This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1646

State of Minnesota,
Respondent,

vs.

David Eugene Richardson Jr.,
Appellant.

Filed November 6, 2023
Reversed and remanded
Connolly, Judge

Redwood County District Court
File No. 64-CR-21-551

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

Jenna M. Peterson, Redwood County Attorney, Travis J. Smith, William C. Lundy, Special Assistant County Attorneys, Slayton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leah C. Graf, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and Cleary, Judge.*

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant argues that the cumulative effect of plain errors in the admission of evidence was to prejudice the jury against him, depriving him of a fair trial. Because we agree that the cumulative effect of the errors was unduly prejudicial and affected appellant's substantial rights, we reverse and remand for a new trial.

FACTS

A jury found appellant David Richardson guilty of felony violation of a domestic abuse no-contact order (DANCO) and of third-degree witness tampering, and he was sentenced to 28 months in prison. Three items admitted into evidence at his trial are at issue here.

The first item is the affidavits of service of the DANCO that appellant was charged with violating, which prohibited his contact with the complainant, and of a subpoena indicating that the complainant was a witness in another criminal case in which appellant was the defendant. Neither the person who served the DANCO nor the person who served the subpoena testified. The parties agree that this violated the confrontation clause and was plain error, although they disagree as to whether it violated appellant's substantial rights and whether this court should address the error to ensure the fairness and integrity of our judicial proceedings.

The second item was an unredacted complaint and a warrant of commitment. The 2020 unredacted complaint charged appellant with two counts of felony domestic assault and stated that the charges were felonies and the maximum sentence was five years'

imprisonment and a $10,000 fine; the warrant of commitment showed that appellant was convicted of one count, the other count was dismissed, and appellant was placed on probation for five years.

The third item was the 158-page exhibit of appellant's text messages to and from the complainant while he was incarcerated. The messages stated that appellant: (1) was having other people interfere with the complainant; (2) abused the complainant and was inclined to dominate women; (3) stole from the complainant and took advantage of her financially; (4) had racist beliefs and was associated with white supremacist activity; (5) was involved sexually with a teenage girl and was a pedophile; and (6) was an evil person, a bad father, and generally undesirable.

Appellant argues that the cumulative effect of the three items was to unduly prejudice the jury and deprive him of a fair trial.

DECISION

None of the three items was objected to.

> When a defendant fails to object at trial, the forfeiture doctrine generally precludes appellate relief. . . . [But Minnesota appellate courts have] a limited power to correct errors that were forfeited. This limited power is known as the plain-error doctrine.
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> Under the plain-error doctrine, a defendant must establish (1) an error, (2) that is plain, and (3) that affects the defendant's substantial rights. When the defendant satisfies these requirements, an appellate court may correct the error *only* when it seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Pulczinski v. State, 972 N.W.2d 347, 355-56 (Minn. 2022) (quotations, citations, and footnote omitted).

We begin by observing that the cumulation of erroneously admitted evidentiary items makes this case not merely unusual, but rare.

> The supreme court has held that, in *rare* cases, "the *cumulative* effect of trial errors can deprive a defendant of his constitutional right to a fair trial when the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant's prejudice by producing a biased jury."

State v. Chauvin, 989 N.W.2d 1, 35 (Minn. App. 2023) (quoting *State v. Davis*, 820 N.W.2d 525, 539 (Minn. 2012)) (emphasis added), *rev. denied* (Minn. July 18, 2023).

"[W]e may be inclined to grant a defendant a new trial based on the cumulative effect of errors that do not individually require a new trial." *Davis*, 820 N.W.2d at 539; *see also State v. Johnson*, 441 N.W.2d 460, 466 (Minn. 1989) (stating that "[c]umulative error exists when the cumulative effect of the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant's prejudice by producing a biased jury" (quotation omitted)); *In re Welfare of D.D.R.*, 713 N.W.2d 891, 907 (Minn. App. 2006) ("Although we find no one individual error that requires a new trial, the cumulative effect of trial error requires a new trial."). "If there is a reasonable possibility that the verdict might have been more favorable to the defendant if the evidence had not been admitted, then the error in admitting the evidence was prejudicial error." *D.D.R.*, 717 N.W.2d at 904 (quotation omitted).

