STATE OF MINNESOTA
IN COURT OF APPEALS
A11-9

State of Minnesota,
Respondent,

vs.

Jeneice Alisha Muchow,
Appellant.

Filed December 27, 2011
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge

Clay County District Court
File No. 14-CR-10-1277

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

Brian J. Melton, Clay County Attorney, Pamela Harris, Moorhead, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Schellhas, Judge; and Crippen, Judge.*

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

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

BJORKMAN, Judge

Appellant challenges her two domestic-assault convictions, arguing that (1) the prosecutor committed multiple instances of misconduct, (2) the district court abused its discretion by admitting relationship evidence, (3) the district court plainly erred by failing to properly instruct the jury on relationship evidence, (4) the district court erred by failing to analyze on the record the impeachment use of appellant's prior convictions, and (5) the district court erred by imposing multiple convictions for the same criminal conduct. Because we discern no prejudicial trial errors, we affirm appellant's felony conviction. But because the district court erred in also entering a conviction for the lesser-included misdemeanor offense, we reverse in part and remand for vacation of that conviction.

FACTS

Appellant Jeneice Muchow was charged with felony domestic assault by strangulation and misdemeanor domestic assault based on an April 12, 2010 altercation with T.S., her live-in girlfriend. Muchow had been drinking alcohol throughout the day and became violent late that evening, hitting and punching T.S. and biting her forehead. At one point, Muchow grabbed T.S.'s head and "slammed" it into the tile floor, then grabbed T.S.'s throat with both hands, restricting her air flow for approximately 15 to 25 seconds. T.S. escaped, but Muchow grabbed her again several minutes later, kneeling on T.S.'s hair while twisting her shirt around her neck and punching the side of her body. T.S. told Muchow to stop, then punched Muchow in the face when she did not.

T.S. subsequently went to the hospital, and hospital personnel contacted the police to investigate the incident. Two police officers interviewed T.S. at the hospital. One of them, Officer Cassandra Guck, also went to the jail where Muchow was being held to obtain her statement. Upon seeing Officer Guck, Muchow declared that she did not want to talk to her and did not want her to take any photographs. Two days later, Muchow asked Officer Guck to photograph her injuries. At that time, Officer Guck observed that Muchow had a black eye and various bruises on her face, right shoulder, right thigh, and in her mouth.

At trial, Muchow admitted fighting with T.S. but claimed that they were engaged in "mutual combat" and that she was acting in self-defense. The jury found Muchow guilty of both domestic-assault offenses. The district court convicted Muchow of both offenses and sentenced her to 32 months' imprisonment on the strangulation conviction. This appeal follows.

D E C I S I O N

I. The prosecutor did not commit prejudicial misconduct.

Muchow argues that the prosecutor committed unobjected-to misconduct by remarking on Muchow's post-arrest silence, mischaracterizing evidence in the record, and making inflammatory arguments to the jury. We review claims of prosecutorial misconduct based on unobjected-to conduct under a modified plain-error standard. Minn. R. Crim. P. 31.02; *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). To establish plain error, an appellant must demonstrate that the challenged conduct was erroneous and the error was plain. *Ramey*, 721 N.W.2d at 302. An error is plain if it is "clear" or

"obvious." *Id.* (quotation omitted). If the appellant establishes plain error, the burden then shifts to the state to prove that the error did not affect the appellant's substantial rights. *Id.* at 300. An error affects substantial rights if it was "prejudicial and affected the outcome of the case." *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002). We will reverse only when the alleged prosecutorial misconduct, "viewed in light of the entire record, is of such serious and prejudicial nature that appellant's constitutional right to a fair trial was impaired." *State v. Haynes*, 725 N.W.2d 524, 529 (Minn. 2007) (quotation omitted).

