

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1995**

State of Minnesota,
Respondent,

vs.

Lonnie Vincent End-of-Horn,
Appellant.

**Filed September 30, 2013
Affirmed
Kirk, Judge**

Ramsey County District Court
File No. 62-CR-11-4006

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

John Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Kalitowski, Judge; and Chutich,
Judge.

UNPUBLISHED OPINION

KIRK, Judge

On appeal from his convictions of first-degree criminal sexual conduct for sexually abusing his daughter, appellant argues that: (1) the district court abused its discretion by admitting evidence that his daughter was also sexually abused by her uncles; (2) the district court committed plain error by admitting evidence that appellant physically abused his family members; and (3) he is entitled to a new trial due to the cumulative effect of trial errors. We affirm.

FACTS

In May 2011, respondent State of Minnesota charged appellant Lonnie Vincent End-of-Horn with one count of first-degree criminal sexual conduct. The state later filed an amended complaint that added a second count of first-degree criminal sexual conduct. The first count of the complaint alleged that appellant engaged in sexual penetration with his daughter, S.J.E., between November 1, 2001, and May 24, 2011. The second count alleged that appellant engaged in sexual penetration with S.J.E. between January 1, 2010, and May 24, 2011. After a trial in June 2012, the jury found appellant guilty of both counts. This appeal follows.

DECISION

I. The district court did not abuse its discretion by admitting evidence that the victim was sexually abused by her uncles.

This court reviews a district court's evidentiary ruling for an abuse of discretion. *State v. Graham*, 764 N.W.2d 340, 351 (Minn. 2009). "A court abuses its discretion

when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011).

Appellant argues that the district court abused its discretion by admitting evidence that S.J.E.’s two uncles abused her because the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. A district court may exclude relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice.” Minn. R. Evid. 403. 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. Schultz*, 691 N.W.2d 474, 478 (Minn. 2005). Probative evidence will “be admitted unless the tendency of the evidence to persuade by illegitimate means overwhelms its legitimate probative force.” *Id.* at 478-79.

At the beginning of the trial, appellant moved to exclude reference to S.J.E.’s allegations that her two uncles, S.C. and R.C., had sexually abused her. In response, the state argued that the evidence was relevant because it explained why S.J.E. waited so long to disclose that she was being abused by appellant, and it provided insight into the environment in which S.J.E. was living. The district court determined that the evidence was relevant and admissible, finding that it explained why S.J.E. did not disclose to her uncles that appellant was abusing her. The district court also found that appellant’s reaction to S.J.E.’s disclosure that her uncle had sexually abused her was relevant. As a result, S.J.E. testified that she told appellant that R.C. had touched her inappropriately and appellant responded, “I know,” but did nothing further.

Appellant argues that the evidence had minimal probative value. However, as the district court found, S.J.E.'s testimony that both S.C. and R.C. sexually abused her provided an explanation for why S.J.E. did not disclose to her uncles, whom she lived with for most of her life, that appellant was sexually abusing her. *See State v. Axford*, 417 N.W.2d 88, 92 (Minn. 1987) (stating that the district court properly admitted evidence that the defendant's son—the victim's father—sexually abused the victim during the same time period, in part because it “allowed the jury to hear evidence which tended to counter any inclination among the jurors to wrongly discredit the victim's testimony because of the delay in complaining about defendant's conduct”). In addition, S.J.E.'s testimony about appellant's reaction when she told him that R.C. had touched her inappropriately, which was corroborated by appellant's statement to police, is highly probative because it demonstrates that appellant did not want to contact police regarding S.J.E.'s disclosure.

