evidence" testimony concerning Spencer's previous violations and his conduct toward S.B. and his former girlfriend, A.M. The district court admitted the evidence over Spencer's objection.

Spencer waived his right to remain silent and testified at trial. He admitted that he was aware that the OFP was in place and acknowledged that the OFP prohibited him from having any contact with S.B. He further admitted that he encountered and spoke to S.B. on August 26 while she was at work.

At the close of trial, Spencer requested a jury instruction on the lesser-included offense of criminal contempt of court. The district court denied Spencer's request. The jury convicted Spencer of violating the OFP. This appeal follows.

D E C I S I O N

I.

Spencer argues that the district court abused its discretion by denying his request to instruct the jury on criminal contempt of court as a lesser-included offense of a violation of an OFP. This court reviews the denial of a requested lesser-included-offense instruction for an abuse of discretion. *State v. Dahlin*, 695 N.W.2d 588, 597 (Minn. 2005). We review the record in the light most favorable to the party requesting the lesser-included instruction. *Id.*

The district court must provide a lesser-included instruction when the evidence warrants it. *Bellcourt v. State*, 390 N.W.2d 269, 273 (Minn. 1986). An instruction is warranted when "(1) the lesser offense is included in the charged offense; (2) the evidence provides a rational basis for acquitting the defendant of the offense charged; and (3) the evidence provides a rational basis for convicting the defendant of the lesser-included offense." *Dahlin*, 695 N.W.2d at 598.

A person commits a felony violation of an OFP by "knowingly violat[ing] [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). A person commits criminal contempt of court by willfully disobeying a lawful process or court mandate. Minn. Stat. § 588.20, subd. 2(4) (2010). An OFP violation also constitutes contempt of court. Minn. Stat. § 518B.01, subd. 14(b) (2010).

The parties dispute whether a rational basis exists to acquit Spencer of violating the OFP and to convict him of criminal contempt of court. The evidence presented at trial, even when viewed in the light most favorable to Spencer, establishes that Spencer knowingly violated the OFP. Spencer testified that he attended the OFP hearing in 2010 and knew that the OFP against him existed. He described the contents of the OFP and acknowledged that it required him to have no contact with S.B. "[w]hatsoever." He further admitted to encountering S.B. at her workplace and speaking to her about her recent marriage—prohibited conduct under the OFP. Additionally, there is no dispute that Spencer has two prior qualified domestic-violence related offenses—Spencer stipulated to those violations prior to trial. Upon this record, there is no rational basis upon which a jury would acquit Spencer of a violation of an OFP but convict him of criminal contempt of court. Accordingly, the district court acted well within the bounds of its discretion by denying Spencer's request for a lesser-included jury instruction of criminal contempt of court.

II.

Spencer challenges the admission of testimony concerning his prior conduct towards S.B. and A.M., arguing that this evidence is outside the scope of the relationship-evidence statute, Minn. Stat. § 634.20. Because Spencer objected to admission of this evidence on relevance and prejudice grounds, but not on the basis that it failed to constitute proper relationship evidence, we review admission of the evidence for plain error. *See* Minn. R. Crim. P. 31.02 (permitting plain-error review); Minn. R. Evid. 103(a)(1) ("Error may not be predicated upon a ruling which admits . . . evidence unless . . . a timely objection . . . appears of record, stating the specific ground of objection, if the ground was not apparent from the context.").

Plain error exists if there is an error, that is plain, and that affects the appellant's substantial rights. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error is plain if it is clear or obvious—either because it contravenes a rule, case law, or standard of conduct, or because it disregards a well-established and longstanding legal principle. *State v. Brown*, 792 N.W.2d 815, 823 (Minn. 2011). If these elements are met, we have discretion to address the error in order to ensure the fairness and integrity of judicial proceedings. *Id.* at 821.

Relationship evidence is "[e]vidence of similar conduct by the accused against the victim of domestic abuse, or against other family or household members." Minn. Stat. § 634.20. "[T]he rationale for admitting relationship evidence under section 634.20 is to illuminate the relationship between the defendant and the alleged victim and to put the alleged crime in the context of that relationship." *State v. Valentine*, 787 N.W.2d 630,

637 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010). This type of evidence "sheds light on how the defendant interacts with those close to him, which in turn suggests how the defendant may interact with the victim." *Id.* Relationship evidence is admissible only if the conduct underlying the current charge constitutes domestic abuse as defined in Minn. Stat. § 518B.01, subd. 2 (2010). *State v. Barnslater*, 786 N.W.2d 646, 651 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010). "Domestic abuse" means engaging in any of the following acts against a family or household member: (1) physical harm, bodily injury, or assault; (2) the infliction of fear of imminent physical harm, injury, or assault; or (3) terroristic threats, criminal sexual conduct, or interference with an emergency call. Minn. Stat. § 518B.01, subd. 2(a), (b).

At trial, S.B. testified that Spencer had violated the OFP several times before the incident at her workplace on August 26. She stated that Spencer previously had approached her while she was in her car, walked outside of her building, waited outside of her home when she returned from work, and called her home phone. St. Paul police officer Michael Johnson testified about the reports that S.B. made to law enforcement concerning these alleged incidents. And Spencer's former girlfriend, A.M., testified that she obtained a DANCO against Spencer in November 2010 and that Spencer violated it twice.

