STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1676

State of Minnesota,
Respondent,

vs.

Christopher Thomas Russell,
Appellant.

Filed August 14, 2017
Affirmed
Bratvold, Judge

Hennepin County District Court
File No. 27-CR-13-28046

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Rodenberg, Judge; and Bratvold, Judge.

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

BRATVOLD, Judge

Appellant challenges his second-degree assault conviction, arguing that the district court committed reversible error by admitting evidence of two types: (1) relationship

evidence of domestic conduct that occurred after the assault; and (2) statements of a non-testifying police officer about what appellant said shortly after the assault. Because the district court did not abuse its discretion when it admitted the evidence, and because any error in the limiting jury instruction did not affect appellant's substantial rights, we affirm.

FACTS

Appellant Christopher Thomas Russell and E.G. met and began dating in 2012; Russell moved into E.G.'s apartment in May 2013. The relationship had "a lot of ups and downs," including verbal and physical abuse. On several occasions, Russell screamed at E.G. and called her names. During one instance, Russell screamed at E.G. and punched the dashboard and window of her car, breaking his hand. During another instance, Russell pushed E.G., broke her bed frame and closet door, then broke the bathroom door after she locked herself inside.

On May 17, 2013, Russell went out with friends and did not come home. Suspicious, E.G. read Russell's emails and discovered that he had posted ads on the Internet "for casual hookups." E.G. decided to break up with Russell and, during the morning of May 18, packed his things. E.G. called her friend, H.B., and told her she was breaking up with Russell. H.B. responded that she would come over.

When Russell returned home at 10:00 a.m., E.G. told him that they "were done." E.G. texted Russell's friend, T.F., and asked him to come to the apartment and pick up Russell. Russell screamed at E.G. and pushed her; he shoved E.G. down onto the couch and put his hands around her throat. Russell then went to the kitchen and returned with a knife. He pinned E.G. down on the couch again, placed his left hand around E.G.'s throat

and squeezed so tightly that E.G. could not breathe. Russell pointed the knife toward E.G. and yelled that he was going to "stick" her.

Russell got off of E.G., who stood up, but Russell then threw her to the floor. At some point, Russell dropped the knife and E.G. "shove[d] it under the couch." As the struggle continued, Russell hit E.G.'s left side and hip and "slammed [E.G.] up against the wall," causing her to hit the back of her head on the wall.

T.F. arrived at about 10:30 a.m. Russell and E.G. continued to argue, but Russell stopped being physically violent. H.B. arrived a short time later. Russell and T.F. left, saying they would return later for Russell's things. E.G. told H.B. about the knife and assault and H.B. encouraged E.G. to call the police. H.B. called 911 at 1:15 pm.

Officers Flaherty and Gannon responded to E.G.'s apartment. E.G. described the assault to both officers, including that Russell threatened to "stick" her with the knife. The police photographed the knife underneath the couch and E.G.'s injuries. After the police left, E.G. texted T.F. and told him Russell should not return to the apartment.

Russell spoke with Officer Flaherty and, according to his report, admitted to grabbing a knife while he was with E.G. Russell also spoke with E.G., apologized, and said he would have to go to California because the police were looking for him. On May 20, E.G. spoke to police, "downplay[ed]" the incident, saying that Russell only wanted to scare her; she attributed his behavior to post-traumatic stress disorder, and said he needed counseling. Shortly after, Russell moved to California.

Russell and E.G. remained in contact through telephone calls, text messages, and Skype, a video-messaging platform. Over the weekend of July 4, 2013, Russell called E.G.

and sent her several text messages telling her he had "made out" with her friends and calling her names. E.G. told Russell to stop contacting her, blocked his telephone number, and removed him from her social media accounts. E.G. also obtained an order for protection (OFP) against Russell.

Russell continued to contact E.G. by changing his telephone number and email accounts. Russell emailed E.G. over 60 times. In several of the emails, Russell told E.G. that he had a gun and bullet and threatened to kill himself. In an email account that Russell set up under his mother's name, he emailed E.G., pretending to be his mother, and stated that Russell had "passed away."