Post-arrest silence

Muchow first argues that the prosecutor improperly elicited testimony regarding her post-arrest silence and improperly commented on it during closing argument. Both the United States Constitution and the Minnesota Constitution guarantee a defendant's right to remain silent. U.S. Const. amend. V; Minn. Const. art. I, § 7. To protect that right, the law generally prohibits the state presenting evidence of the defendant's silence. *State v. Dobbins*, 725 N.W.2d 492, 509 (Minn. 2006). But the United States Supreme Court and our supreme court have identified certain circumstances in which such evidence is admissible, either as impeachment evidence or as direct evidence of guilt. *See id.* at 510 (collecting cases). Because of the nuances of "silence," admissibility turns on a number of factors, including whether (1) the defendant was in custody at the time, (2) the defendant received a *Miranda* warning, (3) the defendant was acting on advice of counsel, and (4) the government conduct toward the defendant amounted to official compulsion to speak. *See Fletcher v. Weir*, 455 U.S. 603, 607, 102 S. Ct. 1309, 1312

(1982) (holding that post-arrest, pre-*Miranda* silence may be used for impeachment without violating due process); *Jenkins v. Anderson*, 447 U.S. 231, 238, 240, 100 S. Ct. 2124, 2129, 2130 (1980) (holding that pre-arrest silence may be used for impeachment without violating the Fifth Amendment or due process); *Doyle v. Ohio*, 426 U.S. 610, 617-19, 96 S. Ct. 2240, 2244-45 (1976) (holding that government's use of defendant's post-arrest, post-*Miranda* silence for impeachment violates due process); *State v. Borg*, ___ N.W.2d ___, ___, 2011 WL 5560172, at *1, *7 (Minn. Nov. 14, 2011) (holding that use in state's case-in-chief of pre-arrest silence in the absence of government compulsion to speak does not violate the Fifth Amendment, citing Justice Stevens's *Jenkins* concurrence); *State v. Billups*, 264 N.W.2d 137, 139 (Minn. 1978) (following *Doyle* to preclude impeachment by post-*Miranda*, counseled silence).

The record is unclear as to whether and to what extent the challenged testimony and argument implicate these factors. In response to the prosecutor's question as to what she did after interviewing T.S., Officer Guck testified that she went

> over to the Cass County Jail to speak with [Muchow] to see if she could give me a statement of what happened, tell me her side of the story. Immediately when I got there she saw me and said she didn't want any photos and she didn't want to make a statement.

The prosecutor referenced this testimony during closing argument by stating, "The officer said when she first had contact with [Muchow], [Muchow] didn't want her to even take a picture of her." But these references establish only that Muchow was in custody when she invoked her right to silence. Nothing in the record indicates why Muchow was in

jail,[1] whether she had received a *Miranda* warning, whether she had spoken with counsel, or whether Muchow was aware that Officer Guck was coming to obtain a statement regarding the incident with T.S. On this record, we cannot discern whether the testimony and argument about Muchow's silence was error.

However, we are able to evaluate prejudice. *See State v. Morrison*, 351 N.W.2d 359, 362 (Minn. 1984) (stating that the absence of a record indication as to whether defendant received a *Miranda* warning precluded a determination on the merits, but affirming because any error "clearly was nonprejudicial"). The challenged testimony and argument, even considered together, were very brief, amounting to no more than two sentences in the entire trial. When compared to T.S.'s detailed testimony as to Muchow's assaultive conduct and the photographic evidence of T.S.'s resulting injuries, the fact of Muchow's post-arrest silence played a minor role in the trial. *See Dobbins*, 725 N.W.2d at 510, 513 (concluding that unobjected-to impeachment by silence violated *Billups* but did not impair substantial rights because "the line of questioning was limited—seven questions"). Moreover, the evidence against Muchow was strong because she freely admitted that she punched T.S. in the mouth, put T.S. in a "head lock," and "could have" twisted T.S.'s shirt around her neck. Based on our review of the record, we conclude that the challenged testimony and argument did not impair Muchow's substantial rights.

[1] Testimony from multiple witnesses strongly suggests but does not specifically establish that Muchow was in jail because of a bail violation related to a Cass County, North Dakota offense, not because of the incident with T.S. If that is the case, it may be less likely that she was given a *Miranda* warning prior to her brief contact with Officer Guck.

Mischaracterizing evidence

Muchow next asserts that the prosecutor mischaracterized Officer Guck's testimony regarding her observations of Muchow's injuries. "A prosecutor commits misconduct by intentionally misstating evidence." *State v. Mayhorn*, 720 N.W.2d 776, 788 (Minn. 2006). But a prosecutor may argue all reasonable inferences from the evidence in the record. *See id*. at 792.

