STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0855

State of Minnesota,
Respondent,

vs.

Caroline Marie Rice,
Appellant.

Filed August 19, 2013
Reversed and remanded
Hudson, Judge
Dissenting, Schellhas, Judge

Carver County District Court
File No. 10-CR-10-1003

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

Mark Metz, Carver County Attorney, Peter Ivy, Assistant County Attorney, Chaska, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Davi Axelson, Assistant Public Defender (for appellant)

Considered and decided by Schellhas, Presiding Judge; Hudson, Judge; and Stauber, Judge.

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

HUDSON, Judge

Appellant Caroline Marie Rice challenges her conviction of three counts of deprivation of parental rights in violation of Minn. Stat. § 609.26, subd. 1 (2010).

Because the cumulative effect of various evidentiary rulings, an erroneous jury instruction, and prejudicial judicial conduct deprived appellant of her due process right to a fair trial, we reverse appellant's convictions and remand for a new trial.

FACTS

Appellant and B.R. are the parents of five children including three daughters, K.R., L.R., and A.R., born in 1989, 1991, and 1997, respectively. As part of the divorce proceedings, B.R. was given full legal and physical custody of the three youngest children, including A.R. An order for protection was issued in 2008 prohibiting appellant from having contact with A.R. except through supervised visits, and the order was extended for two years in 2009.

On October 31, 2010, A.R. ran away from home. Hand-written letters that A.R. sent to the Minnetonka Police Department, Carver County Sheriff's Office, and B.R. stated that A.R. had run away from home and that she was safe.

On November 24, 2010, appellant was apprehended while trying to cross into the United States from Canada. Appellant admitted that she had gone to Canada with two of her daughters, L.R. and A.R., who were waiting for her at a restaurant in Michigan two miles from the border. Appellant was interviewed by Officer George Brown, a customs officer. Officer Brown testified that appellant stated that "because of the protection order they would have been separated, so she chose to withdraw her application [to Canada] for refugee status" and return to the United States. According to Brown, appellant admitted that she had violated the outstanding protection order and that "[s]he'd been with her

daughters for at least two weeks I think she said and she planned to rejoin them as soon as she got through customs."

Carver County detectives recorded an interview with A.R. upon her return to Minnesota, on November 29, 2010. A.R. stated that she had been hidden by a variety of people over the past 30 days, had met up with appellant in Canada, but had only spent one day with her when appellant was arrested.

Appellant was charged with one count of concealing a minor child from the child's parent "where the action manifests an intent substantially to deprive that parent of parental rights" in violation of Minn. Stat. § 609.26, subd. 1(1); one count of obtaining, retaining, or failing to return a minor child from or to the parent in violation of a court order, "where the action manifests an intent substantially to deprive that parent of rights to parenting time or custody," in violation of Minn. Stat. § 609.26, subd. 1(3); and one count of causing or contributing to a child being a runaway, in violation of Minn. Stat. § 609.26, subd. 1(8).

Appellant pleaded not guilty and for all three counts sought to raise an affirmative defense under Minn. Stat. § 609.26, subd. 2(1) (2010), that she reasonably believed her actions were necessary to protect A.R. from physical or sexual assault or substantial emotional harm by B.R. In a pre-trial motion, appellant attempted to introduce 273 pages of documents in support of this defense. The district court excluded the documents because they all related to various events occurring more than two years before the dates of the alleged offenses and were therefore not relevant and because they did not "show that at the moment in time [appellant] allegedly violated the statute . . . she was under a

reasonable belief . . . [that A.R.] was in physical or emotional danger." Determining that the evidence was unreliable, the district court also excluded medical evidence of an alleged incident of abuse upon A.R. by B.R. in 2008 because the police had concluded that the claim was unfounded.

On the date of trial, appellant dismissed her public defender and represented herself. During her opening statement, appellant discussed numerous inappropriate and potentially prejudicial subjects including judicial bias during her divorce proceeding, losing her nursing license because a county social worker (and witness in this case) held a grudge against her, the contents of discussions that had occurred outside the presence of the jury, her living conditions while she was in jail, and the district court's ruling in her favor in a prior family law matter. The prosecutor raised objections throughout appellant's opening statement, which were generally sustained. The district court, after warning appellant twice that her opening statement was becoming repetitive while continuing to drift toward irrelevant topics, eventually required appellant to end her opening statement.

At a bench conference after the state's first witness testified, the prosecutor complained that appellant's attempts to introduce inadmissible evidence put the state "at a real disadvantage. It appears I am beating up on Ms. Rice, denying her the right to counsel." The district court agreed, reminded appellant to focus only on topics relating to the underlying charges, and delivered a warning:

> And I'm telling you now very clearly on the record that *I intend to be much more proactive in stepping in and stopping you on your lines of questioning*. I'm going to do that

> because I believe if I don't do that that is a great prejudice to the state because, in fact, it does look like they're beating up on you, that they are stacking the deck against you. That's not the case. *So I'm going to be more active in that so that if anybody is going to be looking like a bully in this proceeding, if you will, in the eyes of the jury, it's going to be me*. So that we can continue to try to maintain a level playing field to you that is fair to you as well as the state.