In December 2015, Russell returned to Minnesota and was arrested on second-degree assault charges. His jury trial occurred over three days in June 2016. Relevant to this appeal, the state offered relationship evidence of Russell's conduct with E.G. before and after the assault, and his counsel objected. The district court admitted the evidence and said it would give a cautionary instruction.

Also relevant to this appeal, the district court allowed Officer Gannon on re-direct to summarize Officer Flaherty's report about Russell's admission that he had grabbed the knife. In his defense, Russell testified he told Flaherty that he had handled all of the knives in the house because he cooked every night. Russell also testified that he did not touch the knife during the incident or bring the knife into the living room. More generally, Russell testified that he and E.G. argued on May 18, 2013, but denied any physical violence. He also denied the incidents that E.G. said had occurred before May 2013, explaining that E.G. was lying because he had cheated on her.

The jury convicted Russell of one count of second-degree assault and two counts of fifth-degree assault. Russell moved the district court for a judgment of acquittal and a verdict of not guilty or, in the alternative, a new trial or a downward departure from the sentencing guidelines. The district court denied both motions relating to the verdict, but granted a downward durational departure, and sentenced Russell on the second-degree assault to 16 months in prison. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion when it admitted relationship evidence regarding events after the 2013 assault.

Section 634.20 provides that "[e]vidence of domestic conduct by the accused against the victim of domestic conduct . . . 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." Minn. Stat. § 634.20 (2014). Domestic conduct includes evidence of domestic abuse or violation of an OFP. *Id.* This court reviews a district court's decision to admit relationship evidence under section 634.20 for abuse of discretion. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004). In addition to showing abuse of discretion, an appellant challenging an evidentiary ruling must establish prejudice. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Russell makes four arguments about the admission of relationship evidence that occurred after the 2013 assault: (1) the district court used the "wrong version" of Minn. Stat. § 634.20 based on the date of the assault; (2) the evidence was not relevant because it

included events that occurred after the relationship ended; (3) the probative value of the evidence was outweighed by the danger of unfair prejudice; and (4) the district court incorrectly instructed the jury on relationship evidence. We will address each argument in turn.

A. The district court did not err when it evaluated the admissibility of the relationship evidence under the 2014 version of the statute.

The Minnesota Supreme Court has adopted section 634.20 as a rule of evidence. *McCoy*, 682 N.W.2d at 161 (holding section 634.20 is a rule of evidence); *see also State v. Fraga*, 864 N.W.2d 615, 627 (Minn. 2015) (clarifying adoption of section 634.20 as a rule of evidence). Rules of evidence are "applicable to any trial held after the effective date of the amendment." *State v. Friend*, 385 N.W.2d 313, 319 (Minn. App. 1986), *review denied* (Minn. May 22, 1986). Because section 634.20 is a rule of evidence, the district court did not err when it analyzed the evidence under the 2014 version of the statute, which was the version applicable to Russell's trial in 2016.

Even so, any alleged error was harmless. The 2012 version of the statute allows evidence of "similar conduct," which was defined as "evidence of domestic abuse, violation of an [OFP] . . . ; violation of a harassment restraining order [(HRO)] . . . ; or violation of section 609.749 or 609.79, subdivision 1." Minn. Stat. § 634.20 (2012). The 2014 version allows "[e]vidence of domestic conduct" to be used at trial. Minn. Stat. § 634.20. The definition of "domestic conduct" in the 2014 version of the statute is identical to the definition of "similar conduct" in the 2012 version of the statute. *Compare* Minn. Stat. § 634.20 (2012) *with* Minn. Stat. § 634.20 (2014).

B. The district court did not err when it admitted relationship evidence that occurred after the charged assault.

In *State v. Lindsey*, this court held the plain language of section 634.20 imposes "no temporal restriction" on relationship evidence and permits the admission of evidence of subsequent, as well as prior, similar conduct by a defendant against a domestic abuse victim. 755 N.W.2d 752, 756 (Minn. App. 2008), *review denied* (Minn. Oct. 29, 2008). This court also noted that the legislature amended section 634.20 in 2002, removing the reference to "similar *prior* conduct." *Id.* (emphasis added). Thus, *Lindsey* held that the district court properly admitted relationship evidence of conduct that occurred after the charged offense. *Id.*

Russell claims that *Lindsey* is inapposite because "the relationship had ended" between Russell and E.G. at the time of the post-assault conduct. We are not persuaded. Section 634.20 specifically allows the admission of evidence of OFP and HRO violations, thus indicating that a victim's efforts to sever a relationship with the accused does not preclude admission of the accused's conduct. *See* Minn. Stat. § 634.20.