1. Affidavits of Service of the DANCO and the Subpoena

There is no dispute that the failure to have the servers of the DANCO and the subpoena testify violated appellant's right to confrontation. Although appellant said in a

text message that "they put a DANCO on me," the affidavit of service of the DANCO on him was not irrelevant because the text message did not indicate which DANCO it referred to, was never mentioned during the trial, and was not particularly noticeable in the midst of 158 pages of text messages. The affidavit of service of the DANCO made the jury aware that appellant knew of the DANCO when he violated it, a critical element of the state's case.

The affidavit of service of the subpoena was mentioned in the state's closing argument, and the jury was instructed to look at it: "[The complainant] was subpoenaed to testify and there [is an] affidavit[] of service of a subpoena, Exhibit 12" with the case number, "which you will find at the bottom of the subpoena." The declarant of the affidavit did not testify, and the affidavit was offered for the truth of the matter it asserted: it made indisputable the fact that the complainant had been subpoenaed to testify at another trial of appellant. The fact that the complainant had been contacted by appellant within 15 minutes of service corroborated appellant's tampering with a witness.

Thus, there is a real possibility that the verdicts on both charges might have been more favorable to appellant if the affidavits of service of the DANCO and of the subpoena had not been admitted as evidence, and the error in admitting them was therefore prejudicial to appellant. *See D.D.R.*, 713 N.W.2d at 904.

2. The Unredacted Complaint and Warrant of Commitment

> Evidence 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. "Domestic conduct" includes, but is not limited to, evidence of domestic abuse, [and] . . . violation of a [DANCO] under section 629.75 . . . .

Minn. Stat. § 634.20 (2022).

The purpose of admitting domestic-conduct evidence is putting a defendant's crime in the context of the relationship between the defendant and the victim. *State v. Zinski*, 927 N.W.2d 272, 278 (Minn. 2019). The complaint informed the jury that both counts of appellant's 2020 offense were felony-level domestic assault with maximum sentences of five years imprisonment and a $10,000 fine; that appellant was identified by the victim as her boyfriend; that she told police officer C.S. that appellant punched her in the face and had punched her and choked her previously; that she was afraid of appellant when he hit her; that appellant denied ever hitting her; and that appellant was arrested. The complaint went on to state that appellant had prior convictions for two DANCO violations. Police officer C.A. was the complainant. Neither police officer testified, was subjected to cross-examination, or was declared to be unavailable.

Minnesota Statutes section 634.20 says nothing about prior convictions and provides no basis for admitting the warrant of commitment. The warrant of commitment informed the jury that appellant had been convicted of one count of domestic assault, committed to a correctional facility for 18 months, stayed for five years, sentenced to 60 days in the county jail, placed on supervised probation for five years, and subject to 15 conditions. None of this information was evidence of domestic conduct admissible under the statute, nor did it provide information about the relationship between appellant and the complainant, notwithstanding the jury instruction that the warrant of commitment was

admitted only for the limited purpose of demonstrating the nature and extent of the relationship between appellant and the complainant.

The jury's attention was called to the warrant of commitment in the state's final argument, when the jury was told that one document was a complaint in a case in which appellant "was convicted of domestic assault and when you read that complaint you will read that he was convicted of hitting . . . [the complainant] in a car and leaving a mark on her face and I want you to pay attention to the details of that complaint."