(Emphasis added.)

When appellant raised improper subjects during her direct examination, the district court followed through on its warning and began interrupting improper lines of questioning without requiring an objection. The district court interrupted appellant's direct examination of L.R. more than 90 times and interrupted appellant's direct examination of A.R. at least 45 times. The state occasionally raised objections upon which the district court ruled, but the majority of evidentiary rulings during appellant's witness examinations were made sua sponte. The district court does not appear to have interrupted the state at any point during the trial.

The district court's frustration with appellant during these interruptions became increasingly apparent. When appellant cross-examined a Carver County social worker about reports that B.R. was verbally and physically abusive to his children, the district court sustained a state objection, telling appellant that "you can't just throw things out there like you're lobbing hand grenades." The district court continued this theme later when appellant asked L.R. whether B.R. may have ever sedated A.R., telling appellant, "Ms. Rice, you cannot continue to lob hand grenades." He continued his admonishment, stating that appellant may not "[j]ust lob hand grenades out there. . . . I don't know what

they are, they're not questions . . . . You continue to ask questions that are not germane to these proceedings. . . . You ask those questions of witnesses where it doesn't fit."

Appellant later asked L.R., "Did you ever see your dad hit or hurt [A.R.]?" After sustaining an objection that the question "assumes facts not in evidence," the district court interjected, telling L.R., "You're not going to answer that. . . ." The district court then asked appellant, "[d]o you have any basis for lobbing that one out there? . . . Do you have any factual basis for . . . asking that question?" The district court continued, "Don't start asking another question. You throw something out there and you just leave it hanging. . . . Throwing out an allegation about dad having harmed [L.R.] and/or [A.R.]. . . . There is no foundation laid here." L.R. eventually testified about an incident when B.R. dragged K.R. down a flight of stairs by her ankles while L.R. and A.R. watched.

Appellant asked a later witness, "Have the children ever reported to you that anyone else has ever hit or hurt them?" Despite L.R.'s earlier testimony, the district court interjected, "Excuse me, there is no testimony that anyone has hit or hurt them except for the specific instances you've talked about and there is no person identified in those instances. So you're suggesting or implying that [B.R.] has hit or hurt them. That's not in evidence. You may want to rethink that question." Appellant replied that her daughter's testimony provided that evidence, to which the district court replied, "I've not heard any such testimony because they haven't been on the stand. . . . [K.R.] has not been on the stand." The district court added that there was "no testimony that [B.R.] hurt them or hit them."

A.R. testified that two restraining orders had been taken out against B.R. in the past "because he hurt me." Her testimony about these incidents was brief and was punctuated by frequent interruptions by the district court. A.R. was having trouble remembering details about each incident, leading the district court to cut off questioning about these incidents because A.R. had "provided the answers she has available by her own recall."

Because appellant introduced sufficient evidence to have the jury consider her affirmative defense that her actions were necessary to protect A.R. from abuse by B.R., the district court instructed the jury on this defense as part of its instructions for each offense. *See* Minn. Stat. § 609.26, subd. 2(1). Following closing arguments, the district court provided additional instructions. The jury found appellant guilty of all three counts. This appeal follows.

D E C I S I O N

Our justice system affords every criminal defendant the constitutional right to due process in the form of a fair trial, which includes the right to present a complete defense. *State v. Voorhees*, 596 N.W.2d 241, 249 (Minn. 1999). Appellant argues that she was denied her right to a fair trial by various evidentiary errors, an erroneous jury instruction, and prejudicial judicial conduct. We will analyze each issue in turn to determine whether an error occurred.[1] But because each alleged error impacted appellant's ability to assert

[1] Appellant raised several other issues in her appeal. Because it is not necessary for us to resolve these issues in reaching our decision, we decline to consider them.

her affirmative defense under Minn. Stat. § 609.26, subd. 2(1), we will analyze the cumulative effect of those errors to determine whether a new trial is required.

Evidentiary errors

Appellant argues that the district court erred by denying her motion to present evidence regarding past incidents of abuse by B.R. against appellant, A.R., and her sisters. "A criminal defendant has the right to a meaningful opportunity to present a complete defense." *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006) (citation omitted). It is an affirmative defense to all three counts against appellant if "the person reasonably believed the action taken was necessary to protect the child from physical or sexual assault or substantial emotional harm." Minn. Stat. § 609.26, subd. 2(1). The defense has the burden of production in raising this defense. *See State v. Cannady*, 727 N.W.2d 403, 407 (Minn. 2007). "The burden of production is '[a] party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder.'" *State v. Kramer*, 668 N.W.2d 32, 37 n.2 (Minn. App. 2003) (quotation omitted), *review denied* (Minn. Nov. 18, 2003). Once the burden of production is met, the state must disprove the defense beyond a reasonable doubt. *State v. Niska*, 514 N.W.2d 260, 264 (Minn. 1994).

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). "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).

"Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Relevant evidence is generally admissible but "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403; *see* Minn. R. Evid. 402. "Unfair prejudice under rule 403 is . . . evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005).