Russell relies on *State v. McCurry*, which involves a defendant who was convicted of burglary because he broke into his ex-wife's home and stole her wallet. 770 N.W.2d 553, 556 (Minn. App. 2009), *review denied* (Minn. Oct. 28, 2009). The district court admitted evidence of three domestic incidents that happened before the burglary. *Id.* at 557. This court affirmed the conviction after concluding that it was error to admit this evidence as relationship evidence under section 634.20 because the underlying charge was not domestic abuse. *Id.* at 561.

McCurry's analysis is inapplicable, first because the underlying offense, burglary, was not a domestic violence offense. Indeed, *McCurry* ultimately based its analysis on *Spreigl* and concluded the prior incidents were inadmissible without advance notice to the defense. *Id.* Second, section 634.20 explicitly allows the admission of evidence of OFP violations, whether charged or not. Minn. Stat. § 634.20. Because section 634.20 imposes no temporal restriction on relationship evidence, the district court did not err in admitting evidence of Russell's conduct with E.G. for events that occurred after the 2013 assault.

C. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

Relationship evidence under section 634.20 is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice. Minn. Stat. § 634.20. "Evidence that helps to establish the relationship between the victim and the defendant or which places the event in context bolsters its probative value." *State v. Kennedy*, 585 N.W.2d 385, 392 (Minn. 1998). "[U]nfair prejudice is not merely damaging evidence, nor is it severely damaging evidence." *State v. Meyer*, 749 N.W.2d 844, 849 (Minn. App. 2008) (quotation omitted). Unfair prejudice means that the evidence "persuades by illegitimate means and gives one party an unfair advantage." *Id*.

Here, the district court admitted the evidence after determining that its probative value outweighed any unfair prejudice because E.G.'s credibility was at issue and the evidence would provide context for the jury. In reviewing the district court's decision, *State v. Meyer* guides our analysis because the state tried Meyer for gross-misdemeanor domestic assault and offered evidence of three other incidents of domestic conduct under section

634.20. 749 N.W.2d at 847. On appeal, the defendant argued that the evidence of his past conduct was "highly inflammatory" and "painted him to be a serial abuser," which "led the jury to find him guilty based on his past conduct rather than the evidence relating to the charged offense." *Id.* at 849. This court affirmed because the victim's credibility was at issue and the contested evidence explained why she may have given contradictory statements. *Id.* at 850.

Russell repeats arguments that we rejected in *Meyer*. The record establishes that Russell challenged E.G.'s credibility and implied that E.G. lied. The relationship evidence established context for Russell and E.G.'s relationship, including that Russell attempted to control E.G. through guilt and threats. Because the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, the district court did not abuse its discretion in admitting this evidence.

D. The jury instruction was erroneous but does not require reversal.

Russell is correct that the district court did not provide the preferable limiting instruction before the relationship evidence was admitted. During final instructions, the district court did not give the pattern instruction,[1] but instructed the jury as follows:

[1] The correct instruction, CRIMJIG 2.07, provides:

> The State is about to introduce evidence of conduct by the defendant on [] at []. This evidence is being offered for the limited purpose of demonstrating the nature and extent of the relationship between the defendant and [] [(and) (or) other (family) (household) members] in order to assist you in determining whether the defendant committed those acts with which the defendant is charged in the complaint.

> The State has introduced evidence of incidents occurring on dates other than May 18, 2013. This evidence was admitted for the purpose of assisting you in determining whether the defendant committed the acts with which the defendant is charged in this case. The defendant is not being tried for and may not be convicted of any offense other than those that I instruct you on. You are not to convict the defendant on the basis of any occurrence at any other time. To do so might result in unjust double punishment.

Because Russell did not object, he argues that this instruction was plain error.