Because Spencer's conduct of speaking with S.B. at her workplace on August 26 did not involve domestic abuse, the district court admitted the prior-conduct evidence as "relationship evidence" in direct contravention of our holding in *Barnslater*. *See* 786 N.W.2d at 651 (holding that evidence is admissible as relationship evidence only if the

current charge involves conduct constituting domestic abuse). The district court's error was therefore plain.

A plain error affects a defendant's substantial rights "if there is a reasonable likelihood that the error substantially affected the verdict." *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002). This analysis is the equivalent of a harmless-error analysis. *State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011). We consider "(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.* The appellant bears a heavy burden in this analysis. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998).

Here, the state placed minimal emphasis on the challenged evidence. Officer Johnson's testimony concerning S.B.'s prior reports to law enforcement amounts to five pages within a 500-page transcript, and A.M.'s entire testimony constitutes less than ten pages. *See State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992) (stating that prejudicial evidence of a passing nature is unlikely to play a role in persuading the jury to convict). The district court also provided several cautionary instructions—before both S.B. and A.M. testified and again in its closing jury instructions—concerning the limited role of the evidence. *See State v. Vang*, 774 N.W.2d 566, 578 (Minn. 2009) (noting that a jury is presumed to follow the court's instructions); *State v. Vick*, 632 N.W.2d 676, 686 (Minn. 2001) (stating that a broad cautionary instruction reduced the likelihood that the testimony affected the outcome of the case). And the state noticed its intent to introduce this evidence. *See Vick*, 632 N.W.2d at 686 (stating that the potential for prejudice is

minimized when the defendant has notice of the state's intent to use other-crimes evidence).

Furthermore, ample evidence, including Spencer's own testimony, supports the jury's finding of guilt. *See Matthews*, 800 N.W.2d at 634-35 (noting other evidence of guilt when analyzing this factor); *State v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005) (noting that defendant's substantial rights were not affected by district court's plain error because overwhelming evidence pointed toward guilt). Spencer admitted to violating the OFP by speaking to S.B. on August 26. On this record, we conclude that there is no reasonable likelihood that the district court's error substantially affected the jury's verdict. Accordingly, reversal is not warranted.

Spencer also argues that evidence of his prior conduct toward S.B. and A.M. is inadmissible based on Minn. R. Evid. 404(b). Evidence of a prior crime or act is inadmissible "to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). But prior-act evidence may be admissible if offered for other purposes. *Id.* Although we have determined that evidence about Spencer's prior conduct toward S.B. and A.M. fails to meet the definition of relationship evidence, the record leaves no question that the state intended to offer the evidence pursuant to the relationship-evidence statute. The purpose of relationship evidence is to shed light on "the relationship between the defendant and the alleged victim and to put the alleged crime in the context of that relationship." *Valentine*, 787 N.W.2d at 637. Spencer cites nothing in the record to support his assertion that the state elicited testimony concerning

Spencer's prior acts for the purpose of proving Spencer's bad character and an act conforming to that character trait.

III.

Spencer contends that the district court committed reversible error by allowing, over his hearsay objection, Officer Johnson to testify regarding S.B.'s statements to law enforcement concerning Spencer's alleged violations of the OFP. We will not reverse a district court's evidentiary rulings absent a clear abuse of discretion. *State v. Flores*, 595 N.W.2d 860, 865 (Minn. 1999).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial . . . offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Hearsay is inadmissible except as provided by the rules of evidence. Minn. R. Evid. 802. The prior statements of a witness are not hearsay if they are "consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility." Minn. R. Evid. 801(d)(1)(B). The district court must determine whether the witness's credibility has been challenged, the prior statement would be helpful to the fact-finder in evaluating her credibility, and the prior statement and trial testimony are consistent. *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000).

Spencer does not dispute that S.B.'s credibility was challenged at trial or that her prior statements to Officer Johnson would be helpful to evaluate her credibility. Instead, he argues that because S.B.'s prior reports to Officer Johnson included greater detail concerning the alleged OFP violations than did her trial testimony that those out-of-court

statements are inconsistent and therefore inadmissible. We disagree. Trial testimony and prior statements need not be verbatim to be considered consistent. *State v. Zulu*, 706 N.W.2d 919, 924 (Minn. App. 2005). Admission of "reasonably consistent" statements does not constitute reversible error. *In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998).

S.B. testified that Spencer violated the OFP six or seven times before the August 26 incident. She recalled contacting Officer Johnson on one occasion to report that Spencer was outside of her house doing "[t]hings he shouldn't, like just taking over the property," "[w]orking on cars," and waiting for her to arrive home from work. S.B. also recalled another occasion when she contacted Officer Johnson to report that Spencer had telephoned her. She also testified that she reported to Officer Johnson that Spencer called her at work "a couple of times." S.B.'s reports to Officer Johnson included additional detail about the alleged incidents, such as the dates when they occurred and specific harassing comments that Spencer made to S.B. We are not persuaded by Spencer's contention that S.B.'s prior statements are inconsistent merely by virtue of including greater detail as to each alleged incident. While S.B.'s testimony was less specific than her prior statements to Officer Johnson, a more detailed prior statement does not make it inconsistent with trial testimony. *See id.* Importantly, S.B.'s reports to law enforcement do not contradict her testimony. They, in fact, corroborate her testimony. Accordingly, it was well within the district court's discretion to admit Officer Johnson's testimony under the hearsay exception for prior consistent witness statements.

IV.

Spencer raises several arguments in a pro se supplemental brief. After our careful review, we determine that none of the additional assertions warrants relief.

Affirmed.