Appellant contends that the evidence prejudiced him because it: (1) made him seem guilty by association; (2) was confusing for the jury; and (3) portrayed him “as an irresponsible and uncaring father.” Appellant's argument that the evidence made him seem guilty by association is not persuasive. S.J.E. testified about several occasions when appellant abused her and only a few instances when her uncles abused her. S.J.E. clearly distinguished the perpetrator of each instance of abuse and she testified in much greater detail about the incidents involving appellant than she did about the incidents involving her uncles. And, as the state contends, the fact that S.J.E. accused three family members of abusing her indicates that the jury would have closely scrutinized her

testimony because of a concern that she had a propensity to accuse family members of sexually abusing her. Similarly, it is unlikely that the jury was confused about the abuse S.J.E. claimed appellant inflicted and the abuse she claimed her uncles inflicted. S.J.E. distinguished between the acts that she alleged each person committed and her testimony about each instance of abuse was consistent with the statements she gave to police and a nurse at the Midwest Children's Resource Center (MCRC).

Finally, the probative value of S.J.E.'s testimony about her father's reaction when she told him that R.C. had abused her is not outweighed by the danger of unfair prejudice. The evidence, which was corroborated by appellant's own statement to police, establishes that appellant knew about at least some of the sexual abuse that S.J.E. endured, yet he failed to report it. While the evidence is not flattering to appellant, it does not rise to the level of unfair prejudice because it does not "persuade[] by illegitimate means, giving one party an unfair advantage." *Schultz*, 691 N.W.2d at 478. In addition, any risk of unfair prejudice was minimized by the district court's instruction to the jury that it could "not convict [appellant] for any sexual contact between [S.J.E.] and her uncles." The district court did not abuse its discretion by admitting evidence that S.J.E. was sexually abused by her uncles.

II. The district court did not commit plain error by admitting evidence that appellant was physically abusive toward his family members.

Appellant argues that the district court committed plain error by admitting evidence that appellant was physically abusive to his family members and that his mother had sought and obtained an order for protection (OFP) against him. Appellant concedes

that he did not object to the evidence at the time of admission. As a result, this court's review is under the plain-error standard. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). This standard requires that the defendant demonstrate: "(1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). If all three prongs are met, this court "may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotations omitted).

Under the plain-error standard, appellant must first demonstrate that the district court committed an error that was plain. *See id.* "[A]n error is plain if it was clear or obvious." *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) (quotations omitted). Plain error can typically be demonstrated "if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

In general, "[e]vidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). However, "[e]vidence 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." Minn. Stat. § 634.20 (2010). The definition of "similar conduct" includes evidence of domestic abuse and violation of an OFP. *Id.* A defendant commits domestic abuse when he or she commits one of the following acts against a family or household member: (1) physical harm, bodily injury, or assault; (2) infliction of fear of imminent physical harm, injury, or

assault; or (3) terroristic threats, criminal sexual conduct, or interference with an emergency call. Minn. Stat. § 518B.01, subd. 2(a) (2010).

During the trial, S.J.E. testified that there were times that appellant did not live with her family “[b]ecause he was verbally and physically abusive to us and my grandma kicked him out.” The prosecutor later asked S.J.E. if she was “aware that [her] grandmother got an Order for Protection against appellant.” S.J.E. responded, “Yes, I think I remember hearing something about that.” Appellant did not object to this testimony. Appellant testified that his mother obtained an OFP against him after he “cussed her out” and he physically assaulted S.C. Appellant testified that he violated the OFP twice: on one occasion he called the family home, and on a second occasion he stopped by the home to get some of his things.

Appellant does not contest that the evidence of his physical and verbal abuse of his family members constituted relationship evidence under Minn. Stat. § 634.20. Instead, he argues that the state did not characterize the evidence as relationship evidence before it was admitted. But the state is not required to give notice of its intent to introduce relationship evidence. *State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004). And the record establishes that appellant’s actions constitute domestic abuse because he committed physical harm, bodily injury, or assault, or the fear of infliction of physical harm, bodily injury, or assault, against his mother, brother, son, and S.J.E. Because appellant committed domestic abuse and violated an OFP, the definition of “similar conduct” set forth in Minn. Stat. § 634.20 is satisfied. Further, the similar conduct was committed by appellant against the victim and other family or household members. *See*

Minn. Stat. § 634.20. As a result, the evidence is admissible unless its probative value is outweighed by the danger of unfair prejudice. *See id.*