We review unobjected-to errors in jury instructions for plain error. *Id.* "Plain error exists when the district court commits an obvious error that affects the defendant's substantial rights." *State v. Barnslater*, 786 N.W.2d 646, 653 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010). An error affects a party's substantial rights if it affects the outcome of the case. *Id.*

District courts have "considerable latitude in the selection of language for jury instructions." *State v. Meldrum*, 724 N.W.2d 15, 19 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. Jan. 24, 2007). We review jury instructions in their entirety to determine if they adequately explain the law. *Id.* Generally, a district court should provide limiting instructions about relationship evidence before receiving the evidence and again during the final jury instructions. *Barnslater*, 786 N.W.2d at 653. However, the failure to give limiting instructions does not require reversal "when other evidence demonstrates that

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> The defendant is not being tried for and may not be convicted of any behavior other than the charged offense(s). You are not to convict the defendant on the basis of conduct on [] at []. To do so might result in unjust double punishment.

10 *Minnesota Practice*, CRIMJIG 2.07 (2016).

the probative value of the relationship evidence is not outweighed by its potential for unfair prejudice." *Id.*; *see also Meldrum*, 724 N.W.2d at 22 (concluding other evidence offered at trial supported the conviction and negated the allegation that the evidence was unfairly prejudicial).

In *Barnslater*, this court found plain error when the district court gave *no* cautionary instruction either before the relationship evidence was introduced or during the final jury charge. 786 N.W.2d at 654. Instead, the final instructions "stated that the jury 'must not consider any previous conviction as evidence of guilt of the offense for which [Barnslater] is on trial' and that the jury was 'not to convict [Barnslater] of any offense of which he is not here charged.'" *Id*. at 653–54. This court also determined, however, that the error did not affect the defendant's substantial rights because the district court provided a limiting instruction in the final jury charge and other strong evidence supported the defendant's conviction. *Id.* at 654.

Consistent with *Barnslater*, we conclude that the jury instruction was plain error, but Russell's substantial rights were not affected. First, the district court's instruction was similar to that considered in *Barnslater*, where this court determined that the instruction "alleviated much of the risk that the jury" would use the evidence improperly. 786 N.W.2d at 654. Second, the other evidence supporting Russell's conviction was strong. E.G. testified about the assault, the state introduced photographs of E.G.'s injuries, and police found and photographed the knife under the couch where E.G. testified that she hid it. H.B. and Officer Gannon corroborated E.G.'s statements after the assault and observed E.G.'s injuries. *See Meyer*, 749 N.W.2d at 850 (holding lack of jury instructions did not affect

defendant's substantial rights because the conviction was supported by persuasive evidence including video recording of assault, victim's description of assault, and eyewitness testimony). Thus, reversal is not required.

II. The district court did not err when it admitted statements by a non-testifying police officer about what appellant told him.

Russell asserts that the district court erred by admitting Officer Gannon's testimony that Officer Flaherty's police report stated that Russell admitted handling the knife. Russell contends that admission of the testimony violated the rules of evidence and his Sixth Amendment right to confrontation. The state responds that Russell forfeited the issue because he did not object at trial and the evidence was not hearsay because it was not offered to prove the truth of the matter asserted. We do not reach the forfeiture or constitutional issues because we determine the evidence was not hearsay.

Hearsay is inadmissible except as provided by the rules of evidence. Minn. R. Evid. 802. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(b). Evidentiary rulings "are within the discretion of the district court and will not be reversed absent a clear abuse of discretion." *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

"[W]hether the admission of evidence violates a criminal defendant's rights under the Confrontation Clause is a question of law" reviewed de novo. *Id.* The Sixth Amendment provides that accused persons "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. A court may admit "[t]estimonial statements of

witnesses absent from trial" when "the declarant is unavailable" and the defendant "has had a prior opportunity to cross-examine." *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369 (2004). A statement must be testimonial hearsay before the Confrontation Clause is implicated. *Hennepin County v. Perry*, 561 N.W.2d 889, 894 (Minn. 1997); *see also State v. Lasnetski*, 696 N.W.2d 387, 392 (Minn. App. 2005). If a Confrontation Clause violation is harmless beyond a reasonable doubt, reversal is not required. *Caulfield*, 722 N.W.2d at 314. To be harmless error, the verdict must be "surely unattributable to the error." *Id.*

