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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1189

State of Minnesota,
Respondent,

vs.

Don Antoine Jones,
Appellant.

Filed June 17, 2013
Affirmed
Stauber, Judge

Scott County District Court
File No. 70CR1028231

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

Patrick J. Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

David Merchant, Chief State Public Defender, Theodora Gaïtas, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Connolly, Judge; and Stauber, Judge.

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

STAUBER, Judge

On appeal from his convictions of stalking and violating an order for protection, appellant alleges that the prosecutor committed misconduct at trial by making prejudicial

statements about appellant and by eliciting inadmissible testimony and that the district court erred by imposing consecutive sentences for offenses stemming from a single behavioral incident. Because the prosecutor's statements did not constitute plain error, and because appellant's convictions qualify for permissive consecutive sentencing under the Minnesota Sentencing Guidelines, we affirm.

FACTS

Appellant Don Antoine Jones and S.J. were married in 2009 and have two children together. In September 2010, S.J. informed appellant that she wanted a divorce. S.J. began to feel threatened and frightened by appellant's conduct toward her, and on October 11, 2010, she requested an order for protection. The district court granted the order for protection and served appellant with the order on October 13, 2010.

Appellant continued to call, text, and visit S.J. at her home and at work. Specifically, on or about October 16, 2010, appellant contacted S.J. via text message. At the time, S.J. was working as a security officer at the Trail of Terror, a Halloween attraction in Shakopee. One of appellant's texts to S.J. stated, "I see you; do you see me?" Over the course of the evening, appellant sent S.J. 33 text messages. S.J. felt "terrified," "scared," "violated," and "threatened that [appellant] was going to hurt [her]."

Based on this activity, the Scott County Attorney's Office (the state) charged appellant with violating the order for protection, in violation of Minn. Stat. § 518B.01, subd. 14(d)(1) (2010). The state later amended its complaint to include one count of stalking, in violation of Minn. Stat. § 609.749, subd. 2(4), 4(b) (2010). Appellant pleaded not guilty to these charges.

At a pretrial hearing, the state moved to introduce relationship evidence, including "past acts and occurrences of domestic abuse" between appellant and S.J., pursuant to Minn. Stat. § 634.20 (2010). The state sought to introduce evidence that on October 18, 2010, appellant stole S.J.'s cell phone and chased and pushed S.J.; that on October 10, 2010, appellant came to S.J.'s home and injured her; that on October 6, 2010, appellant threatened S.J. at her work; and that on September 25, 2010, appellant grabbed and pushed S.J. The district court granted the state's motion, finding that the incidents were relevant to S.J.'s fear of appellant as well as to appellant's intent with respect to the charges. However, the district court limited S.J.'s testimony to domestic-abuse occurrences and prohibited her from testifying about appellant's mental health or other acts and from providing character evidence.

S.J. testified at appellant's trial. The jury found appellant guilty of both stalking and violating the order for protection. The district court sentenced appellant to 18 months in prison for stalking, and one year and one day for violating the order for protection, to be served consecutively. At the time, appellant was serving a 57-month sentence for stalking S.J. in Ramsey County. This appeal follows.

D E C I S I O N

I. Prosecutorial misconduct

Because appellant's attorney did not object to the alleged prosecutorial misconduct at trial, we apply the plain error standard of review. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). Plain error exists when (1) there is error, (2) that error is plain, and (3) the error affected the appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736,

740 (Minn. 1998). It is the appellant's burden to demonstrate that an error occurred and the error was plain. *Ramey*, 721 N.W.2d at 302.

If the appellant can demonstrate plain error, the burden shifts to the state to show that the prosecutorial misconduct did not prejudice the appellant's substantial rights. *Id.* Prosecutorial misconduct does not prejudice the substantial rights of the appellant when "there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id.* (quotation omitted).

If we find plain error affecting the appellant's substantial rights, we "then assess[] whether [we] should address the error to ensure fairness and the integrity of the judicial proceedings." *Griller*, 583 N.W.2d at 740 (citation omitted).

II. Opening statement

Appellant contends that the prosecutor committed misconduct in his opening statement by stating that S.J. was a victim of appellant's abuse. The admissible evidence on the record reflects that this statement is true. S.J. testified that appellant pushed her, injured her, and threatened her on numerous occasions while they were married. Further, the district court ruled that "relationship evidence" was admissible, including "incidents of prior domestic violence and domestic abuse related conduct." Appellant does not appeal this ruling. Therefore, the prosecutor's comments were not plain error.

Appellant next contends that the prosecutor's comment that S.J. "lived a life of terror" was also plain error. S.J.'s testimony at trial reflects that S.J. lived a life of terror prior to appellant's arrest. She testified that appellant came to her work, was told to leave, but returned and "notified everybody that he was on his way in there to get me."

She was afraid he would hurt her. On another occasion, appellant appeared at her work and told her, "I wish I could hit you right now." He refused to leave. Appellant also came to S.J.'s home and, in front of their children, pushed her, chased her into her house, and in attempting to enter the house, broke glass in a door that shattered on top of S.J. and caused her to bleed. On another occasion, appellant's friend texted S.J. saying, appellant "is coming to 'F' you up. Are you okay and are the kids okay?" Appellant also came to S.J.'s home, and, in front of their children, chased her while she was screaming and calling 911, pushed her to the ground, and took her cell phone. S.J. was "terrified" of appellant. The prosecutor had a sound basis for stating that S.J. "lived a life of terror." Therefore, there was no plain error in this statement.

