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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0853

State of Minnesota,
Respondent,

vs.

Bounkieng Sinthavong,
Appellant.

Filed April 15, 2013
Affirmed
Ross, Judge
Dissenting, Cleary, Judge

Stearns County District Court
File No. 73-CR-11-6658

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

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

David W. Merchant, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Presiding Judge; Ross, Judge; and Larkin, Judge.

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

ROSS, Judge

A jury found Bounkieng Sinthavong guilty of domestic assault and terroristic threats after hearing evidence that Sinthavong had choked P.F. with an extension cord during an argument in her home. Sinthavong appeals from his conviction, arguing that the district court improperly admitted hearsay evidence, opinion evidence, and excessive relationship evidence, and that the cumulative effect of the improperly admitted evidence denied him the right to a fair trial. Because we hold that the district court did not abuse its discretion by admitting the relationship evidence, and any errors in admitting hearsay or opinion evidence did not affect Sinthavong's substantial rights, we affirm.

FACTS

Bounkieng Sinthavong and P.F., who have two children together, had a turbulent three-year romantic relationship that P.F. ended in July 2011 after Sinthavong struck her in the face and later allegedly choked her with an electrical extension cord. That later incident led to Sinthavong's arrest and the criminal convictions that Sinthavong challenges in this appeal.

According to P.F.'s trial testimony, Sinthavong first struck her on July 6, motivating her to move into a mobile home near St. Cloud with the children and not tell Sinthavong where she had moved. Sinthavong found her three weeks later and showed up at the home unannounced. Sinthavong made jealous accusations and refused to leave despite P.F.'s urging. He stayed all night, and, the next morning, P.F. borrowed a

neighbor's telephone and called the trailer park manager. Sinthavong eventually left, but he returned 90 minutes later, apologetic.

Two days later Sinthavong returned to P.F.'s home. He accused her of having men over to the home, and, once again, he initially refused to leave despite P.F.'s demand that he do so. He eventually left, only to return again and continue accusing P.F. of cheating. P.F. testified that Sinthavong wrapped an extension cord around P.F.'s neck and lifted her off the floor by the cord. P.F. could not breathe and thought she was going to die. While Sinthavong strangled P.F., he told her that he loved her and that he didn't understand why she didn't feel the same toward him. Sinthavong loosened the cord. P.F. screamed for help when she saw someone just outside the home. Sinthavong covered her mouth. He told P.F. that he was going to bury her so deeply that she would never be found. P.F. tried to leave, but Sinthavong stopped her. He stayed the night, sleeping in front of the door to prevent her from leaving.

P.F. slipped out in the morning and called the police from her neighbor's home. She reported that an unwanted person was in her home. Sinthavong left before police arrived. One of the deputies asked P.F. if anything had happened beyond Sinthavong being at the home and refusing to leave. P.F. told the deputy that she and Sinthavong had argued and that she was afraid that he would return, but she said that nothing physical had happened. The next day, P.F. went to a domestic-abuse shelter seeking help to obtain an order for protection. She told an employee at the shelter that Sinthavong had choked her, and the employee called the sheriff's department. One of the deputies who had responded to P.F.'s call went to the shelter and took a recorded statement from P.F.

The state charged Sinthavong with two counts of felony domestic assault, one count of terroristic threats, and one count of domestic assault by strangulation. *See* Minn. Stat. § 609.2242, subd. 4 (2010); Minn. Stat. § 609.713, subd. 1 (2010); Minn. Stat. § 609.2247, subd. 2 (2010). Before trial, the state moved to introduce evidence of incidents in Sinthavong's relationship with P.F., under Minnesota Statutes section 634.20 (2010). Sinthavong objected, arguing that the evidence was irrelevant and unfairly prejudicial. The court overruled the objection, determining that the evidence was "likely to have a high probative value, since it would help to establish the relationship between [P.F.] and [Sinthavong] and can place the incident in issue in context for the jury." The district court also found that the probative value of the evidence was "not substantially outweighed by the danger of unfair prejudice, which is the potential to persuade by illegitimate means, especially if this Court provides a curative instruction." It stated that it would permit the relationship evidence with the caveat that "the Court reserves its right to limit testimony."