Officer Flaherty was not available to testify because he had passed away before trial. During cross-examination, Russell's attorney asked Officer Gannon whether the knife recovered from E.G.'s apartment had been tested for fingerprints or DNA. Officer Gannon stated that police collected the knife into evidence but did not test it for fingerprints or DNA. On re-direct, the state asked why the knife was not sent out for analysis. Officer Gannon responded, "Based on the report, and Officer Flaherty had spoken with the defendant, and he had admit[ted] to grabbing a knife . . ." Russell's attorney objected and asked to approach. After an off-the-record bench discussion, the state asked Officer Gannon if "one reason that fingerprint and DNA testing wasn't done is because . . . the defendant had admitt[ed] touching the knife during the incident so . . . it wouldn't tell you anything you didn't already know?" Officer Gannon responded, "Yes." Russell's attorney failed to state the reason for his objection and did not preserve the bench discussion.

Russell challenges the admission of Gannon's testimony as double hearsay, i.e., Flaherty's report about Russell's statements. We conclude that Russell's argument fails

because neither statement is hearsay. First, Russell's statement to Flaherty was the statement of a party-opponent, which is not hearsay. Minn. R. Evid. 801(d)(2). Second, evidence of Flaherty's report was not offered to prove the truth of the matter asserted. Minn. R. Evid. 801(c). In other words, Gannon's testimony was not to prove that Russell had touched the knife, but rather to establish why the police did not submit the knife for forensic analysis. *See, e.g., State v. Hull*, 788 N.W.2d 91, 101 (Minn. 2010) (concluding statement that "something was wrong" if victim did not call his friend was not hearsay because it was offered to explain friend's efforts to locate the victim); *see also State v. Swaney*, 787 N.W.2d 541, 553 (Minn. 2010) (concluding that officer's testimony about statements by defendant's wife was not hearsay because it was offered to provide context and explain why wife confronted defendant on the phone).

Even if the district court erred by admitting the statements, we conclude that any error was harmless beyond a reasonable doubt because the verdict was "surely unattributable" to the error. *Caulfield*, 722 N.W.2d at 314. We consider several factors: (1) how the evidence was presented, (2) whether the evidence was "highly persuasive," (3) whether the evidence was highlighted in closing arguments, and (4) whether the defendant effectively countered the evidence. *Id.* We also evaluate other evidence of guilt. *Id.*

First, the evidence of Russell's statement was presented through a few statements by a witness. Although Russell argues this was "dramatic" because it was "the last piece" of Officer Gannon's testimony, he fails to acknowledge that Russell elicited the officer's testimony on cross-examination. While Minnesota has not determined whether an attorney

can "open the door" to a Confrontation Clause violation, the manner of presentation is relevant to our analysis of prejudice. *Hull*, 788 N.W.2d at 101–02.

Second, Russell argues the testimony was "highly persuasive" because it was the turning point of the trial and no other evidence corroborated E.G.'s testimony about the knife. Russell ignores that the challenged testimony merely repeated Russell's statement that he grabbed the knife at some time, and did not establish that he brandished the knife during the assault. Moreover, Russell ignores other strong evidence that he brandished the knife, which we have already summarized in this opinion. Thus, Officer Gannon's testimony was not highly persuasive.

Third, the prosecution did not mention Officer Gannon's testimony about Russell touching the knife in its closing argument.

Fourth, we consider whether Russell effectively countered the evidence. Russell testified in his own defense, denied grabbing the knife, and stated that Officer Flaherty asked him generally if he touched the knives in the apartment. Russell testified that he told the officer he routinely touched the knives because he did most of the cooking. On appeal, Russell asserts that Officer Gannon's testimony compelled him to testify, but we are not persuaded. Russell knowingly and voluntarily waived his Fifth Amendment right. Russell did not limit his testimony to the statements he made to Officer Flaherty and gave detailed testimony on a host of issues at trial. Because Russell's own testimony admitted that he regularly handled the knife, we conclude that he countered any prejudicial effect of the challenged evidence.

Because the challenged evidence is not hearsay and any error was harmless beyond a reasonable doubt, the district court did not abuse its discretion and Russell's right to confrontation was not violated.

Affirmed.