III. Closing argument

Appellant contends that the prosecutor committed misconduct in his closing argument by asking the jury to "send a message" to appellant. "It is improper for the prosecutor to make statements urging the jury to protect society or to send a message with its verdict." *State v. Duncan*, 608 N.W.2d 551, 556 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). Here, the prosecutor stated, "[t]his is an important matter to [S.J.]. It's important to her that we send the message she be left alone. She's still frightened." Cases where prosecutors have asked juries to "send a message" typically involve broad requests to send a message to society that certain conduct is unacceptable. *See Duncan*, 608 N.W.2d at 556 ("It's time in this country that we start believing kids . . . ."); *see also State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993) ("What do you typically hear about a rape case? You hear about the defense attorney putting the victim

on trial. They do that because they focus the attention away from the client . . . ."); *State v. Threinen*, 328 N.W.2d 154, 157 (Minn. 1983) (jury's verdict "would determine what kind of conduct would be tolerated on the streets").

"With respect to claims of prosecutorial misconduct arising out of closing argument, we consider the closing argument as a whole rather than focus on particular phrases or remarks that may be taken out of context or given undue prominence." *State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000) (quotation omitted). Because the prosecutor's statement as a whole did not impermissibly urge the jury to send a message to society, the prosecutor's statement was not misconduct.

IV. Inadmissible testimony

Appellant contends that the prosecutor committed misconduct by eliciting inadmissible testimony that appellant broke into S.J.'s house and stole money and a laptop. The district court had specifically excluded any mention of this incident. Eliciting inadmissible testimony constitutes prosecutorial misconduct. *Ramey*, 721 N.W.2d at 300.

The record reflects, however, that the prosecutor did not elicit this testimony from S.J. The prosecutor asked, "was there another incident, then, in early October 2010?" Appellant's allegation only stands if an inadmissible incident is the only one to have occurred in early October 2010. It was not. There was another incident on the same day, when appellant visited S.J. at her workplace and threatened her. This incident was admissible. And there was yet a third incident that occurred in early October. When the prosecutor asked, "[W]as there an incident, then, after this incident, that happened also in

early October?" S.J. stated that appellant had appeared at her home on October 6[1], and pushed and injured her. This incident was also admissible. So there were three incidents in "early October" that S.J. testified to and that the prosecutor could have been referencing—two of which were admissible. There is no clear connection between the prosecutor's questions and S.J.'s answers that establishes that the prosecutor elicited the inadmissible portion of S.J.'s testimony. Therefore, there was no plain error.

Appellant contends that the prosecutor also committed misconduct by eliciting inadmissible testimony that appellant had taken their daughter and kept her for two days. However, the record reflects that the prosecutor did not specifically elicit this testimony. When the prosecutor asked S.J. whether appellant had contacted her after she obtained the order for protection, S.J. testified in the affirmative. The prosecutor asked, "[H]ow?" S.J. stated that, "[t]he first instance was when he took my daughter out of kindergarten, and he kept her for two days at an undisclosed location." The prosecutor then asked, "[W]as there an incident after that?" S.J. responded, "[Y]es. It was at the Trail of Terror . . . ." This incident was admissible. It is likely that the prosecutor was trying to elicit testimony regarding the admissible Trail of Terror incident, which provided the basis for the charge of violating an order for protection. Therefore, there was no plain error.

[1] S.J. testified that this incident occurred on October 6, 2010, but the district court referenced it as occurring on October 10, 2010.

V. Rules of evidence

Appellant contends that the prosecutor committed misconduct by improperly introducing character evidence in violation of Minn. R. Evid. 404(a)(1) by suggesting that appellant had a history of "physically, emotionally, and mentally" abusing S.J. Prosecutorial misconduct constitutes plain error when the conduct violates caselaw, a rule, or a standard of conduct. *Ramey*, 721 N.W.2d at 302. "In a criminal prosecution, a prosecutor may not attack the character of a defendant until the defendant puts his or her character in issue." *State v. Strommen*, 648 N.W.2d 681, 687 (Minn. 2002) (citing Minn. R. Evid. 404(a)(1)).

The district court granted the state's motion to introduce "relationship evidence" pursuant to Minn. Stat. § 634.20. "Evidence of similar conduct by the accused against the victim of domestic abuse . . . is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice . . . . 'Similar conduct' includes, but is not limited to, evidence of domestic abuse . . . ." Minn. Stat. § 634.20. The record reflects that the prosecutor introduced admissible relationship evidence, not inadmissible character evidence, pursuant to the district court's ruling admitting relationship evidence—a ruling appellant does not challenge on appeal. Therefore, the prosecutor did not commit misconduct.

VI. Consecutive sentences

Appellant finally contends that the district court erred by imposing consecutive sentences for stalking and for violating an order for protection because these convictions arose from the same behavioral incident.

"The interpretation of a statute and the sentencing guidelines are questions of law that we review de novo." *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009). Subject to certain inapplicable exceptions, "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." Minn. Stat. § 609.035, subd. 1 (2010). Appellant argues that his convictions for stalking and violating an order for protection stem from a single behavioral incident—the 33 text messages he sent S.J. while she was at the Trail of Terror on October 16, 2010.

Consecutive sentences are permissible under the Minnesota Sentencing Guidelines when a defendant is convicted of violating an order for protection under Minn. Stat. § 518B.01, subd. 14(d) and stalking under Minn. Stat. § 609.749, subd. 4, regardless of whether they arose from the same behavioral incident. Minn. Sent. Guidelines VI (2010); Minn. Sent. Guidelines cmt. II.F.203 (2010) ("It is permissive for multiple current felony convictions for offenses on the eligible list to be sentenced consecutively to each other when the presumptive disposition for these offenses is commitment to the Commissioner of Corrections as determined under the procedures outlined in Section II.C[.] of the guidelines."). Even if appellant's convictions arose from the same behavioral incident, and we do not agree that they do, the district court's imposition of consecutive sentences for these convictions was proper under the Minnesota Sentencing Guidelines.

Affirmed.