During trial, P.F. testified about five previous incidents of similar conduct by Sinthavong: (1) a May 2008 incident during which Sinthavong grabbed at P.F.'s face as she left to go to a shelter and after which P.F. sought an order for protection but failed to appear to testify in support of it; (2) an August 2008 incident during which Sinthavong threatened P.F.—then six-months pregnant—with a knife, saying that he would cut the baby out of her, after which the state filed but dropped charges against Sinthavong because P.F. again did not testify; (3) a different August 2008 incident during which Sinthavong kicked P.F. (still pregnant) in the stomach, causing bruising apparent in

photographs shown to the jury; (4) a July 2011 incident during which Sinthavong hit P.F. in the face and called her “whore,” “slut,” and “bitch”; and (5) an October 2011 incident during which Sinthavong’s brother contacted P.F. to see if she was planning to attend the trial in this case. P.F. also testified about the general context of her relationship with Sinthavong, explaining that he called her names, controlled when she could see her family, and did not allow her to work. The district court cautioned the jury that the evidence of the incidents was being offered “for the limited purpose of demonstrating the nature and the extent of the relationship” between Sinthavong and P.F. to assist the jurors in determining whether Sinthavong committed the acts with which he was charged. The court also cautioned that Sinthavong was not being tried for any offenses other than those charged and directed the jury not to convict him based on the prior conduct.

Others who testified at trial were P.F.’s neighbor, whose phone P.F. used to dial 9-1-1 on the morning of July 28; the deputy who responded to P.F.’s emergency call on July 28 and who took P.F.’s statement at the shelter; and a domestic-abuse victim advocate at the shelter, who helped P.F. fill out the affidavit for an order for protection and encouraged P.F. to report the assault and seek medical attention.

The jury found Sinthavong guilty of both counts of domestic assault and of terroristic threats, but not guilty of assault by strangulation. This appeal follows.

DECISION

Sinthavong raises four arguments on appeal, all focusing on the district court’s handling of evidentiary issues. He does not argue merely that the district court abused its discretion under the rules of evidence; he maintains that the trial errors were so

substantial that they deprived him of his constitutional right to a fair trial. He does not reference any specific constitutional provision or identify whether his claims rest on the federal or state constitution. He first argues that the district court abused its discretion by not limiting the relationship evidence. He also argues that the district court erred by admitting hearsay statements by P.F. that were inconsistent with her testimony at trial. He next argues that the district court erred by admitting opinion testimony from the victim advocate. And he contends that the cumulative effect of these errors requires reversal.

I

Sinthavong first challenges the district court's failure to limit the relationship evidence admitted under Minnesota Statutes section 634.20. He argues specifically that the evidence was unnecessarily cumulative and that its prejudicial effect outweighed its probative value. In domestic-abuse trials, "[e]vidence of similar conduct by the accused against the victim . . . is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice," among other things, or by "considerations of . . . needless presentation of cumulative evidence." Minn. Stat. § 634.20. We review the district court's decision to admit this sort of evidence for an abuse of discretion. *State v. Lindsey*, 755 N.W.2d 752, 755 (Minn. App. 2008), *review denied* (Minn. Oct. 29, 2008).

Sinthavong acknowledges that evidence of his relationship with P.F. was probative of material facts because it placed the assault in context. But he maintains that the district court should have limited the evidence to only one or two prior events, not the several admitted. To show that the district court admitted improper evidence under the relationship-evidence statute, it is not enough that Sinthavong establishes that the

challenged evidence was prejudicial (as in damaging or even severely damaging); he must instead establish that the evidence was *unfairly* prejudicial, which is "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). And he must also do more than show that the evidence was more prejudicial than probative. Rather, he must show that the district court admitted evidence with probative value that was *substantially* outweighed by the danger of unfair prejudice. Minn. Stat. § 634.20.

The district court recognized the balancing necessary to weigh the admissibility of the evidence, stating that "although the relationship evidence is admissible, there is a time when there may be too many and it just becomes too cumbersome and where it may then become prejudicial." The court determined that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, and in admitting the evidence, it also cautioned the jury with a limiting instruction before each instance of relationship evidence. This caution was in keeping with precedent. *See Lindsey*, 755 N.W.2d at 757 (holding that cautionary instructions minimized the potential prejudice and lessened the probability of undue weight being given to the evidence). We recognize that other judges might have been more restrictive, but the district court is vested with the discretion to make the determination, and it appears to us that it carefully considered the relevant factors when doing so. We will not substitute our judgment on appeal in place of the district court's. In light of the discretion afforded to district courts in evidentiary matters, we hold that the district court did not abuse its discretion by admitting the relationship evidence.

II

Sinthavong next argues that the district court erred by admitting hearsay statements by P.F. that were inconsistent with her testimony at trial. Sinthavong did not object to any of the statements at trial. When a defendant challenges his conviction based on the admission of evidence to which he failed to object at trial, we review only for plain error. That is, we will not consider reversing unless the appellant has identified an actual error, the error is plain, and the error affects the appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it is clear or obvious, which usually means it "contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). And by affecting substantial rights, we mean that "the error was prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741. Even if all three elements of the test are met, we will correct the unobjected-to error only if we should do so "to ensure fairness and the integrity of the judicial proceedings." *Id.* at 740. Seeking appellate review of unobjected-to hearsay is particularly difficult under this high standard, because "[t]he number and variety of exceptions to the hearsay exclusion make objections to such testimony particularly important to the creation of a record of the [district] court's decision-making process in either admitting or excluding a given statement." *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006).

