STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1968

State of Minnesota,
Respondent,

vs.

Jennifer Ann Culver,
Appellant.

Filed August 31, 2020
Affirmed
Reyes, Judge

Ramsey County District Court
File No. 62-CR-16-5774

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Gina D. Schulz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Reyes, Judge.

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

REYES, Judge

The Minnesota Supreme Court reinstated appellant's conviction of felony deprivation of parental rights after this court had concluded that the state presented

insufficient evidence to prove her guilt for the offense. *State v. Culver*, 941 N.W.2d 134, 144 (Minn. 2020). The supreme court then remanded the matter back to this court for consideration of appellant's alternative claim for relief not addressed in this court's opinion of whether the district court erred in admitting relationship evidence and in failing to provide the jury with a limiting instruction as to its proper use. *Id.* Because the district court did not abuse its discretion by admitting the challenged evidence and any error in failing to provide a limiting instruction to the jury was not plain, we affirm.

FACTS

The pertinent facts are as set forth in the supreme court's opinion reinstating appellant Jennifer Ann Culver's conviction of felony deprivation of parental rights under Minn. Stat. § 609.26, subd. 1(3) (2016). *Culver*, 941 N.W.2d at 136-38. In brief, appellant and D.E. share a child together, L., to whom D.E. retains visitation rights. Respondent State of Minnesota charged appellant with depriving D.E. of visitation with L. on multiple occasions between July 25 and August 8, 2016. A jury found appellant guilty of the charged offense, and the district court stayed imposition of her sentence for two years.

On appeal to this court, appellant did not dispute that she deprived D.E. of visitation with L. during the alleged time period, but argued instead that the state presented insufficient evidence to prove beyond a reasonable doubt that she specifically intended to "substantially deprive" D.E. of his parenting time, as required by statute. Minn. Stat. § 609.26, subd. 1(3). Appellant also alleged that the district court erred by permitting D.E. to testify regarding additional visitation issues between him and appellant and about appellant's reluctance to allow D.E. to participate in L.'s life. Appellant argued that the

prejudice from the relationship evidence outweighed its probative value, and that the district court erred further by failing to provide the jury with an instruction limiting its use in the determination of appellant's guilt.

This court reversed appellant's conviction, concluding that the state presented insufficient evidence to prove beyond a reasonable doubt that appellant specifically intended a substantial deprivation of D.E.'s parental rights. *State v. Culver*, No. A17-1968, 2018 WL 6837735, at *2 (Minn. App. Dec. 31, 2018), *rev'd*, 941 N.W.2d 134 (Minn. 2020). We therefore declined to address appellant's claims concerning the admission of relationship evidence. *Id.* at *3.

On the state's petition for further review, the Minnesota Supreme Court reversed this court, holding that whether a deprivation of parental rights is "substantial" is an objective inquiry for the factfinder and that the state presented sufficient evidence to support the jury's guilty verdict under this interpretation. *Culver*, 941 N.W.2d at 141-44. The supreme court then remanded the matter to this court "for consideration of [appellant's] challenge to the admission of relationship evidence." *Id.* at 144.

D E C I S I O N

I. The district court did not abuse its discretion by admitting evidence regarding appellant and D.E.'s relationship prior to the time period of the charged offense.

Appellant argues that the admission of D.E.'s testimony violated Minn. R. Evid. 404(b) concerning the admission of other-acts evidence because its potential for unfair prejudice outweighed its probative value. We are not persuaded.

Appellate courts review evidentiary rulings for an abuse of discretion, and this court will reverse only if the appellant proves the erroneous admission of the evidence and that the error substantially influenced the jury's verdict. *State v. Loving*, 775 N.W.2d 872, 879 (Minn. 2009).

Minnesota Rule of Evidence 404(b) provides, "Evidence of another . . . act is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b)(1). To be admitted against the defendant in a criminal prosecution, the evidence must (1) be relevant and material to the state's case; (2) be proved by clear and convincing evidence; and (3) not be so unfairly prejudicial as to outweigh its legitimate probative value. Minn. R. Evid. 404(b)(2).

Minnesota caselaw, however, recognizes "relationship evidence" as a specific type of other-acts evidence of "character evidence that may be offered to show the 'strained relationship' between the accused and the victim [and] is relevant to establishing motive and intent and is therefore admissible." *Loving*, 775 N.W.2d at 880 (alteration in original) (quotation omitted). Relationship evidence is also legitimately admitted "for the purpose of illuminating the relationship of defendant and complainant and placing the incident with which defendant was charged in proper context," *State v. Volstad*, 287 N.W.2d 660, 662 (Minn. 1980), which "bolsters its probative value," *State v. Kennedy*, 585 N.W.2d 385, 392 (Minn. 1998). This evidence is generally considered to be independent of the application of rule 404(b), although courts must still evaluate the evidence to determine whether its

potential for unfair prejudice outweighs its probative value. *State v. Hormann*, 805 N.W.2d 883, 890 (Minn. App. 2011), *review denied* (Minn. Jan. 17, 2012). When balancing the potential prejudice against the probative value, "unfair 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." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted).

At trial, the district court allowed D.E. to testify that appellant did not inform him that she had given birth to his child until after L. was born and that he only obtained visitation rights through a court order. He also testified that, prior to the time period relevant to the charged offense, appellant would often cancel D.E.'s parenting time, telling him that L. was sick or that there were family plans that could not be changed. He testified that the times appellant actually allowed him visitation compared to what the parenting schedule provided "was 50/50 at best," that he rarely got his scheduled weekend visits, and that appellant never provided him make-up visitations despite her agreeing to do so. The district court permitted D.E. to testify at trial as previously discussed in order to "provide context about the history of the relationship between [D.E. and appellant]."