Here, the district court concluded that, because the documents related to incidents occurring between 2004 and 2008, the documents were not relevant because they did not relate to any danger of physical assault or substantial emotional harm that A.R. faced at the time of the offense. This determination was an abuse of discretion for two reasons. First, the statute contains no immediacy or imminence requirement that would necessarily render the evidence irrelevant. *See* Minn. Stat. § 609.26, subd. 2(1). Therefore, while appellant was required to show that she had a reasonable belief in the necessity of her actions at the time of the offense, determining both the existence of such a belief and its reasonableness would require an understanding of both the past and present events that led to the formation of that belief. Moreover, evidence of alleged abuse by B.R. of his other daughters was probative, as this court has observed in the context of domestic-assault offenses. *See State v. Valentine*, 787 N.W.2d 630, 637 (Minn. App. 2010) ("Obviously, evidence showing how a defendant treats his family or household members

. . . sheds light on how the defendant interacts with those close to him, which in turn suggests how the defendant may interact with the victim."), *review denied* (Minn. Nov. 16, 2010); *cf.* Minn. Stat. § 634.20 (2012) (providing that "[e]vidence of similar conduct by the accused against the victim of domestic abuse, or against other family or household members" is presumptively admissible). Evidence of abuse against appellant is probative because it speaks to the reasonableness of her fear that B.R. posed a danger to A.R. The evidence was not unfairly prejudicial because it did not persuade through illegitimate means, but spoke directly to whether appellant could have had a reasonable belief that her actions were necessary to protect A.R. from physical assault. *Schulz*, 691 N.W.2d at 478.

Second, this court has recognized that "[d]omestic abuse is unique in that it typically occurs in the privacy of the home, it frequently involves a pattern of activity that may escalate over time, and it is often underreported." *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004). Therefore, evidence of incidents from two or six years before the offense could be probative if they demonstrated an escalating pattern of abuse.

It was similarly an abuse of discretion to conclude that the medical evidence documenting possible abuse had no probative value because an officer responding to the allegation determined in a written report that the allegation was "unfounded." While the police may not have believed K.R. or A.R., the jury may have. The report made the existence of a fact more or less likely and, therefore, was relevant. Minn. R. Evid. 401.

This also speaks to a broader problem with the district court's general approach to appellant's affirmative defense. Specifically, the district court seemed to assume that,

because social workers and police officers had rejected appellant's accusations of abuse, there was no foundation for her affirmative defense. While the conclusions of these professionals may have been admissible, the ultimate question of whether appellant had a reasonable belief that her actions were necessary to protect A.R. was a jury question, once appellant met her burden of production with the testimony of multiple witnesses, as well as the documents that were excluded by the district court. *See State v. Glowacki*, 630 N.W.2d 392, 403 (Minn. 2001) (stating the general rule that a reasonableness determination is properly made by the jury if the evidence could allow a reasonable mind to draw an adverse inference).

The dissent argues that appellant was barred from introducing evidence of any alleged incident of abuse previously addressed in a family law matter, because it would be an impermissible collateral attack on prior custody and parenting-time orders concluding that the evidence did not support a finding that B.R. had abused his children or that they were endangered in his custody. *See State v. Romine*, 757 N.W.2d 884, 889–90 (Minn. App. 2008) (concluding that defendant could not challenge the constitutionality of an order for protection when appealing his conviction for violating that order because he did not originally appeal issuance of the order for protection), *review denied* (Minn. Feb. 17, 2009). The *Romine* court noted: "[a]s a general rule, a party's failure to appeal the issuance of a court order precludes a collateral attack on that order in a subsequent proceeding"). *Id.*[2]

[2] Here, the dissolution order and custody award were affirmed by this court. And while appellant challenged the custody award, she did not challenge the district court's factual

Appellant was therefore precluded from arguing that either the custody order or order for protection was invalid or unconstitutional. *See Greer v. Prof'l Fiduciary, Inc.*, 792 N.W.2d 120, 127 (Minn. App. 2011) (quoting *Black's Law Dictionary* 298 (9th ed. 2009) (defining a collateral attack as "[a]n attack on a judgment in a proceeding other than a direct appeal; esp., an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective")). But appellant's affirmative defense is not a collateral attack because she is not arguing that any of the prior judgments are legally ineffective; her affirmative defense simply runs contrary to an earlier court's factual findings.

What the dissent is in fact arguing is that appellant's defense should be barred under the doctrine of collateral estoppel, or issue preclusion, which "precludes parties to an action from relitigating in subsequent actions issues that were determined in the prior action." *State v. Lemmer*, 736 N.W.2d 650, 658 (Minn. 2007) (quotation omitted). But application of collateral estoppel is also not appropriate here because the state is required to disprove appellant's affirmative defense beyond a reasonable doubt. In contrast, the earlier family court orders applied a preponderance-of-the-evidence standard in finding a lack of domestic abuse by B.R. against his children. Because of the difference in the burden-of-proof standard, "[a] state 'cannot use the result in a civil proceeding to bind a criminal defendant on any element of a crime as a matter of collateral estoppel.'" *State v. Wagner*, 637 N.W.2d 330, 338 (Minn. App. 2001) (quoting *McKinney v. Alabama*, 424

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findings regarding domestic abuse. *Rice v. Rice*, No. A06-1648 (Minn. App. Jan. 22, 2008).

