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STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1974

State of Minnesota,
Respondent,

vs.

Marcus Tavon Brown,
Appellant.

Filed December 18, 2017
Affirmed in part, reversed in part, and remanded
Reilly, Judge

Cottonwood County District Court
File No. 17-CR-16-217

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

Nick Anderson, Cottonwood County Attorney, Windom, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Reilly, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

REILLY, Judge

On appeal from his convictions of felony domestic assault and false imprisonment, appellant Marcus Tavon Brown argues that his conviction of felony domestic assault was

improper because the felony domestic assault statute unambiguously requires predicate offenses to arise from two separate instances of conduct. Appellant also objects to the jury instructions, the submission of his unredacted conviction record to the jury, and multiple sentencing issues. Appellant submitted a pro se brief alleging a number of other issues. We affirm appellant's convictions, reverse his sentence, and remand for resentencing.

D E C I S I O N

I. Appellant's prior offenses qualify as predicate offenses for felony domestic assault under Minn. Stat. § 609.2242.

Appellant argues the two predicate offenses required for felony domestic assault cannot arise out of the same instance of conduct. *See* Minn. Stat. § 609.2242, subd. 4 (2016). We conclude the statute unambiguously allows the two predicate offenses to arise from one instance of conduct and affirm the district court.

Statutory interpretation is a question of law that we review de novo. *State v. S.A.M.*, 891 N.W.2d 602, 604 (Minn. 2017). The purpose of statutory interpretation is to "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2016); *see also State v. Campbell*, 814 N.W.2d 1, 4 (Minn. 2012). We construe statutes in accordance with their "plain and ordinary meaning," and if the statute is unambiguous, we apply the plain language. *State v. Zais*, 805 N.W.2d 32, 38 (Minn. 2011). A statute is unambiguous if it has only one reasonable interpretation. *State v. Nelson*, 842 N.W.2d 433, 436 (Minn. 2014). If the language of a statute is unambiguous, we "[do] not engage in any further construction and instead look[] to the plain meaning of the statutory language." *State v. Leathers*, 799 N.W.2d 606, 608 (Minn. 2011) (citation omitted). We do not add terms or

meanings that are absent from unambiguous statutory language. *See Dupey v. State*, 868 N.W.2d 36, 40 (Minn. 2015).

A defendant is guilty of a felony in Minnesota if they commit domestic assault "within ten years of the first of any combination of two or more previous qualified domestic violence-related offense convictions." Minn. Stat. § 609.2242, subd. 4. Appellant argues that "the first . . . of two or more previous" offenses unambiguously indicates the offenses must be from two separate incidents. Respondent argues "any combination of two or more previous" offenses unambiguously indicates that two convictions entered on the same day would qualify as "any combination" of offenses. Appellant argues the phrase "any combination of two or more" exists to allow any of the 22 distinct predicate offenses to satisfy the rule. *See* Minn. Stat. § 609.02, subd. 16 (2016) (defining qualified domestic violence-related offense).

We agree with respondent's reading of the statute. The phrase "any combination of two or more previous" offenses is broad and plainly encompasses two convictions entered at the same proceeding. Minn. Stat. § 609.2242, subd. 4. Here, appellant was convicted of two counts of assault for assaulting two different victims. The statute does not contain language that would treat two convictions entered on the same day any differently than two convictions entered on two different days. The only time-related language in the statute refers to the range of time in which the predicate offenses must have been committed, within ten years. To reach appellant's reading, this court would have to add language, which we will not do. *See Dupey*, 868 N.W.2d at 40.

The statute is unambiguous in requiring "any combination" of two prior domestic violence-related convictions, which includes two convictions entered on the same day. Accordingly, we affirm appellant's conviction of felony domestic assault.

II. The district court did not err by instructing the jury that simple assault is a qualified domestic-assault-related conviction.