Sinthavong maintains that the admission of four hearsay statements requires reversal. The first was offered by the domestic-abuse victim advocate, M.B., who testified that P.F. told her that Sinthavong "had basically broken into [P.F.'s] house"

when, in fact, P.F. did not claim that Sinthavong broke into her home but that she allowed him inside and he refused to leave. The second is a deputy's testimony that P.F. told him Sinthavong pulled her hair (and M.B.'s testimony that P.F. showed M.B. where her hair was missing). The third is testimony from M.B. and the deputy that Sinthavong threatened to bury P.F. in lye when P.F. testified only that Sinthavong threatened to bury her "so deep [she'd] never be found again" but did not mention lye. The fourth challenged hearsay statement was the neighbor's testimony that P.F. told him that Sinthavong had choked her "to the point of passing out," when P.F. testified instead that she could not breathe when Sinthavong choked her and that she thought she was going die.

Some, but not all, of the challenged testimony appears to have been hearsay, but without an objection and the chance for the district court to explore the nature and purpose of the evidence further, it is difficult for us to conclude that the statements were obviously inadmissible hearsay. But even if we did, it does not appear that any of them prejudiced Sinthavong and affected the outcome of the case. Given P.F.'s clear testimony that she allowed Sinthavong in her home and he refused to leave, we cannot imagine any prejudice from M.B.'s qualified hearsay characterization that P.F. told her that Sinthavong "had basically broken into [P.F.'s] house." Also not prejudicial is the deputy's testimony that P.F. told him Sinthavong pulled her hair. The jury rejected the allegation that Sinthavong strangled P.F. with a cord, but it heard considerable testimony that he threatened and hit her, and it convicted him of domestic abuse. The difficulty with waiting until an appeal to challenge hearsay is that the failure to object prevented the

state from returning P.F. to the stand to clarify the hair-pulling claim directly, and it is commonly known that a reasonable defense strategy is not to object to hearsay statements when the objection would likely invite the same statements directly from the victim herself. M.B.'s testimony that she saw where P.F.'s hair was missing is not hearsay but her own first-hand observation. And the observation makes the deputy's hearsay so reliable that prejudice is unlikely.

The testimony from M.B. and the deputy that Sinthavong threatened to bury P.F. in lye had no plausible bearing on the outcome. P.F. testified emphatically that Sinthavong threatened to bury her "so deep [she'd] never be found again," making any prejudice from the additional hearsay reference to the substance of the threatened burial—lye—inconsequential. That's because it is impossible for us to think that a jury would become unfairly impassioned by a defendant's threat to bury the mother of his children in lye after it already having heard the mother testify directly that he threatened to bury her (in *something*) too deeply to be discovered. Especially inconsequential to the outcome, and therefore not prejudicial, is the neighbor's statement that P.F. told him that Sinthavong choked her "to the point of passing out." The jury found Sinthavong not guilty of assault by strangulation, demonstrating that the jury was not influenced by the allegedly hearsay statement.

The district court did not commit plain error affecting Sinthavong's substantial rights by admitting any of this unobjected-to testimony.

III

Sinthavong next argues that the district court erred by admitting opinion testimony from M.B., who asserted that she was fearful for P.F. and that next time P.F. "might not be so lucky . . . as far as making it out alive." Sinthavong did not object, so again, we review only for plain error. And again, the prejudice prong of the test prevents us from considering reversal. Because the jury rejected the assault-by-strangulation charge, it is clear that it carefully weighed the evidence and, in doing so, was not persuaded by the more serious physical conduct alleged. And it is not an uncommon trial strategy for a defendant's counsel intentionally to refrain from objecting when testimony is so grandiose or exaggerated that it calls that witness's other testimony into general discredit. By allowing the specific testimony without objection, Sinthavong's attorney secured the opportunity to emphasize M.B.'s broader lack of credibility from her bias in P.F.'s favor, which he did during closing argument:

> Remember, she had been working with [P.F.] for three years. She had a vested interest in what she believed her to be in a bad situation. Remember, [M.B.] is an advocate. She is not a truth finder nor is she an investigator. She reacts to what people tell her when they come to the agency.

So even if it was plain error for the district court to admit M.B.'s opinion testimony (and the dissenting opinion makes a compelling case that it was), it was simply not plain error affecting substantial rights.