U.S. 669, 689 n.5, 96 S. Ct. 1189, 1200 n.5 (1976) (Brennan, J., concurring)); *see also One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235, 93 S. Ct. 489, 492 (1972) (holding that "the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel"). The finding in earlier civil cases that B.R. had not committed abuse against his daughters therefore did not bar appellant from raising this affirmative defense at her criminal trial.

In sum, while many of the documents offered by appellant appeared irrelevant or duplicative, it was nevertheless an abuse of discretion to exclude evidence of prior abuse by B.R. against appellant, A.R., or her sisters.

Jury instruction

Appellant argues that the district court's instruction regarding her affirmative defense was erroneous. District courts are afforded considerable latitude in selecting the language of jury instructions, but instructions may not misstate the law. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). "Fairness requires that [the defendant] be given an opportunity to present [her] account of the facts to a jury under the proper instructions." *Id.* at 114. "A district court errs in instructing the jury if the challenged jury instruction confuses, misleads, or materially misstates the law." *State v. Larson*, 787 N.W.2d 592, 601 (Minn. 2010). We review jury instructions "as a whole, in their entirety," to determine if they accurately describe the law. *State v. Auchampach*, 540 N.W.2d 808, 816 (Minn. 1995).

It was the state's burden to disprove appellant's affirmative defense under Minn. Stat. § 609.26, subd. 2(1), beyond a reasonable doubt. *Niska*, 514 N.W.2d at 264. As

part of its instructions regarding each offense, the district court instructed the jury regarding appellant's affirmative defense using language from CRIMJIG 15.07, the standard jury instruction. *See* 10 *Minnesota Practice*, CRIMJIG 15.07 (2006). But the district court omitted the last sentence of CRIMJIG 15.07: "The burden is on the state to prove beyond reasonable doubt that the defendant did not act in such circumstances and with such intent." *Id.*

The omission of the last sentence of CRIMJIG 15.07 from each instruction shifted the burden of proof of the defense to appellant, or at the very least confused the issue, as demonstrated by the district court's instruction for count one.

> The statutes of Minnesota provide that whoever is at least 18 years old and more than 24 months older than a child and causes or contributes to a child being a runaway is guilty of a crime. The elements . . . are as follows. First, defendant was at least 18 years old. . . . Fourth, defendant's act took place on or about October 31, 2010 through November 24, 2010. And Carver County was the lawful residence of [A.R.]. It is a defense to this charge if defendant reasonably believed the action taken was necessary to protect a child from physical or sexual assault or substantial emotional harm. If you find that each of the elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty.[3]

To the jury, it would have been unclear how the statement made immediately following the affirmative-defense instruction—that the defendant is guilty if "each of the elements has been proven beyond a reasonable doubt"—related to the affirmative

[3] The instruction for the other two offenses followed a similar pattern whereby the affirmative defense was described after the list of offense elements followed by a statement that each element of the offense must be proven beyond a reasonable doubt.

defense. We think it most likely that the jury inferred that the affirmative defense must be proven beyond a reasonable doubt for it to exonerate the defendant. Stated otherwise, the placement of the description of the affirmative defense made it indistinguishable from the offense elements and, therefore, appeared to be a proposition that must be "proven beyond a reasonable doubt."

Respondent argues that the meaning was clear given the earlier instruction that "[t]he burden of proving guilt is on the state. The defendant does not have to prove her innocence." We disagree. In *State v. Caine*, the district court gave a duress instruction in a first-degree murder case that placed the burden on the state to prove lack of duress but did not state that the lack of duress must be proven "beyond a reasonable doubt." 746 N.W.2d 339, 354–55 (Minn. 2008). But the district court "made clear that the burden was on the state to disprove duress" and stated several times that guilt must be proven beyond a reasonable doubt. *Id.* at 355–56. The supreme court held that, taken together, these two instructions made it clear that it was the state's burden to prove lack of duress beyond a reasonable doubt, and the improper instruction did not constitute reversible error. *Id.*

But unlike in *Caine*, the instructions here never stated that it was the state's burden to disprove appellant's affirmative defense. Absent such an instruction, the jury could interpret the statement "the burden of proving guilt is on the state" as applying only to proving the elements of the offense, not necessarily the affirmative defense. The district court's earlier instruction allocating the burden to prove guilt on the state therefore did not correct its erroneous affirmative-defense instruction.

Respondent argues that any confusion the jury might have had was alleviated in the state's closing argument when it reiterated the fact that the defendant must be proved guilty beyond a reasonable doubt. *See State v. Vang*, 774 N.W.2d 566, 582 (Minn. 2009). But, viewed in context, the state's closing argument likely added to the jury's confusion.

> The judge just gave you the law, *the elements of the crime*. That is the burden I shoulder gladly *to prove those elements* beyond a reasonable doubt. The law importantly says as an affirmative defense somebody can take a child away from a lawful parent if they reasonably believe that the child is in danger of sexual assault, physical assault, or great emotional harm. Not any reason, but a reasonable, reasonable belief. And nothing that Caroline Rice has done is reasonable.

(Emphasis added.)