Officer Guck testified that she observed bruises on Muchow's left eye, other places on her face, her right shoulder, her right thigh, and inside her mouth. The prosecutor later cross-examined Muchow by comparing Officer Guck's description of Muchow's bruises with Muchow's testimony that she was "bruised from head to toe." And during closing argument, the prosecutor stated:

> Muchow told you that she was bruised from head to toe. The officer didn't tell you that. . . . Now [T.S.] told you that, yeah, she punched her one time in the eye. That was clear from the photograph taken by the officer. But bruised from head to toe? Bruises behind the ears? The officer didn't testify she saw any of that. She said she saw a bruise on the thigh, a little bit on the shoulder, and a black eye.

Muchow argues that the prosecutor's question and closing argument misstated Officer Guck's testimony. We disagree.

Officer Guck's testimony about Muchow's bruises could reasonably be viewed as something less than "head to toe" bruising, and both the prosecutor's questions and her argument invite the jury to compare Officer Guck's testimony to Muchow's testimony and the other evidence of Muchow's injuries in determining the extent of Muchow's

injuries and their likely cause. This is well within the realm of proper questioning and argument, and Muchow's claim of plain error fails.

Inflammatory argument to the jury

Finally, Muchow argues that the prosecutor's comments on Muchow's sexual orientation and relationship with T.S. during closing argument were prejudicial and inflammatory. "A prosecutor must not appeal to the passions of the jury." *Id.* at 786-87. Accordingly, while a prosecutor may explain or otherwise prepare the jury for unfamiliar concepts, a prosecutor may not invite the jury to consider factors such as the defendant's race or socioeconomic background in making its decision. *Id.* at 789 (discussing the appropriateness of "prepar[ing] the jury for evidence of an unfamiliar world involving drugs" (quotation omitted)). Nor may the prosecutor align herself with the jury as against the defendant. *Id.* at 790.

Muchow challenges the following portion of the prosecutor's argument: "Obviously, when you were told this morning that this was a case of domestic assault that involved two women, you thought it was maybe a little unusual, and then you heard the evidence and probably got a peek into a world that you didn't know really existed in Clay County." The state does not dispute that highlighting a defendant's sexual orientation is improper under *Mayhorn*, but argues that the prosecutor intended merely to prepare the jury for the arguments concerning a couple that was "very strange," not because of their sexual orientation but because of their living habits, including Muchow's excessive alcohol use. Although it is unclear from the transcript whether the prosecutor attempted to highlight Muchow's sexual orientation or her lifestyle, we conclude that both purposes

are improper. *See id.* at 789-90 (noting that it is improper for a prosecutor to comment on a defendant's character except insofar as it bears on a testifying defendant's credibility). And because *Mayhorn* plainly prohibits such argument, we also conclude that the prosecutor's argument constitutes plain error.

But this conclusion does not end our analysis. Rather, we look to the prosecutor's closing argument as a whole to determine whether the error prejudiced Muchow's substantial rights. *See State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). The improper portion of the prosecutor's argument was only a small portion of an argument that focused heavily on the elements of the offenses, the extensive testimony and photographic evidence of the violent acts Muchow committed against T.S., Muchow's claim of self-defense, and the factors that bear on Muchow's and T.S.'s credibility. On this record, we conclude that the prosecutor's error in drawing the jury's attention to improper considerations did not impair Muchow's substantial rights.

II. The district court did not abuse its discretion by admitting relationship evidence.

Muchow challenges the district court's admission of evidence of an incident between Muchow and T.S. that occurred on June 6, 2010—two months after the charged offenses. A district court may admit evidence of similar conduct by a defendant against an alleged victim of domestic abuse unless the probative value of the evidence is "substantially outweighed by the danger of unfair prejudice" to the defendant. Minn. Stat. § 634.20 (2010). Such relationship evidence is offered to illuminate the relationship between an accused and an alleged victim. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn.

2004). We will not reverse a district court's decision to admit relationship evidence unless the appellant establishes that the district court abused its discretion and that appellant was thereby prejudiced. *State v. Lindsey*, 755 N.W.2d 752, 755 (Minn. App. 2008), *review denied* (Minn. Oct. 29, 2008).