IV

Finally, Sinthavong claims that the cumulative effect of the errors deprived him of a fair trial. In some cases, although identified errors might not individually warrant a new

trial, the cumulative effect of them might. *State v. Erickson*, 610 N.W.2d 335, 340 (Minn. 2000). But we need not discuss the alleged cumulative effect of errors here, since we have spotted no plain errors that had any likely effect on the verdict.

Affirmed.

CLEARY, Judge (dissenting)

I respectfully dissent. The district court abused its discretion by admitting five instances of relationship evidence pursuant to Minn. Stat. § 634.20 (2010), all involving the same victim, over a three-year period. *See State v. Lindsey*, 755 N.W.2d 752, 755 (Minn. App. 2008) (stating that we review a district court's decision to admit relationship evidence under Minn. Stat. § 634.20 for an abuse of discretion), *review denied* (Minn. Oct. 29, 2008). This overemphasis on *past* alleged criminal behavior was compounded by the admission of testimony predicting *future* homicidal behavior on the part of appellant toward the victim. The district court plainly erred by admitting this testimony concerning predicted future conduct. The cumulative effect of the trial errors in this case made a fair trial impossible, and appellant is entitled to a new trial. *See State v. Penkaty*, 708 N.W.2d 185, 200 (Minn. 2006) (stating that cumulative error exists when a defendant is prejudiced by the cumulative effect of errors and indiscretions at trial, even though none of the errors alone might have been enough to tip the scales to cause prejudice).

A district court is not limited under Minn. Stat. § 634.20 to the admission of any specific number of instances of similar conduct. The statute provides that evidence of similar conduct is admissible "unless the probative value is substantially outweighed by the danger of unfair prejudice, . . . or needless presentation of cumulative evidence." Minn. Stat. § 634.20. Here the district court presented evidence of four prior incidents of similar conduct by appellant and evidence of one incident where appellant's brother contacted the victim at appellant's direction. Even with the cautionary instruction, it is

unlikely that the jury was able to approach the current charges on the merits, rather than focus on past bad behavior.

The district court relied primarily on two cases in admitting the relationship evidence: *State v. Bell*, 719 N.W.2d 635 (Minn. 2006), and *State v. Lindsey*, 755 N.W.2d 752. In *Bell*, the state offered evidence of four prior incidents of abuse and the district court excluded two of the four incidents saying, in part, "I think it probably is more prejudicial than probative." 719 N.W.2d at 638. In *Lindsey*, the state was allowed to present evidence of two subsequent incidents where the probative value was clear as the alleged victim had recanted her allegations at trial. 755 N.W.2d at 756–57. Here, the victim was available and cooperative in offering her testimony regarding the current charges, and yet the district court allowed in evidence of five prior incidents from May 2008 to October 2011.

The testimony presented by M.B., the domestic abuse advocate, was also unduly prejudicial to appellant. *See* Minn. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."). In her testimony, M.B. predicted future homicidal behavior by appellant toward P.F. She told the jury that "there was a pattern of abuse, and I really thought at this point that . . . next time [P.F.] might not be so lucky . . . as far as making it out alive." Minutes later, under continuing questioning by the prosecutor, M.B. predicted, "I remember telling her that I thought that the next time that he would kill her. And, um, I don't say that lightly. I probably said that maybe two or three times in my 11 years, and I honestly believe that in my heart that that would happen." These statements

further reinforced the perception of appellant as a dangerous and violent person and made a fair trial on the facts of the present charges impossible.

Appellant did not object to M.B.'s testimony at trial. (The majority suggests that this was due to "trial strategy," citing a statement of the defense in final argument. I respectfully disagree. The statement in final argument would be better characterized as "damage control.") When a defendant fails to object to the admission of evidence, our review is under the plain-error standard. *See* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "[B]efore an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." *Griller*, 583 N.W.2d at 740. An error is plain if it is clear or obvious; "[u]sually this is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). "The third prong, requiring that the error affect substantial rights, is satisfied if the error was prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741. If all three prongs of the test are met, we then determine whether we "should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.* at 740. I believe that the district court plainly erred by admitting M.B.'s testimony and that the error affected appellant's right to a fair trial. M.B.'s testimony in conjunction with the excessive relationship evidence amounted to cumulative error that was prejudicial to appellant.

The jury here heard a litany of appellant's past incidents of abuse relating to the victim. The jury later heard an advocate predict future homicidal behavior on the part of the appellant toward the victim. In between this testimony, the jury heard about the

incident for which appellant was being prosecuted. The admission of the numerous allegations of past abuse toward the victim and the prediction of future homicidal behavior by the appellant toward the victim made a fair trial impossible. The cumulative effect of the district court's errors in admitting this evidence was to deprive the appellant of a fair trial.

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Judge Edward J. Cleary