While the prosecutor stated it was the state's burden to prove the elements of the offense beyond a reasonable doubt, the prosecutor never mentioned the state's burden to disprove the affirmative defense. By stating only the state's burden to prove the elements of the offense, the prosecutor implicitly and improperly placed the burden on appellant to prove her affirmative defense.

Later in his closing argument, the prosecutor again implicitly placed the burden on appellant to prove her affirmative defense.

> Those [deprivation of parental rights] laws reflect social values. Societal values that we want to protect our children. Unless there is an exception and that exception has to be reasonable. If it's not, it's not a defense. It should be the very rare case where this occurs. Because if these actions in this case were justified, then this exception swallows the rule,

> it destroys these laws and destroys the values that these laws are trying to uphold in protecting our children.[4]

By stating that the exception, meaning the affirmative defense, "has to be reasonable," the prosecutor implied that the defendant must prove that her belief was reasonable. And by stating that the affirmative defense should apply in very rare cases, the state further implied that a defendant must overcome a major hurdle to succeed in asserting the defense. These are both misstatements of the law. Thus, respondent's argument that any error contained within the district court's instruction was corrected by the state's closing argument lacks merit. We conclude that the district court's jury instructions, taken as a whole, misstated the law by implying that it was appellant's burden to prove her affirmative defense. This constitutes error.

Judicial conduct

Appellant argues that the district court's conduct deprived her of her right to a fair trial before an impartial judge. Whether a judge's conduct deprived the defendant of the right to a fair trial is a constitutional question, which we review de novo. *State v. Dorsey*, 701 N.W.2d 238, 249 (Minn. 2005).

[4] We note that this statement was inappropriate not only because it implicitly shifted the burden to appellant to prove her affirmative defense, but also because it diverted the jury's attention from its duty by focusing on issues broader than guilt. *See State v. Salitros*, 499 N.W.2d 815, 819 (Minn. 1993). It is misconduct to place responsibility on the jury for upholding society's values or protecting potential future victims. *See State v. Threinen*, 328 N.W.2d 154, 157 (Minn. 1983) (holding that it is misconduct for a prosecutor to argue in the closing statement "that the jury represent[s] the people of the community and that their verdict would determine what kind of conduct would be tolerated").

"In Minnesota, we have long recognized that a criminal defendant has a fundamental right to a fair trial before an impartial judge beyond the requirement that a judge not have actual bias." *Id.* at 252. The judge "must maintain the integrity of the adversary system at all stages of the proceedings." *State v. Schlienz*, 774 N.W.2d 361, 367 (Minn. 2009). The judge must therefore be "fair to both sides" and "refrain from remarks which might injure either of the parties to the litigation." *Id.* (quoting *Hansen v. St. Paul City Ry. Co.*, 231 Minn. 354, 360, 43 N.W.2d 260, 264 (1950)). When reviewing judicial conduct, "[w]e begin from the presumption that a judge has discharged his or her judicial duties properly." *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998).

We have carefully reviewed the record and, to be sure, appellant engaged in challenging conduct throughout the trial, asking irrelevant questions, using her self-representation to portray herself as a victim or martyr, making accusations without foundation, ignoring district court instructions regarding appropriate topics for questioning, referring to documents not in evidence, and wasting the district court's time by showing up late and leaving the courtroom during the proceedings without permission. Given these challenges, much of the district court's conduct to which appellant now objects unquestionably fell within the district court's authority to control the courtroom and manage witness examinations. *See* Minn. R. Evid. 611 (providing that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, [and] (2) avoid needless consumption of time"); *State v.*

Richards, 495 N.W.2d 187, 195 (Minn. 1992) (noting that "[a]lthough the right to present witnesses is constitutionally protected, the accused 'must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' These same principles should guide the court in reasonably controlling the trial process.") (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973)).

But while we acknowledge that the district court was in a difficult position and that judicial intervention was necessary to maintain control of the proceedings, the district court's authority to control the courtroom does not permit abandoning impartiality. *See Hansen*, 231 Minn. at 360–61, 43 N.W.2d at 264–65. We conclude that the district court exceeded its authority to control the proceedings and threatened the perception of its impartiality.

First, it was improper for the district court to take on the role of an advocate in raising its own objections to appellant's questions rather than waiting for the state to raise an objection. *See Hansen*, 231 Minn. at 360, 43 N.W.2d at 264 ("Since the judge's duties are of a judicial nature, he should not act as counsel for a party by raising objections which the party should make. To assume a partisan position is to desert the high position to which the judge is elevated, and assume the role of the advocate.") (quotation omitted). Adopting a partisan position by raising objections sua sponte risked swaying the opinion of jurors, "who, called upon to perform unaccustomed duties in strange surroundings, tend to seek from the court *some hint or suggestion* as to how their decision is to be reached." *Id.* at 361, 43 N.W.2d at 264–65 (emphasis added). The district court stated

that its sua sponte interventions were necessary because of potential prejudice to the state from having to raise frequent objections, but other measures—such as a curative jury instruction—could have alleviated or mitigated any potential prejudice.

