STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1689

State of Minnesota,
Respondent,

vs.

George Marita Obara,
Appellant.

Filed November 4, 2008
Affirmed
Hudson, Judge

Hennepin County District Court
File No. 06069899

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, C-2000 Government Center, Minneapolis, Minnesota 55487 (for respondent)

Glenn P. Bruder, Mitchell, Bruder & Johnson, 4005 West 65th Street, Suite 110, Edina, Minnesota 55435 (for appellant)

Considered and decided by Hudson, Presiding Judge; Bjorkman, Judge; and Huspeni, 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

HUDSON, Judge

On appeal from his criminal convictions for third-degree assault and terroristic threats, appellant argues that the district court abused its discretion by allowing the prosecutor to use the victim's out-of-court statements as substantive evidence of appellant's guilt, and by admitting evidence of alleged previous acts of domestic abuse between appellant and the victim. Appellant also asserts that the evidence was insufficient to sustain his convictions. We affirm.

FACTS

On October 9, 2006, appellant George Marita Obara was driving to the bank with his wife R.R. D.A. was a passenger in an SUV traveling behind appellant's car. From the SUV, D.A. saw appellant striking R.R. Appellant's vehicle slowed down and pulled over, and the SUV passed appellant's car. Shortly after, appellant sped up and passed the SUV. As appellant's car passed, R.R. was "screaming" and D.A. again observed appellant striking R.R.

Both vehicles continued their pace and approximately two minutes later, D.A. saw a door open on appellant's vehicle. D.A. then saw R.R. fall out of the car while the car was traveling at approximately 55–60 miles per hour. R.R. got up, ran to the SUV, and asked D.A. for help. She was crying and had several injuries. R.R. got into the SUV and told D.A. and the driver to drive off because appellant was going to kill her. D.A. and the driver then drove R.R. to a nearby gas station.

Police Officer Brian Wentworth interviewed R.R. at the gas station. R.R. told Officer Wentworth that appellant threatened to kill her, hit her several times in the face and head, and pushed her out of the car. Officer Wentworth observed that R.R. had abrasions on her arm, leg, and stomach. R.R. was taken by ambulance to the hospital and was treated by Dr. Kimberley Heller. During treatment, R.R. told Dr. Heller that she was pushed out of a car.

Appellant was charged with one count of third-degree assault and one count of terroristic threats. At trial, R.R. told the jury a different version of the events than she told Officer Wentworth and Dr. Heller. She testified that she and appellant were arguing in the car over money when appellant pulled the car over and started smoking. They continued to argue as she grabbed appellant's cigarettes, and during this time appellant hit her once or twice in the head and face.

According to R.R., she told appellant that she would wait outside of the car until he finished smoking. She opened the door, but appellant did not want to be late for work so he drove off. R.R. stated that they continued driving past their destination, so she asked, "Are you going to kill me somewhere?" She testified that appellant responded by asking, "Am I a killer? Why should I kill you now?" R.R. said they then began to struggle over a cigarette package, which caused her to fall out of the car because the door was not properly closed from her previous attempt to get out of the car.

R.R. admitted, however, telling D.A. that appellant was going to kill her. She also admitted telling police that appellant threatened her and pushed her out of the car, although she now felt the statements she made were inaccurate. D.A., Officer

Wentworth, and Dr. Heller all testified at trial about what R.R. told them moments after the incident. The jury found appellant guilty as charged. This appeal follows.

D E C I S I O N

I

Appellant challenges two of the district court's evidentiary decisions. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citations omitted).

Appellant first challenges the use of R.R.'s out-of-court statements to Officer Wentworth. Officer Wentworth testified that when he interviewed R.R. shortly after the incident, R.R. told him that appellant hit her several times in the face and head, threatened to kill her, and pushed her out of the car. During closing argument, the prosecutor used R.R.'s statements to Officer Wentworth as substantive evidence of appellant's guilt. Appellant admits R.R.'s statements are admissible under Minn. R. Evid. 801(d)(1)(D), but argues that the statements are admissible for impeachment purposes only. We disagree. Statements admissible under Minn. R. Evid. 801(d)(1)(D) are by definition not hearsay and are thus admissible as both impeachment and substantive evidence.

Further, the statements are admissible under Minn. R. Evid. 803(2), which provides that out-of-court statements are admissible if they are statements "relating to a startling event or condition made while the declarant was under the stress of excitement

caused by the event or condition." R.R. made the statements only moments after being punched in the face and head by appellant, ejected from a moving car, and sustaining injuries to several parts of her body. R.R.'s statements relate to the altercation with appellant, and R.R. was upset, crying, and nervous when she made the statements. As such, they are admissible as substantive evidence of appellant's guilt. *See State v. Smith*, 333 N.W.2d 879, 880 n.1 (Minn. 1983) (noting that evidence admissible under Minn. R. Evid. 803(2) is admissible as substantive evidence).