Evidence of the facts and circumstances surrounding the 2020 incident did not include evidence that appellant was convicted as a result of the incident. In *State v. Melanson*, the state was allowed "to introduce evidence of the underlying facts of the 2014 terroristic threats conviction as relationship evidence at trial," but "was not allowed to inform the jury that appellant was convicted of a felony as a result." 906 N.W.2d 561, 566 (Minn. App. 2018), *rev. granted* (Minn. Mar. 28, 2018) and appeal dismissed (Minn. June 5, 2019). Here, the warrant of commitment was also irrelevant to the relationship of appellant and the complainant and informed the jury that appellant had been convicted of a felony. The warrant of commitment was erroneously admitted.

3. The Text Messages

The jury was not instructed on how or for what purpose jurors were to use the evidence in the 158 pages of text messages, and the declarant of many of the messages did not testify. The text messages included the complainant's statements to appellant that: (1) "having whoever follow and stalk me is about the absolute last straw"; (2) "my life's been left in shambles by you"; (3) "[Your] thing is absolutely having power and control, eg [you]

like to choke and tie women up”; (4) “I just wanna kill myself when I think of how callous and heinous [you] are”; (5) “Being with [you] has cleaned me and my parents out.” “My net worth when I met [you] was $240,000 and now it’s less than zero”; (6) “I know [you] stole a sh-t ton of money from me”; (7) “[You were] using the fact that I was mourning the loss of my fiancé against me so [you] could clean me out and burn me down”; (8) “[Y]ou have every white supremacist [in] the metropolitan area and beyond f****** trying to kill me trying to [get] me trying to run me into the ground you need to stop”; (9) “[B] was 16 when [you] began f-cking her”; (10) [C]hances are that b-tch is only about 16 or 17 so [appellant is] a predator dirtbag in the worst way. Pedophile”; and (11) “[Y]ou lie cheat steal and are a woman beater [you] didn’t raise [your] kids.”

Some of these statements were evidence of appellant’s prior bad acts, while others were character evidence. Prior bad act evidence is not admissible to show action in conformity with it, and is admissible for other purposes only if, among other things, the state gives notice of its intent to admit the evidence and indicates what the evidence is offered to prove, and the evidence is relevant and material to the state’s case—here, DANCO violation and witness tampering. *See State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006). The state did not indicate what the evidence was intended to prove, other than that appellant was in contact with the complainant.

But a complainant’s general testimony that is “only marginally relevant to establish” the charged crime and that is “devoid of detail as to time, place, circumstance or context—presents the risk of leading the jury to improperly conclude that [an] appellant has a propensity to behave criminally and should now be convicted, and punished, for the

charged offenses." *State v. Hormann*, 805 N.W.2d 883, 891 (Minn. App. 2011), *rev. denied* (Minn. Jun. 17, 2012); *see also Old Chief v. United States*, 519 U.S. 172, 180–81 (1997) (noting that (1) evidence of prior bad acts often "rais[es] the odds" that the defendant committed the charged act "or, worse," promotes "preventive conviction" regardless of guilt, and (2) creates "the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment" and "creates a prejudicial effect that outweighs ordinary relevance" (quotation omitted)); *State v. Townsend*, 546 N.W.2d 292, 296 (Minn. 1996) (holding that prolonged description of prior-crimes evidence was prejudicial because it improperly "inflame[d] the jury"); *State v. DeWald*, 464 N.W.2d 500, 504 (Minn. 1991) (noting that preventing a "conviction based on prejudice created by evidence of other crimes is the underlying purpose" for excluding such evidence).

The highly inflammatory material about appellant that appeared in the 158 pages of text messages, when added to the erroneously admitted affidavits of service of the DANCO and the subpoena and to the unredacted complaint and warrant of commitment in another matter, could have prejudiced the jury against appellant and thus provided a reasonable possibility that the verdict would have been more favorable to appellant if it had been excluded. *See D.D.R.*, 713 N.W.2d at 904.

Based on the cumulation of these plain evidentiary errors, we believe that appellant's substantial rights were violated and that we must address these errors to ensure the fairness and integrity of our judicial proceedings. Appellant is entitled to a new trial.

Reversed and remanded.