Second, several of the district court's comments made while raising or sustaining objections appeared to attack appellant's credibility, her evidence, or her theory of the case. *See Schlienz*, 774 N.W.2d at 367; *cf. State v. King*, 88 Minn. 175, 182, 92 N.W. 965, 968 (1903) (noting that, while a judge may reprimand or admonish a witness for trying to inject inadmissible evidence into the case, in doing so the court may not "reflect upon the character of the witness for truthfulness, or suggest that his testimony was untrue or unworthy of belief"). In at least five separate instances, the district court criticized appellant's line of questioning by comparing it to "lobbing hand grenades." This language was inflammatory and inappropriately risked prejudicing the jury. *See I.J. Bartlett Co. v. Ness*, 156 Minn. 407, 412, 195 N.W. 39, 41 (1923).

The potential for prejudice became apparent during the state's closing argument, when the prosecutor borrowed the district court's language, analogizing appellant's case to "lob[bing] hand grenades." The prosecutor then stated, "In fact, there was one nuclear bomb. The judge instructed you. So, too, there is nothing, there is no foundation, there is no solid evidence that [B.R.] hit, punched, dragged, smashed [A.R.] in any form whatsoever." Thus, the prosecutor—in effect—used the district court's statements as an endorsement of his position.

Lastly, the district court undermined the credibility of L.R.'s testimony by stating that there was "no testimony that [B.R.] hurt [his daughters] or hit them," even though

L.R. had previously testified about an incident she witnessed in which B.R. had dragged K.R. down a flight of stairs. Therefore, while we are sympathetic to the district court's position given the challenge that appellant's conduct posed throughout the case, we conclude that the district court's conduct as described above unduly prejudiced appellant.

Prejudicial error

Having determined that the district court committed multiple errors throughout the trial, which were compounded by various forms of prosecutorial misconduct, we conclude that those errors, taken together, require reversal of appellant's convictions. *See State v. Mayhorn*, 720 N.W.2d 776, 791–92 (Minn. 2006) (reversing defendant's conviction and remanding for a new trial because "the number of errors and seriousness of some of them" deprived the defendant of a procedurally fair trial, which requires reversal "regardless of the defendant's culpability"). While it might have been a close call if we were asked to consider any of these errors individually, in combination, the errors denied appellant her right to a fair trial, which warrants reversal regardless of the strength of the evidence against her.

Reversed and remanded.

SCHELLHAS, Judge (dissenting)

I respectfully dissent from the majority's decision to reverse and remand this case for a new trial.

Erroneous Jury Instruction on Affirmative Defense

After concluding that appellant introduced sufficient evidence to support her affirmative defense under Minn. Stat. § 609.26, subd. 2 (2010), the district court submitted the affirmative defense to the jury and instructed the jury on the defense. Appellant did not object to the jury instruction.

"Failure to object to jury instructions may result in waiver of the issue on appeal," "[b]ut [an appellate court has] discretion to review instructions not objected to at trial if the instructions contain plain error affecting substantial rights or an error of fundamental law." *State v. Scruggs*, 822 N.W.2d 631, 642 (Minn. 2012) (quotation omitted). An appellate court "will order a new trial only if all three prongs of the plain error standard are satisfied and the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation omitted).

"[D]istrict courts have latitude" and "broad discretion in determining jury instructions." *State v. Hayes*, 831 N.W.2d 546, 555 (Minn. 2013) (quotation omitted) (stating during plain-error analysis). "A district court errs when its instructions confuse, mislead, or materially misstate the law, but if the instructions read as a whole correctly state the law in language that can be understood by the jury, there is no reversible error." *Scruggs*, 822 N.W.2d at 642 (quotation omitted).

Because appellant failed to object to the district court's jury instruction, I would conclude that she waived the right to appeal. Alternatively, I would review the jury instruction under the plain-error standard. *See* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (stating that when a defendant fails to object to a jury instruction, an appellate court may review the jury instruction under the plain-error standard). The plain-error standard requires that the appellant show: (1) error; (2) that was plain; and (3) that affected substantial rights. *Griller*, 583 N.W.2d at 740. "The third prong, requiring that the error affect substantial rights, is satisfied if the error was prejudicial and affected the outcome of the case." *Id*. at 741. "The defendant bears the burden of persuasion on this third prong," and the burden is heavy. *Id.* If all three prongs of the plain-error standard are satisfied, a reviewing court must nevertheless determine "whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.* Even in a harmless-error analysis involving an objected-to jury instruction regarding an element of an offense, "[t]he use of an erroneous jury instruction by the district court . . . does not automatically entitle [a defendant] to a new trial." *State v. Koppi*, 798 N.W.2d 358, 364 (Minn. 2011). A properly objected-to instructional error regarding an element of an offense requires a new trial *only* "if it cannot be said beyond a reasonable doubt that the error had no significant impact on the verdict." *Id.* 798 N.W.2d at 364 (quotations omitted).

Here, appellant did not object to the instructional error. Given our standard of review, I would conclude that appellant has not satisfied her heavy burden of showing

that the instructional error had a significant impact on the verdict. The evidence that the district court determined was sufficient to justify instructing the jury on the affirmative defense was irrelevant, being mostly related to the excluded 273-page document proferred by appellant and mostly in violation of the court's evidentiary rulings. I would conclude that the state sustained its burden of proving the elements of the offense beyond a reasonable doubt and disproved appellant's affirmative defense beyond a reasonable doubt. The evidence that appellant offered regarding her affirmative defense pertained to events that occurred at least two years before the dates of the offense and was irrelevant.