Appellant has a conviction of simple assault from the State of Georgia. The district court judge instructed the jury that "simple assault is a qualified domestic-assault-related conviction" of felony domestic assault. Appellant equates this statement to a directed verdict on the element of predicate convictions and argues the judge deprived the jury of its fact-finding role.

Appellant did not object to this jury instruction. When there is no objection at trial, the appellate court has discretion to consider a claim of error on appeal under the plain-error standard. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (quotation omitted). Plain error requires a showing of: (1) an error; (2) that was plain; and (3) that affected substantial rights. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002).

Here, appellant does not satisfy the first prong of the plain-error test. The district court did not commit error by giving this jury instruction. A district court has "considerable latitude" in the selection of language for jury instructions. *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011). It is the role of the district court to "fairly and adequately explain the law" to the jury. *Id.* Whether an out-of-state conviction is a qualified domestic violence-related offense is a matter of law. *See State v. Moen*, 752 N.W.2d 532, 535-36 (Minn. App. 2008); *see also State v. Wiskow*, 774 N.W.2d 612, 616-17 (Minn. App. 2009)

(explaining that there is no right to a jury finding on whether an out-of-state conviction qualifies as a "violent crime" for enhancement purposes). Whether an out-of-state conviction qualifies as a predicate offense in Minnesota is a question of law. The district court judge's instruction that appellant's prior out-of-state convictions qualified as domestic-assault-related convictions was a fair and accurate statement of the law well within the district court judge's wide latitude to select jury instructions.

III. The district court's failure to sua sponte redact appellant's conviction record was not plain error.

The district court submitted an unredacted conviction record to the jury for the purposes of showing two prior assault convictions, which were predicate offenses for felony domestic assault. The unredacted conviction record also showed that appellant held two people at gunpoint and stole one of their smart phones. Appellant objects to the district court submitting his unredacted conviction record to the jury as being irrelevant, unfairly prejudicial, cumulative, inadmissible under *Spreigl*, and a violation of the Confrontation Clause.

We review evidentiary rulings applying an abuse of discretion standard. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Where there is no objection to an evidentiary ruling, the appellate court considers a claim of error under the plain-error standard. *State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007). Plain error requires a showing of: (1) an error; (2) that was plain; and (3) that affected substantial rights. *Id*. An error is "plain" if it is clear or obvious. *Strommen*, 648 N.W.2d at 688 (citing *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770 (1993)). Plainness is shown if the error "contravenes case

law, a rule, or a standard of conduct." *State v. Sontoya*, 788 N.W.2d 868, 872 (Minn. 2010) (citation omitted). A new trial shall be awarded only if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Crowsbreast*, 629 N.W.2d at 437 (citation omitted).

Before trial, appellant provided a written statement stipulating to his two prior assault convictions. The day of trial, the judge asked appellant to confirm that he wanted to stipulate to his prior convictions. After conferring with his attorney, appellant chose to withdraw his stipulation, and said he wanted "[the jury] to get the full intel of the case." Appellant seemed to understand that the jury would receive information about his prior convictions. Respondent then admitted a copy of appellant's conviction record into evidence to establish his prior convictions. Appellant's counsel never objected to the full conviction record being admitted, presumably in furtherance of his client's wishes that the jury see the "full intel."

The issue before the court, then, is not whether the district court erred in admitting the conviction record, since the court was never asked to rule on that issue. Instead, the question is whether the court committed plain error by failing to sua sponte redact the conviction record. This question is almost identical to the one in *Vick*, where a witness's testimony about a defendant's prior bad acts was admitted without objection. *State v. Vick*, 632 N.W.2d 676 (Minn. 2001). The record indicated there was no prior notice about the possible prejudicial nature of the witness's testimony, so the court did not have the opportunity to rule on admissibility or the scope of the *Spreigl* notice. *Id.* at 685. In the absence of an objection, the district court found "there was no reason for the trial court to

intercede sua sponte and, as a result, the trial court did not err in not striking [the] testimony." *Id.*

