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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-263**

State of Minnesota,
Respondent,

vs.

Raul Aguilar, Jr.,
Appellant.

**Filed February 21, 2012
Affirmed; motion granted
Worke, Judge**

Clay County District Court
File No. 14-CR-10-2410

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

Brian J. Melton, Clay County Attorney, Heidi M. Fisher Davies, Assistant County Attorney, Moorhead, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Renée Bergeron, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Stoneburner, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his conviction of second-degree assault, arguing that: (1) the district court erred by admitting testimonial evidence in violation of the Confrontation

Clause; (2) the district court abused its discretion by admitting relationship evidence; (3) the district court plainly erred by failing to give the jury a cautionary instruction on the proper use of relationship evidence; (4) the prosecutor committed misconduct throughout the trial; and (5) the cumulative effect of these errors deprived him of a fair trial. Appellant also moves to strike a portion of the state's brief. We grant appellant's motion to strike, but affirm his conviction.

FACTS

On July 6, 2010, 21-year old O.A. called 911 to report that appellant Raul Aguilar, Jr., O.A.'s father, was trying to kill him with a knife. Appellant was in the kitchen making food when O.A. entered and an argument started. Appellant threatened O.A. with a knife. O.A. then locked himself in an adjacent bedroom where his mother was resting and called the police. O.A. informed the dispatcher that appellant "has a knife and he's trying to kick the door down," and pleaded for the police to be sent quickly.

The dispatcher told O.A. that officers were on their way. The dispatcher asked if appellant was drunk and O.A. responded that appellant was on prescription medication and had been drinking. The dispatcher asked if appellant was still in the home and if there was anyone else in the home. O.A. responded that appellant remained outside of the bedroom where he and his mother were located. The dispatcher asked if appellant had been physical like this before. O.A. responded that appellant had been physically violent in the past, and that the family had "been looking for . . . some way to talk to the VA Hospital and they say we can't take him off of any medications." O.A. added, "And they don't know how, what we have to live with." Police arrived at the home while the

dispatcher was still on the phone with O.A. The dispatcher told O.A. to wait in the bedroom until the police had control and then she ended the call. After appellant was placed in custody, a second officer spoke with O.A. and his mother in the bedroom.

Appellant was charged with assault in the second-degree with a dangerous weapon, in violation of Minn. Stat. § 609.222, subd. 1 (2008), and terroristic threats reckless disregard of risk, in violation of Minn. Stat. § 609.713, subd. 1 (2008). Appellant moved to suppress the evidence of his previous domestic-assault convictions. The district court denied appellant's motion. Before trial, the state moved to admit the 911 phone call into evidence. Over appellant's objection, the district court concluded that the 911 call was nontestimonial and met a hearsay exception. Appellant testified at trial. On cross-examination, appellant admitted that he was convicted of domestic assault in 2003 and 2006, and also interfered with a 911 call in 2008. Although the state subpoenaed both O.A. and appellant's wife, neither appeared at trial. Appellant was found guilty on both counts. This appeal follows.

DECISION

Motion to Strike

We begin by addressing appellant's motion to strike. Appellant moved to strike the following statement from the state's brief: "During his testimony, the appellant demonstrated what he did with the knife, indicating a slashing motion rather than a stabbing motion." Appellant claims that the record does not describe any hand motion he made during his testimony, nor does the record otherwise support this assertion. Appellant is correct in this contention, and appellant's motion to strike is granted.

911 Call

Appellant asserts that his constitutional rights were violated by the admission of O.A.'s 911 phone call because O.A. was not available to testify at trial. The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. In *Crawford v. Washington*, the Supreme Court interpreted the Confrontation Clause as barring the “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had . . . a prior opportunity for cross-examination.” 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365 (2004). The critical question under *Crawford* is whether the statement at issue is testimonial. *Davis v. Washington (Davis/Hammon)*, 547 U.S. 813, 821, 126 S. Ct. 2266, 2273 (2006) (holding that nontestimonial out-of-court statements are subject to hearsay limitations but are not subject to the Confrontation Clause); *State v. Tscheu*, 758 N.W.2d 849, 864 (Minn. 2008).

In *Davis/Hammon*, the Supreme Court explained that whether a statement is testimonial turns on the primary purpose served by the statement. 547 U.S. at 822, 126 S. Ct. at 2273-74. The Court elaborated:

Statements are nontestimonial . . . under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to

establish or prove past events potentially relevant to later criminal prosecution.

Id.; see also *State v. Wright*, 726 N.W.2d 464, 472 (Minn. 2007). We analyze 911 phone calls on a case-by-case basis to determine whether they contain testimonial statements. See *Wright*, 726 N.W.2d at 473-74. “[W]hether the admission of evidence violates a criminal defendant’s rights under the Confrontation Clause is a question of law this court reviews de novo.” *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

Appellant challenges the admission of O.A.’s statements made in response to the question of whether appellant had been physically abusive in the past. Appellant argues that the emergency had subsided at this point in the phone call. Because there was no ongoing emergency when O.A. responded to the question, appellant asserts that O.A.’s reply was testimonial and, thus, inadmissible under *Crawford*. See generally *State v. Warsame*, 735 N.W.2d 684, 695 (Minn. 2007) (holding that a statement that begins as nontestimonial because it concerns an ongoing emergency may evolve into a testimonial statement as the emergency is resolved).