Exclusion of Appellant's Proffered 273-Page Document

I also disagree with the majority's conclusion that the district court abused its discretion by excluding as irrelevant appellant's proffered 273-page document related to incidents of alleged abuse by B.R. against appellant, A.R., or her sisters, occurring between 2004 and 2008.

The majority concludes that the district court abused its discretion by excluding as irrelevant appellant's 273-page document that related to various events that occurred more than two years before the dates of appellant's alleged offenses. I would conclude that the district court did not abuse its discretion by excluding the document and that appellant's attempt to introduce the evidence constituted an impermissible collateral attack on prior orders of the district court. *See State v. Cook*, 275 Minn. 571, 571−72, 148 N.W.2d 368, 369−70 (1967) (holding that defendant who had not pursued a direct appeal from the suspension of his driver's license could not collaterally attack the suspension in a subsequent prosecution for driving after suspension); *State v. Romine*, 757 N.W.2d 884,

889−90 (Minn. App. 2008) ("As a general rule, a party's failure to appeal the issuance of a court order precludes a collateral attack on that order in a subsequent proceeding."), *review denied* (Minn. Feb. 17, 2009); *State v. Harrington*, 504 N.W.2d 500, 503 (Minn. App. 1993) (holding that defendant who had not appealed from issuance of restraining order precluded from challenging constitutionality of order in subsequent criminal prosecution for violation of order), *review denied* (Minn. Sept. 30, 1993); *see also State, Dep't of Conservation v. Sheriff*, 296 Minn. 177, 179−80, 207 N.W.2d 358, 360 (1973) (holding that failure to appeal a commissioner's order precluded defendant from again contesting the matter in another proceeding).

The history between appellant, B.R., and their three youngest children, and appellant's interaction with the district court involving B.R. and those children is protracted and tortured.

> In 2004, [appellant, who is a trained registered nurse,] petitioned for a marital dissolution. The district court granted the dissolution on December 28, 2004, and reserved several issues (including custody) for trial on December 6-7, 2005. In a March 2006 order issued after the December 2005 trial, the district court (1) granted [appellant] sole legal and sole physical custody of the parties' two oldest children, (2) granted husband sole physical custody of the parties' three youngest children, (3) granted the parties joint legal custody of the three youngest children, and (4) reserved the issue of spousal maintenance.

Rice v. Rice, No. A06-1648, 2008 WL 170694, at *1 (Minn. App. Jan. 22, 2008).

In May 2006, the family court appointed a parenting consultant and a guardian ad litem for the children. Also in May, appellant moved for a new trial and/or amended findings and expanded parenting time with the three youngest children. In considering

appellant's motion, the family court considered evidence that had arisen since the trial in December 2005 and denied appellant's motion. *Rice v. Rice*, No. DC 292 618, slip op. at 1, 4−5 (Minn. Dist. Ct. June 30, 2006). [Order not available on Westlaw.]

In her appeal to this court from the family court's grant of custody of the three youngest children to B.R., appellant argued that the family court's order was clearly erroneous. *Rice*, 2008 WL 170694, at *1. This court stated:

> The record demonstrates that in reaching its custody determination, the district court considered the report of two custody evaluators, the recommendations of the guardian ad litem, and the testimony of the parties. After evaluating all of this evidence, the district court made findings regarding the 13 statutory best-interests factors and determined that it was in the best interests of the children to grant [appellant] sole physical and sole legal custody of the two oldest children, to grant [B.R.] sole physical custody of the three youngest children, and to grant the parties joint legal custody of the three youngest children.

Id., at *2. This court affirmed the grant of custody, concluding that appellant did not show "that in awarding custody of the children, the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Id.*, at *3.

On April 7, 2008, the family court conducted a hearing to address the recommendation of the children's guardian ad litem to suspend appellant's contact with A.R., both in person and by telephone, and to limit appellant's contact with A.R. to a therapeutic setting. *Rice v. Rice*, No. 27-FA-292618, slip op. at 1 (Minn. Dist. Ct. May 9, 2008) [Order not available on Westlaw.] At the conclusion of the hearing, the family court referee ordered, effective immediately, that appellant's contact with A.R. be limited

to therapeutic sessions. *Id*. at 2. After the hearing, the guardian ad litem sent the family court a letter, relating that appellant had ignored the oral order of the court, "picking [A.R.] up from school at [appellant]'s whims, keeping the child with her, resulting in several missed school days for the child." *Id.* The family court referee found that appellant was "in flagrant violation of the oral order of the court" and "warned [appellant] that violation of this order could lead to further serious civil and/or criminal repercussions." *Id.* at 2−3. Before the commencement of trial in this case, appellant moved the district court to remove Judges Eide, Perkins, Kanning, and Cain for cause, based on the Minnesota Code of Judicial Conduct.