In addition, R.R.'s statements are admissible as substantive evidence under the residual hearsay exception, which allows admission of a statement not otherwise covered by an exception or exclusion if it has "equivalent circumstantial guarantees of trustworthiness" and:

> (A) the statement is offered as evidence of a material fact;
>
> (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
>
> (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Minn. R. Evid. 807. We examine the "totality of the circumstances" to assess whether a statement has sufficient circumstantial guarantees of trustworthiness to be admissible under the residual exception. *State v. Martinez*, 725 N.W.2d 733, 737 (Minn. 2007); *State v. Robinson*, 718 N.W.2d 400, 408 (Minn. 2006).

In *State v. Ortlepp*, the Minnesota Supreme Court considered four factors in deciding whether to admit the confession of a co-conspirator, who later recanted and

repudiated the statement at trial, as substantive evidence of the defendant's guilt under the residual hearsay exception. 363 N.W.2d 39, 44 (Minn. 1985). Specifically, the supreme court examined whether (1) the witness was available for cross-examination regarding the statement, thereby assuaging any confrontation problems; (2) there was proof that the prior statement was made; (3) the statement was against the declarant's penal interest; and (4) the statement was consistent with all the other evidence introduced. *Id*. These factors "provide guidance," but "are not an exclusive list of the indicia of reliability." *Martinez*, 725 N.W.2d at 738 (discussing *Ortlepp* factors).

During oral argument before this court, appellant's counsel asserted that *Ortlepp* does not apply here because R.R. admitted making the out-of-court statements to Officer Wentworth and thus did not recant. While we agree that R.R. did not recant the fact that she made the statements, she clearly recanted the content of the prior statements. R.R. told Officer Wentworth that appellant threatened her, hit her several times in the face and head, and pushed her out of the car. But at trial, R.R. testified that she fell out of the car because the door was not properly closed, and she characterized appellant's statements about killing her as questions, not threats. Accordingly, R.R. recanted the content of her statements and we review the trustworthiness of those statements under *Ortlepp*.

The first two *Ortlepp* factors are clearly satisfied. R.R. testified at trial, thereby assuaging any confrontation problems, and she admitted making the prior statements to Officer Wentworth, so there is no question that the prior statements were made. And although R.R.'s statements were not against her penal interest, we recognized in *State v. Plantin* that a declarant's statement against her interest in a relationship with the

defendant satisfies the third *Ortlepp* factor. 682 N.W.2d 653, 659 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). R.R.'s statements were against her interest in her relationship with appellant, and therefore the third *Ortlepp* factor is satisfied. *Ortlepp's* fourth factor is also satisfied because R.R.'s prior statements are consistent with the testimony from D.A., Officer Wentworth, and Dr. Heller.

Because R.R.'s statements are admissible as substantive evidence under Minn. R. Evid. 801(d)(1)(D), 803(2), and 807, the district court did not abuse its discretion by allowing the prosecutor to use them as substantive evidence of appellant's guilt.

Appellant also claims that the district court abused its discretion by admitting evidence of alleged previous acts of domestic abuse between appellant and R.R. Appellant failed to object to the admission of this evidence at trial. In general, the failure to object to the admission of evidence constitutes a waiver of the issue on appeal. *State v. Vick*, 632 N.W.2d 676, 684 (Minn. 2001). However, this court may exercise discretion to consider an issue if it constitutes plain error or a defect affecting substantial rights of appellant, even if the issue was not brought to the attention of the district court. Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

"The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citing *Griller*, 583 N.W.2d at 740 (citing *Johnson v. United States*, 520 U.S. 461, 466–67, 117 S. Ct. 1544, 1548–49 (1997))). "If those three prongs are met, we may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation omitted) (citing *State v. Crowsbreast*,

629 N.W.2d 433, 437 (Minn. 2001)). The burden is on appellant to show that the district court's admission of alleged domestic abuse evidence was "plain error" that prejudiced his case. *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1778 (1993).

Appellant offers no explanation or argument as to whether the alleged error (1) is plain error, (2) affects his substantial rights, or (3) affects the fairness, integrity, or public reputation of judicial proceedings. Nor does the record support his assertion. Even if the evidence was inadmissible, the district court instructed the jury that appellant was "not being tried for and may not be convicted of any offense other than the charged offense." The jurors are presumed to have followed the district court's instructions. *See State v. Shoen*, 578 N.W.2d 708, 718 (Minn. 1998) (noting the presumption that a jury follows the court's instructions). Therefore, this claim is without merit.

II

Next, appellant challenges the sufficiency of the evidence to support his convictions. In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict which they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court assumes the jury believed the state's witnesses and disbelieved contrary evidence. *State v. Asfeld*, 662 N.W.2d 534, 544 (Minn. 2003). The court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

Appellant first argues that the evidence is insufficient to support his conviction for third-degree assault because R.R.'s injuries were not severe enough to constitute substantial bodily harm. "Whoever assaults another and inflicts substantial bodily harm" commits assault in the third degree. Minn. Stat. § 609.223, subd. 1 (2006). Substantial bodily harm is "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member." Minn. Stat. § 609.02, subd. 7a (2006).