But, as the state argues, the 911 call was brief and happened while the appellant was outside the bedroom door with a knife in hand. Before the police arrived at the scene, the dispatcher asked O.A. several questions to assess the situation. Although O.A. said at one point that he was safe, he repeatedly told the dispatcher that appellant was outside of the room. The dispatcher ended the call once officers arrived at the scene. The officers found appellant still in the kitchen and O.A. and his mother in the adjacent bedroom. The primary purpose of the dispatcher’s questioning was to assist police in an

ongoing emergency. Accordingly, we conclude that the 911 call was nontestimonial; the district court did not err in this respect.

Hearsay

Appellant alternatively argues that O.A.'s statements were inadmissible because they do not meet a hearsay exception. 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(c). Hearsay is inadmissible unless it falls within one of several exceptions. *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006) (citing Minn. R. Evid. 802, 803, and 804). An excited utterance, "[a] statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition," is not excluded by the hearsay rule. Minn. R. Evid. 803(2). We will not reverse a district court's evidentiary ruling absent a clear abuse of discretion. *Caulfield*, 722 N.W.2d at 308.

Although the 911 call lasted for five minutes, O.A.'s statements were all made while under the stress imposed by appellant's presence outside of the bedroom. The district court did not err in admitting O.A.'s statements as excited utterances. Appellant's argument fails; thus, the district court properly admitted the 911 phone call in its entirety.

Relationship Evidence

Appellant also argues that the district court abused its discretion by admitting relationship evidence because the probative value was substantially outweighed by unfair prejudice and the likelihood of misleading the jury. Minn. Stat. § 634.20 (2010) provides that: "Evidence of similar conduct by the accused against the victim of domestic abuse,

or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury[.]” Unfair prejudice requires more than merely 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). Evidence of the accused’s domestic abuse may be admitted to depict the relationship between the accused and the alleged victim and to provide context for the jury to “better judge the credibility” of the individuals. *State v. McCoy*, 682 N.W.2d 153, 161 (2004) (reasoning that a history of domestic abuse may prevent victim from testifying truthfully). Evidentiary rulings rest within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Palubicki*, 700 N.W.2d 476, 485 (Minn. 2005).

Appellant argues that the state failed to explain that O.A. was the victim in only one of appellant’s prior offenses; thus, the evidence did not demonstrate the history of appellant and O.A.’s relationship. But evidence showing how appellant treats one member of the household sheds light on how appellant treats any member of the household. And Minn. Stat. § 634.20 only requires that the evidence of similar conduct by the accused be against the victim *or* other family or household members. (Emphasis added.) The state is not required to differentiate prior offenses by victim. Thus, appellant’s argument fails.

Jury Instructions

Appellant next argues that the district court erred when it admitted the relationship evidence without instructing the jury on its proper use. Appellant did not request a cautionary instruction and did not object to the final jury instruction at trial. “[A] failure to object will not cause an appeal to fail if the instructions contain plain error affecting substantial rights or an error of fundamental law.” *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). Accordingly, our analysis is governed by the plain-error test. *Id.*

Plain error exists if the district court commits a clear or obvious error that affects the appellant’s substantial rights. *State v. Barnslater*, 786 N.W.2d 646, 653 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010). Plain error affects a defendant’s substantial rights if it was prejudicial and had a significant effect on the jury’s verdict. *Id.* We will “look at the entire record to determine if there is a significant likelihood that the jury misused the evidence.” *State v. Meldrum*, 724 N.W.2d 15, 21-22 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007).

“The purpose of a cautionary instruction is to ensure that the jury uses the other-crimes evidence solely for the permissible purpose and not to convict the defendant for prior bad acts.” *Id.* at 22. “A district court should instruct the jury regarding the proper use of relationship evidence presented under section 634.20 both when the evidence is received and in the final jury instruction.” *Barnslater*, 786 N.W.2d at 653.

Here, the district court did not provide a limiting instruction to the jury when the relationship evidence was received or during the district court’s final jury instructions. As such, appellant correctly contends that the district court committed plain error by

contravening case law. The state concedes that the district court should have instructed the jury about the limited use of relationship evidence; thus, appellant establishes plain error.