The district court excluded appellant's proffered 273-page document as irrelevant because it related to various events that occurred more than two years before the dates of appellant's alleged offenses, October 31−November 24, 2010. In concluding that the district court abused its discretion, the majority cites Minn. Stat. § 609.26, subd. 2(1), and notes that

> the statute contains no immediacy or imminence requirement that would necessarily render the evidence irrelevant. Therefore, while appellant was required to show that she had a reasonable belief in the necessity of her actions at the time of the offense, determining both the existence of such a belief and its reasonableness would require an understanding of both the past and present events that led to the formation of that belief.

(Citation omitted.) The majority then discusses at length the "tendency of perpetrators of physical abuse to abuse multiple family members"; the probative value of "[e]vidence of abuse against appellant . . . because it speaks to the reasonableness of her fear that B.R.

posed a danger to A.R."; the uniqueness of domestic abuse in that it typically occurs in the privacy of the home, frequently involves a pattern of activity that escalates over time, and is often underreported; and the possible probity of evidence of incidents from at least two years before the offense to "demonstrate[] an escalating pattern of abuse." I agree with the district court that none of this evidence is relevant to the offenses with which appellant was charged because all of the incidents referred to in the proffered 273-page document occurred during or before 2008.

Moreover, I would conclude that, because the subject of the incidents described in appellant's proffered 273-page document, except one August 2008 inadequately probative incident for which the evidence is unreliable, predate the January 2008 family court custody order and subsequent orders relating to parenting time, the incidents, as a matter of law, are not relevant to appellant's affirmative defense under Minn. Stat. § 609.26, subd. 2(1), that she "reasonably believed the action taken was necessary to protect the child from physical or sexual assault or substantial emotional harm." What would be relevant is reliable evidence related to incidents occurring *after* the issuance of the family court's orders in 2006 and 2008, but the 273-page document describes no such evidence.

To rule that the district court abused its discretion by excluding appellant's proffered 273-page document is tantamount to a ruling that in every criminal case involving an alleged violation of Minn. Stat. § 609.26, subd. 1 (2010), a defendant has the right to submit evidence of his or her "reasonable belie[f]" notwithstanding the fact that the evidence predates a final custody order and subsequent orders related to

parenting time. In other words, such a defendant has the right to introduce evidence to show that the custody order is "wrong." In my opinion, the majority's opinion supports the proposition that a defendant charged with a violation of Minn. Stat. § 609.26, subd. 1, may collaterally attack a final custody order for the purpose of asserting an affirmative defense that his or her own beliefs, contrary to the custody order, are reasonable.

The right to present a complete defense is not absolute. *State v. Hannon*, 703 N.W.2d 498, 506 (Minn. 2005). I would conclude that appellant may not assert an affirmative defense under Minn. Stat. § 609.26, subd. 1, by collaterally attacking the district court's custody orders with evidence that predates the issuance of the orders. *See Cook*, 275 Minn. at 571−72, 148 N.W.2d at 369−70; *Romine*, 757 N.W.2d at 890. To hold otherwise renders Minn. Stat. § 609.26, subd. 1, meaningless in cases like this in which the custodial parent's rights are established by court order.

Judicial Conduct

I also disagree with the majority's conclusion that the district court deprived appellant of a fair trial because it exceeded its authority to control the proceedings and threatened the perception of impartiality. "Trial courts have a grave responsibility in overseeing and regulating courtroom conduct and procedure during trials, including criminal trials." *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006). "A trial court must maintain order in the courtroom." *Id.* "Because an appellate court cannot glean from a transcript the atmosphere or particular threats to order and decorum in the courtroom, trial courts are vested with broad discretion in deciding matters of courtroom procedure." *Id.* (quotation omitted); *see Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 1061

(1970) (stating that trial court must be given "sufficient discretion" in dealing with "disruptive, contumacious, stubbornly defiant defendants" and that "[n]o one formula for maintaining the appropriate courtroom atmosphere will be best in all situations").

Although I do not embrace the district court's choice of words—"lobbing hand grenades"—in its characterization of appellant's repeated questions of witnesses that lacked foundation, I disagree that the record in this case reflects that the court exceeded its authority to control the proceedings and threatened the perception of its impartiality. The record clearly reflects that appellant repeatedly disobeyed prior orders of the court regarding the introduction of evidence and engaged in repeated acts of disruptive and obstreperous behavior in the courtroom. For example, appellant repeatedly introduced evidence related to the contents of the excluded 273-page document, prompting the court to admonish her: "For the 19th time, at least, at very least, I'm telling you that we are not retrying the custody case. We are not retrying the order for protection case[s]. We are not retrying the CHIPS case." And, having discharged her court-appointed attorney, appellant proceeded without counsel and repeatedly asked witnesses questions that lacked foundation and were prejudicial to the state. Although the court attempted to intervene, the intervention was frequently futile and prejudicial to the state.

Could the judge have conducted himself more admirably? Yes, of course. In hindsight, few trials are conducted that do not reflect room for improvement by the judge and counsel. Perhaps, this case suggests room for more improvement rather than less, but, generally, the judge conducted himself within the bounds of his authority and discretion,

particularly under these very trying circumstances. I conclude that the district court properly exercised its discretion.

I would affirm appellant's convictions.