Here, appellant's conviction record was submitted the day of trial without objection. The district court was not aware that the evidence would be offered, because respondent offered it the day of trial in response to appellant withdrawing his stipulation the day of trial. Appellant's conviction record was admissible to the extent it established predicate offenses for felony domestic assault. The judge provided limiting instructions,[1] which diminished the risk of unfair prejudice to appellant. "In the absence of an objection, then, we are hard pressed to see how the trial court could be attuned to whether" the conviction record would exceed the scope of limiting instructions. *Id.* The district court did not err under the established "rule that a trial court's failure to sua sponte strike unnoticed *Spreigl* evidence . . . is not ordinarily plain error." *Id.* Though there were potential evidentiary issues, the district court was never given the opportunity to rule on the question of admissibility, so its failure to sua sponte redact the document is not plain error.

Even if this court found error, there is not a reasonable likelihood that appellant's conviction record had a significant effect on the outcome of the case. The appellant bears a heavy burden of persuasion to show a reasonable likelihood that, without the error, the

[1] "The State has introduced evidence of prior criminal convictions. This evidence is not to be used to prove the character of the defendant or that the defendant acted in conformity with such character. The defendant is not being tried for and may not be convicted of any offense other than the charged offenses. You are not to convict the defendant on the basis of prior criminal convictions. To do so might result in unjust double punishment."

outcome of the case would be different. *Bernhardt v. State*, 684 N.W.2d 465, 475 (Minn. 2004). Even then, the court will further address whether they must correct the error to "ensure fairness and the integrity of the judicial proceedings." *Id.* (quotation omitted).

Appellant's conviction record likely had little prejudicial effect on the verdict. Appellant was convicted of one count of domestic violence for causing fear. The jury acquitted appellant of three counts of domestic assault involving violence, which shows they did not believe him to be an inherently violent person. The mixed verdict also indicates the jury carefully considered the persuasiveness of the evidence and the credibility of the witnesses. In addition to the victim testifying, the jury also heard testimony from the victim's mother and daughter, who were in the same home at the time appellant was assaulting the victim. Removing the details of appellant's prior convictions from the jury room was unlikely to have changed their verdict. The district court's failure to sua sponte redact the conviction record did not create a reasonable likelihood that the jury verdict would have been different with the redaction, and appellant's substantial rights have not been violated.

IV. The district court erred by imposing two sentences for crimes arising from the same behavioral incident.

Minn. Stat. § 609.035 (2016) prohibits sentencing for two crimes arising from the same behavioral incident. Appellant was sentenced for domestic assault and false imprisonment. The state agrees with appellant that both crimes arose from a single behavioral incident, and the district court should have imposed one sentence. We remand to the district court for resentencing in accordance with Minn. Stat. § 609.035.

V. The state did not sufficiently prove appellant's out-of-state convictions to determine his criminal-history score.

The state must prove "the facts necessary to justify consideration of [an] out-of-state conviction[] in determining a defendant's criminal history score." *State v. Outlaw*, 748 N.W.2d 349, 355 (Minn. App. 2008) (quotation omitted), *review denied* (Minn. July 15, 2008). The state must establish by a fair preponderance of the evidence that the out-of-state conviction would constitute a felony in Minnesota. *State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983). According to the Minnesota Sentencing Guidelines, for an out-of-state felony to count on a person's criminal-history score, the person must have "received a sentence that in Minnesota would be a felony-level sentence, which includes the equivalent of a stay of imposition." Minn. Sent. Guidelines 2.B.5.b (2016).