Appellant, however, fails to establish that the district court's plain error prejudiced his substantial rights. *See State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998) (stating that plain error must affect substantial rights to warrant reversing a conviction). The relationship evidence was introduced to impeach appellant's statement that he had never fought with his family, and the prosecutor never mentioned the prior convictions again. Moreover, the evidence supporting appellant's guilt on the charged offense was overwhelming. O.A. called 911, reporting that appellant "ha[d] a knife and he's trying to kick the door down." O.A. then pleaded for the dispatcher to send someone quickly. Further, the district court's jury instructions, emphasizing a conviction based on the specific offense, decreased the risk that the relationship evidence significantly affected the jury's verdict. *See Barnslater*, 786 N.W.2d at 654. Accordingly, appellant fails to demonstrate that the district court's plain error prejudiced appellant's substantial rights.

Prosecutorial Misconduct

Appellant next argues that the prosecutor committed misconduct throughout the trial. Appellant did not object to the prosecutor's alleged misconduct at trial. Prosecutorial misconduct which was not objected to is analyzed under the plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). Prosecutorial error "is plain if it was clear or obvious" by "contraven[ing] case law, a rule, or a standard of conduct." *Id.* at 302 (quotation omitted).

Appellant contends that the prosecutor committed misconduct on three occasions. First, appellant argues the prosecutor made dramatic arguments in her opening statements that mischaracterized the evidence, and that the prosecutor knew the statements were not supported by admissible evidence. “A prosecutor commits misconduct by intentionally misstating evidence.” *State v. Mayhorn*, 720 N.W.2d 776, 788 (Minn. 2006). “But it is not prejudicial error when a prosecutor discusses expected testimony in his opening statement but does not produce the evidence at trial.” *State v. Nissalke*, 801 N.W.2d 82, 104 (Minn. 2011).

In the prosecutor’s opening statement, she told the jury that they would hear on the 911 call that O.A. was “chased . . . into the bedroom” and that O.A. locked the door while appellant “was screaming outside the door, pushing [a] knife through the door.” Appellant claims that the prosecutor knew or should have known that there was no reference to appellant knifing the door or chasing O.A. It was reasonable, however, for the prosecutor to believe evidence supporting her statements would be introduced at trial. The prosecutor offered into evidence police photographs showing scratches on the door and the prosecutor expected appellant’s wife and O.A. to testify about the event because both were subpoenaed. Appellant, thus, fails to show that the prosecutor’s statements were plain error.

Second, appellant argues that the prosecutor knowingly offered inadmissible evidence of police photographs displaying long scratches on the bedroom door in the home. Appellant claims that no foundational evidence existed to show appellant tried to push a knife through the door. The prosecutor admitted photographs of the door along

with other photographs taken at the scene after the incident. The prosecutor, however, did not comment on the damage to the door, nor did the prosecutor ask the photographing officer about what caused the damage. Appellant's argument fails to demonstrate that the prosecutor's conduct constituted plain error.

Third, appellant argues that the prosecutor inflamed the jury by suggesting the family was routinely abused by the appellant, resulting in a conviction based on appellant's character and not the evidence. "When reviewing claims of prosecutorial misconduct during closing argument, we consider the argument as a whole, rather than focusing on particular phrases or remarks that may be taken out of context or given undue prominence." *State v. Jones*, 753 N.W.2d 677, 691 (Minn. 2008) (quotation omitted). The closing argument "must be based on the evidence produced at trial, or the reasonable inferences from that evidence." *State v. Porter*, 526 N.W.2d 359, 364 (Minn. 1995). A prosecutor must avoid inflaming the jury's passions and prejudices against the defendant. *Id.* at 363.

In closing argument, the prosecutor paraphrased O.A.'s statement, "they don't know what we have to live with," several times and added, "you saw a slice of what [O.A. and appellant's wife] have to live with today." The prosecutor's statement paraphrasing O.A. is directly from the 911 phone call which we determined was properly admitted into evidence. The prosecutor's reiteration of this statement and the inference drawn from it were within the appropriate boundaries of a prosecutor's closing argument. Further, the prosecutor's remarks taken as a whole accurately described the evidence

presented and show the prosecutor emphasized finding guilt based on appellant's actions. Appellant fails to demonstrate that the prosecutor's statements resulted in plain error.

Cumulative Error

Appellant argues that cumulative trial errors deprived him of a fair trial and entitle him to a new trial. "Cumulative error exists when the cumulative effect of the . . . errors and indiscretions, none of which alone might have been enough to tip the scales, operate[s] to the defendant's prejudice by producing a biased jury." *State v. Johnson*, 441 N.W.2d 460, 466 (Minn. 1989) (quotation omitted). A new trial is not warranted when "errors did not affect the jurors' deliberations or their assumption about appellant's innocence or guilt." *State v. Erickson*, 610 N.W.2d 335, 341 (Minn. 2000).

As discussed above, appellant only demonstrates that the district court erred in failing to give a jury instruction regarding relationship evidence. Our review of the record establishes that the error did not prejudice appellant's substantial rights and, therefore, had no significant impact on the verdict rendered. Appellant, as a result, was provided a fair trial. Appellant's cumulative-error argument is unavailing.

Affirmed; motion granted.