Dr. Heller testified that R.R. had skin injuries to her stomach, right and left elbows, and right knee. As Dr. Heller testified, pictures were published to the jury that showed the extent of R.R.'s injuries. Three layers of skin were removed on her stomach, down to the subcutaneous fat. Dr. Heller noted that the injury on R.R.'s stomach spanned almost the entirety of her abdomen. Two layers of skin were removed on R.R.'s remaining injuries. Dr. Heller concluded that R.R.'s injuries were substantial because of their extensive nature. Dr. Heller's testimony and the pictures of R.R.'s injuries support the conclusion that R.R. suffered substantial bodily harm.

Appellant also asserts that the evidence is insufficient to support his conviction for third-degree assault because appellant's assault was not the cause of R.R.'s injuries.[1]

[1] In a footnote in his appellate brief, appellant also briefly mentions that he believes the state failed to establish any assaultive behavior. He claims the record is more supportive of the conclusion that the parties struggled over a package of cigarettes than it is supportive of the conclusion that he assaulted R.R. But R.R. testified that appellant struck her in the head and face before the struggle for the cigarettes ensued. And D.A. testified that he saw appellant repeatedly striking his wife. When viewed in a light most

R.R. sustained her injuries upon impact with the ground after being pushed from a moving vehicle. Appellant argues that even if he admits to striking his wife, there was no testimony at trial that he pushed R.R. from the moving vehicle. R.R. testified that she fell out of the car because it was not properly shut, and D.A. testified that he did not see how R.R. fell out of the car.

But Officer Wentworth testified that when he interviewed R.R. moments after the incident, she told him that appellant pushed her out of the car. Similarly, when Dr. Heller spoke to R.R. in the emergency room, R.R. told Dr. Heller that she was pushed out of a car. Thus, it appears that the jury believed Officer Wentworth and Dr. Heller, and credited R.R.'s out-of-court statements while discrediting her in-court testimony. Given the jury's apparent credibility determinations and viewing the evidence in the light most favorable to the conviction, the evidence is sufficient for the jury to conclude that appellant pushed R.R. out of the moving vehicle, thereby causing her injuries.

Lastly, appellant argues that the evidence is insufficient to support his conviction for terroristic threats. A person who "threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror" is guilty of making terroristic threats. Minn. Stat. § 609.713, subd. 1 (2006). The state, therefore, must prove that the defendant (1) made threats, (2) to commit a crime of violence, (3) with purpose to terrorize another or in reckless disregard of the risk of terrorizing another. *See State v. Schweppe*, 306 Minn. 395, 399,

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favorable to the conviction, this evidence is sufficient to support the conclusion that appellant assaulted R.R.

237 N.W.2d 609, 613 (Minn. 1975). "Purpose" means "aim, objective, or intention." *Id.* at 400, 237 N.W.2d at 614. And "terrorize" means "to cause extreme fear by use of violence or threats." *Id*.

In support of his claim, appellant relies on R.R.'s characterization of his statements about killing her, which at trial R.R. framed as questions rather than threats. Appellant argues that when viewed in isolation, these statements are insufficient to show that he made any threats or intended to terrorize R.R. But appellant's statements are not to be viewed in isolation. Instead, whether a statement is a threat depends on "whether the communication in its context would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *Id*. at 399, 237 N.W.2d at 613 (quotations omitted).

Here, appellant's statements about killing R.R. were made in the context of an argument during which appellant repeatedly hit R.R. in the face and the head and pushed her out of a moving car. Whether the jury believed R.R.'s out-of-court description of appellant's statements or her in-court characterization of appellant's statements, either version of the statements would have a reasonable tendency to create apprehension that appellant would follow through with killing R.R. given the context in which the statements were made.

The record also establishes that appellant intended to terrorize R.R. or acted in reckless disregard of the risk of terrorizing R.R. After appellant threatened R.R. and pushed her out of the car, R.R. was scared, sought help from D.A., and told D.A. to drive off because appellant was going to kill her. A victim's reaction to a threat can provide

"circumstantial evidence relevant to the element of intent." *Id.* at 401, 237 N.W.2d at 614. The jury could reasonably conclude from R.R.'s reaction that appellant made the threat with the intent to terrorize or in reckless disregard of the risk of terrorizing.

Finally, appellant avers that R.R. suffered no actual terror. But the state was not required to establish R.R.'s actual, subjective fear. *Id.* at 399, 237 N.W.2d at 613 (discussing the elements of the crime of terroristic threat). Therefore, when viewed in the light most favorable to the conviction, the evidence is sufficient for the jury to find that appellant made terroristic threats.

Because R.R.'s out-of-court statements to Officer Wentworth are admissible as substantive evidence, the district court did not abuse its discretion by allowing the prosecutor to use the statements as substantive evidence of appellant's guilt. Similarly, appellant cannot establish that the admission of alleged domestic abuse evidence was plain error that affected his substantial rights. And when viewed in the light most favorable to the conviction, the evidence is sufficient to support the jury's verdict.

Affirmed.