The district court used six felony convictions from Georgia to calculate appellant's criminal-history score. Appellant's two 2013 convictions occurred on the same day, and the record is unclear as to whether he was sentenced for one or both of the offenses as a felony. At the sentencing hearing, appellant did not object to the criminal-history score, and the state did not show that appellant's Georgia convictions would be felonies in Minnesota or that the 2013 offenses entered on the same day were sentenced as separate felonies. We remand this case to the district court to determine if appellant's Georgia felony convictions would be felonies in Minnesota and whether the 2013 offenses were both sentenced as felonies. The state may "further develop the sentencing record so that the district court can appropriately make its determination." *Outlaw*, 748 N.W.2d at 356

(holding the state may supplement the record on remand where appellant did not object to including his out-of-state criminal record).

VI. Appellant's pro se arguments lack merit.

Appellant raises a number of arguments in his pro se brief. Appellant first argues ineffective assistance of counsel for his lawyer's failure to object to the use of a prior conviction for impeachment purposes. The prior conviction was for giving a false name to a police officer, and crimes involving dishonesty are automatically admissible for impeachment purposes. *See State v. Sims*, 526 N.W.2d 201, 201 (Minn. 1994); Minn. R. Evid. 609. This evidence would have been admitted over an objection. *Id.*[2]

Appellant next objects to the district court's failure to grant a continuance after the state added the false imprisonment charge. While adding a criminal charge after jeopardy attaches can prejudice defendants such that they deserve a new trial, appellant was notified of the new charge before the jury was sworn, so no apparent prejudice exists. *See, e.g.*, *State v. Smith*, 313 N.W.2d 429, 430 (Minn. 1981).

Appellant next challenges T.M.F.'s mental health, arguing that her credibility was chiefly responsible for his conviction, and that evidence of her mental health issues would have been proper for impeachment. Appellant moved the court to conduct an in camera review of T.M.F.'s mental health records. Appellant did not indicate that T.M.F. suffered

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[2] Appellant also argues that cross-examination about his prior conviction for providing a false name to a police officer violated the Confrontation Clause, because the arresting officer was not present to provide testimony. The cross-examination of appellant did not constitute an out-of-court testimonial statement, so the Confrontation Clause does not apply. *See Crawford v. Washington*, 541 U.S. 36, 51-52, 124 S. Ct. 1354, 1364 (2004).

from a psychological condition that would affect her memory or ability to testify, and given appellant's bald assertions of mental illness and nothing more, the district court did not err by declining in camera review of T.M.F.'s mental health records. *See State v. Hummel*, 483 N.W.2d 68, 71-72 (Minn. 1992) (holding that a person requesting in camera review must make a "plausible showing that the information sought would be both material and favorable to his defense").

Finally, appellant argues that the prosecutor engaged in impermissible vouching during her closing argument. In Minnesota, a prosecutor may not "personally endorse the credibility of witnesses." *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006). When evaluating alleged misconduct, "the closing argument will be considered as a whole." *State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003). We evaluate unobjected-to prosecutorial vouching under the plain-error standard. *Swanson*, 707 N.W.2d at 656. Vouching is plain error if: (1) there was an error, (2) the error was plain, and (3) the error affected the defendant's substantial rights. *Id.* "To meet the third prong, a defendant must show that the error was prejudicial and affected the outcome of the case." *Id.*

Here, while summarizing appellant's testimony during her closing argument, the prosecutor said:

> Now I want to talk to you about why I don't think Mr. Brown is credible. As I mentioned before, this case is a large—largely a matter of credibility. It's [T.M.F.]'s word, along with her grandmother's and her daughter's, against the defendant, and clearly there are big discrepancies in between those statements. I would like to take a couple minutes [sic] why I think you should not believe the defendant.
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> . . .

> I hope that you don't—I hope that you don't buy that argument because again it just doesn't make sense.

These statements are a personal endorsement of the credibility of a witness, because the prosecutor described how she personally did not believe appellant's testimony. While these statements represent prosecutorial misconduct, the statements are only a small portion of the prosecutor's otherwise satisfactory behavior at trial, so we determine the error did not affect the outcome of the case.

Affirmed in part, reversed in part, and remanded for resentencing.