Here, allowing D.E. to testify regarding his and appellant's prior relationship provided context to the jury for the specific 15-day period of time for which appellant was charged, making it highly probative of appellant's intent. Conversely, while this evidence was likely damaging to appellant's case, there is no indication that its admission persuaded the jury by illegitimate means or provided the state with an unfair advantage. Indeed, the state mitigated this risk by admonishing the jury not to find appellant guilty based on this

testimony and that it merely provided context for the charged offense. Accordingly, the probative value of D.E.'s testimony did not outweigh its potential for unfair prejudice and the district court did not abuse its discretion by admitting it.

II. The district court did not plainly err by failing to provide a limiting instruction to the jury on the permissible use of D.E.'s relationship testimony.

Appellant argues that the district court erred by failing to provide the jury with a limiting instruction on the use of D.E.'s testimony, either at the time of the testimony or prior to the jury's deliberation. We disagree.

Because appellant did not request a limiting instruction during trial or object to the district court's failure to provide one in its final charge to the jury, we review for plain error. *State v. Zinski*, 927 N.W.2d 272, 275 (Minn. 2019). Under this standard of review, we may consider an unobjected-to error "if the defendant establishes (1) an error, (2) that was plain, and (3) that affected [her] substantial rights." *Id.* An error is "plain" if it "contravenes case law, a rule, or a standard of conduct." *Id.* (quotation omitted).

Assuming, without concluding, that the district court erred by failing to provide a limiting instruction, appellant argues that this error is plain based on *State v. Bauer*, 598 N.W.2d 352 (Minn. 1999). There, the district court admitted evidence of the relationship between the defendant and victim to illuminate its strained nature and "to place the incident for which appellant was charged into proper context." *Id.* at 364. Regarding the district court's failure to provide a limiting instruction to the jury, the court stated, "As a general rule, even absent a request by the defense, such instructions should be given prior to the

admission of 404(b) evidence and again at the end of trial to help ensure that the jury does not use the evidence for an improper purpose." *Id.* at 365.

While this court's initial opinion was pending further review, the supreme court issued its opinion in *Zinski*, which stated that *Bauer*'s "use of the words 'general rule' and 'should' can hardly be read as creating a clear requirement that a district court sua sponte give a limiting instruction to the jurors for any type of relationship evidence." *Zinski*, 927 N.W.2d at 277. Although the supreme court released the *Zinski* opinion well after appellant's trial, this court "examines the law in existence at the time of appellate review, not the law in existence at the time of the district court's error, to determine whether an error is plain." *State v. Kelley*, 855 N.W.2d 269, 277 (Minn. 2014). Accordingly, we rely on *Zinski*'s analysis to conclude that *Bauer* did not establish that a district court's failure to provide a limiting instruction to a jury on the use of relationship evidence is plain error.

Appellant also analogizes to prior opinions of this court which have addressed the need for limiting instructions on the jury's use of statutory relationship evidence admitted pursuant to Minn. Stat. § 634.20 (2016). *See State v. Barnslater*, 786 N.W.2d 646, 654 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010); *State v. Word*, 755 N.W.2d 776, 785-86 (Minn. App. 2008). Similar to the general relationship evidence at issue in this case, section 634.20 specifically permits the introduction of "[e]vidence of domestic conduct by the accused against the victim of domestic conduct, or against other family or household members" unless the capacity for unfair prejudice outweighs the probative value of such evidence. Minn. Stat. § 634.20. In both *Barnslater* and *Word*, this court held that the district court plainly erred by failing to instruct the jury on the proper use of section

634.20 evidence. 786 N.W.2d at 654; 755 N.W.2d at 785. The supreme court in *Zinski* noted that, although *Barnslater* and *Word* had found plain error, this court subsequently found in *State v. Melanson*, 906 N.W.2d 561, 568 (Minn. App. 2018), *review granted* (Minn. Mar. 28, 2018) *and appeal dismissed* (Minn. June 5, 2019), that failing to provide a limiting instruction did *not* constitute plain error. *Zinski*, 927 N.W.2d at 277. And "[b]ecause *Melanson* was released two weeks before the court of appeals issued its decision in Zinski's case, the court of appeals' case law at the time of appellate review was unsettled . . . [and] did not clearly require a district court to sua sponte instruct the jurors on the proper use of 634.20 evidence." *Id.* at 278.

This court released *Melanson* nearly a full year prior to this court's initial opinion in appellant's case. So for Zinski, the law at the time of appellate review was similarly unsettled as to whether a district court had to provide a limiting instruction on the use of relationship evidence. Thus, even if we were to accept appellant's invitation to rely by analogy on our past opinions involving section 634.20 evidence, *Zinski* would compel us to conclude that, like *Bauer*, these cases did not establish any clear mandate for district courts in this regard.[1] Accordingly, any error by the district court in failing to provide a limiting instruction to the jury on the use of the state's relationship evidence in appellant's case was not plain.

Affirmed.

[1] Although the *Zinski* court ultimately concluded that a district court plainly errs by failing to provide a jury with a limiting instruction on the use of section 634.20 evidence, it made its holding prospective and applicable only to trials held after the opinion's release.