Appellant contends that the evidence was inadmissible because it was extremely prejudicial and only minimally probative. But the probative value of the evidence is high because it demonstrates why S.J.E. did not immediately report that appellant was sexually abusing her. *See State v. Spencer*, 366 N.W.2d 656, 660 (Minn. App. 1985) (determining that evidence of a father’s disciplinary methods was admissible in a case of intrafamilial abuse to show why the child did not seek help immediately), *review denied* (Minn. July 11, 1985). The danger of unfair prejudice is low because appellant was charged with sexually abusing S.J.E., not physically abusing her. And appellant testified at trial and denied that he had physically abused his mother, S.J.E, and his son. He also explained his version of the events that led his mother to obtain an OFP against him and his violations of the OFP. Thus, the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

Appellant also argues that the state failed to provide cautionary instructions at the time the relationship evidence was admitted and during the final jury instructions. This court has stated that “[a] cautionary instruction is strongly preferred” after evidence of a defendant’s other crimes is presented to the jury. *State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). But the district court’s failure to give a cautionary instruction “does not *automatically* constitute plain error.” *Id.* “[O]ther evidence offered during trial may negate the allegation that the probative value of other-crimes evidence is outweighed by its potential for unfair prejudice.” *Id.* This

includes a situation where a defendant did not object to the district court's failure to give a cautionary instruction to the jury and other evidence supports the defendant's conviction. *Id.*

Here, the district court did not give a cautionary instruction to the jury at the time the evidence was received or in the final jury instructions. However, appellant failed to object at trial to the district court's failure to give a cautionary instruction, and the state presented a large amount of evidence that supports appellant's convictions. S.J.E. testified about several acts of sexual abuse that appellant committed against her, and her testimony was consistent with the statements she gave to her teacher, a police officer, and a MCRC nurse. In addition, S.J.E.'s younger brother testified that he witnessed appellant sexually abuse S.J.E. The state presented evidence that appellant was initially not truthful with police about whether his girlfriend had been gone from the home overnight during the time period when S.J.E. reported that the most recent abuse had occurred. In his statement to police, appellant corroborated S.J.E.'s explanation of his reaction when she told him R.C. had abused her.

While we reaffirm the importance of the district court giving a cautionary instruction at the time relationship evidence is received and during the final instructions, we conclude that this is a situation where the evidence offered during the trial negates any allegation that the probative value of the evidence is outweighed by its prejudicial effect. *See id.* Thus, the district court's failure to give a cautionary instruction did not constitute plain error.

Accordingly, the district court did not commit plain error by admitting evidence that appellant physically and verbally abused family members or by failing to give a cautionary instruction to the jury.

III. Appellant is not entitled to a new trial due to the cumulative effect of trial errors.

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. Davis*, 820 N.W.2d 525, 538 (Minn. 2012) (quotation omitted).

As previously discussed, the district court did not abuse its discretion by admitting evidence that S.J.E. was abused by her uncles and did not commit plain error by admitting evidence that appellant had physically and verbally abused his family members. In addition, the state presented significant evidence of appellant’s guilt. S.J.E. testified extensively about the abuse that appellant committed against her and she was subject to cross-examination. Appellant also testified at trial and was able to explain his reaction to S.J.E.’s disclosure that her uncles had abused her and his version of the events that led to the OFP against him. Appellant is not entitled to a new trial based on the cumulative effect of errors at trial.

IV. Appellant’s pro se argument does not have merit.

Appellant’s pro se supplemental brief does not raise any legal arguments. Instead, appellant contends that S.J.E. falsely accused him of sexually abusing her. Appellant

provides his version of the events and reasserts his claim that he did not sexually abuse S.J.E. However, appellant testified at trial and denied that he sexually abused S.J.E. The jury's verdict demonstrates that it did not find appellant credible, and this court defers to the jury's credibility determinations. *See State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). Therefore, we conclude that appellant's pro se argument lacks merit.

Affirmed.