Muchow argues that the probative value of the evidence was substantially outweighed by its danger of unfair prejudice because (1) the June 6 incident "closely paralleled" the circumstances of the charged offense, (2) the district court failed to give a contemporaneous cautionary instruction, (3) the June 6 incident occurred after the charged offense, and (4) Muchow could not defend against the evidence without forfeiting her right against self-incrimination because she faced pending charges based on the June 6 incident. We address each argument in turn.

First, the similarity of the two incidents does not preclude admission of the June 6 evidence. The relationship-evidence statute not only requires that the evidence be "similar" to the charged conduct but makes such evidence presumptively admissible. *See* Minn. Stat. § 634.20. And the supreme court has recognized that relationship evidence provides a context in which the jury can "better judge the credibility of the principals in the relationship." *McCoy*, 682 N.W.2d at 161. Because this case turned almost entirely on the relative credibility of T.S. and Muchow, the relationship evidence was particularly relevant.

Second, the failure to provide a contemporaneous cautionary instruction does not materially alter our analysis of the district court's admission of the evidence. As we discuss below, the district court provided a cautionary instruction to the jury in its final

instructions and the prosecutor reinforced that instruction during closing argument by stating that the jury was to decide Muchow's guilt based only on the evidence of the April 12 incident. This guidance adequately focused the jury on the proper use of the evidence.

Third, the statute contains no temporal restriction. Accordingly, relationship evidence may include conduct before or after the incident giving rise to the charged offense. *Lindsey*, 755 N.W.2d at 756. The mere fact that the June 6 incident occurred after the charged offense does not preclude its admission as relationship evidence.

Fourth, the fact that Muchow faced pending charges based on the June 6 incident does not, in and of itself, mandate exclusion of the evidence. Muchow did not argue that her right against self-incrimination was implicated, and the district court granted her request to exclude evidence of the charges themselves. She cites no authority for a blanket prohibition against admission of relationship evidence if there are charges pending based on the "similar conduct." Nor would a blanket prohibition be appropriate; the pendency of the charges suggests that the "similar conduct" was close in time to the charged offense and serious enough to support criminal charges—both of which bolster the relevance of the evidence. In short, the district court's failure to exclude the evidence because of the pending charges does not constitute abuse of discretion.

III. The district court did not commit prejudicial plain error by failing to instruct the jury on relationship evidence when the evidence was admitted.

"Upon admittance of relationship evidence, even in the absence of a request from counsel, the district court should provide a cautionary instruction when the evidence is

admitted, and again during its final charge to the jury." *State v. Meldrum*, 724 N.W.2d 15, 21 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). After *Meldrum*, the failure to give a cautionary instruction is plain error. *See State v. Barnslater*, 786 N.W.2d 646, 654 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010).

The district court cautioned the jury about the relationship evidence only at the end of the trial. Based on *Meldrum* and *Barnslater*, the failure to caution the jury about the limited use of the June 6 evidence at the time it was admitted constitutes plain error. Accordingly, we consider whether the error prejudiced Muchow's substantial rights. *Id.* at 653 (citing *Meldrum*, 724 N.W.2d at 22) (stating that failing to give a cautionary instruction "does not automatically constitute plain error affecting the defendant's substantial rights, particularly when other evidence demonstrates that the probative value of the relationship evidence is not outweighed by its potential for unfair prejudice"). First, as noted above, the evidence of the June 6 incident was highly probative, and Muchow has not demonstrated that the potential for unfair prejudice from that evidence substantially outweighed the probative value. Second, the district court properly cautioned the jury in its final instructions about the limited use of the evidence. We presume that the jury followed the district court's instruction. *See State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002). Third, the prosecutor, during closing argument, echoed the district court's limiting instruction. On this record, Muchow is not entitled to relief based on the district court's failure to provide a cautionary instruction at the time the evidence was admitted.

IV. The district court's failure to analyze on the record the admissibility of Muchow's prior felony convictions for impeachment was harmless error.

A district court may admit evidence of a defendant's prior convictions for impeachment on a determination that the crime either (1) was punishable by imprisonment of over one year and "the probative value of admitting this evidence outweighs its prejudicial effect" or (2) involves dishonesty or false statement. Minn. R. Evid. 609(a). In determining whether the probative value of a conviction outweighs its prejudicial effect, a court considers

> (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility of the issue.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978). "[A] district court should demonstrate on the record that it has considered and weighed the *Jones* factors." *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006). We review for an abuse of discretion the district court's admission of prior convictions for impeachment purposes. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998).

Muchow argues that the district court's failure to make a record of the *Jones* analysis before admitting evidence of Muchow's two prior felony convictions entitles her to a new trial.[2] If a district court fails to conduct an analysis of the *Jones* factors, an

[2] The felony convictions at issue are convictions of theft and fifth-degree controlled-substance crime, but the district court permitted only evidence that Muchow had two prior felonies, without identifying the offenses. The district court also admitted

appellate court may review the factors to determine whether the error is harmless. *Id.* "[T]he error is harmless if the conviction could have been admitted after a proper application of the *Jones*-factor analysis." *State v. Vanhouse*, 634 N.W.2d 715, 719 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). Accordingly, we consider the record with respect to the *Jones* factors.

Impeachment value of the prior crime

"[I]mpeachment by prior crime aids the jury by allowing it to see the whole person and thus to judge better the truth of his testimony." *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979) (quotation omitted). The "whole person" analysis recognizes that "abiding and repeated contempt for laws [that one] is legally and morally bound to obey" demonstrates a lack of trustworthiness. *Id.* (quotation omitted). And the supreme court recently reaffirmed that "*any* felony conviction is probative of a witness's credibility, and the mere fact that a witness is a convicted felon holds impeachment value." *State v. Hill*, 801 N.W.2d 646, 651-52 (Minn. 2011) (holding that a district court may permit impeachment with an unspecified felony conviction because rule 609 does not require that the conviction be specified and the common law recognizes the inherent relevance of a felony conviction). Based on these general principles and because Muchow's felony convictions were two among a series of recent offenses, the convictions are relevant to Muchow's credibility. We conclude that this factor favors admission.

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convictions of providing false information to a police officer and multiple forgery convictions, which are admissible as involving dishonesty or false statement. *See* Minn. R. Evid. 609(a). Muchow does not challenge the admission of those convictions.

Date of the conviction and the defendant's subsequent history

The felony convictions at issue were from 2003 and 2005, which is within the ten-year limit indicated in rule 609 and recent enough to bear on testimony in 2010. These convictions also are part of an unbroken pattern of criminal conduct that stretches from 2003 to 2010, some of which was presented to the jury in the form of Muchow's multiple convictions of misdemeanor offenses involving dishonesty. We conclude that this factor also weighs in favor of admission.

Similarity of the past crime with the charged crime

"The danger when the past crime is similar to the charged crime is that the likelihood is increased that the jury will use the evidence substantively rather than merely for impeachment purposes." *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980). This concern is not an issue here because the jury was not informed of the nature of the prior offenses. We therefore conclude that this factor is neutral.

Importance of defendant's testimony and centrality of credibility

Courts commonly consider the fourth and fifth *Jones* factors together. *E.g.*, *Swanson*, 707 N.W.2d at 655. "If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions." *Id.* This case pitted Muchow's testimony directly against T.S.'s testimony, making credibility extremely important. Accordingly, these factors weigh in favor of admission here.

On balance, the *Jones* factors support admission of the brief impeachment testimony regarding Muchow's two prior felony convictions. On this record, we

conclude that the district court's error in failing to make a record of its *Jones* analysis is harmless.

V. The district court erred by imposing multiple convictions for the same criminal conduct.

Muchow argues that the district court erred by imposing multiple convictions because the misdemeanor domestic assault is a lesser-included offense of the felony domestic assault by strangulation. The state concedes that Muchow's misdemeanor conviction must be vacated. We agree.

"Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2008). An included offense is one "necessarily proved if the crime charged were proved." *Id.*, subd. 1(4).

The offense of domestic assault by strangulation involves an assault against a family or household member by "intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person." Minn. Stat. § 609.2247, subds. 1(c), 2 (2008). Because misdemeanor domestic assault involves an assault against a family or household member, Minn. Stat. § 609.2242, subd. 1 (2008), it is impossible to commit domestic assault by strangulation without committing domestic assault. *See State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). We, therefore, reverse and remand for vacation of Muchow's misdemeanor domestic-assault conviction.

Affirmed in part, reversed in part, and remanded.