STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0186, A10-521

State of Minnesota,
Respondent,

vs.

Todd David Jenson,
Appellant.

Filed December 7, 2010
Affirmed
Wright, Judge

Stearns County District Court
File No. 73-CR-08-5686

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and Wright, Judge.

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

WRIGHT, Judge

Appellant challenges his convictions of first-degree burglary, a violation of Minn. Stat. § 609.582, subd. 1(c) (2008), and fifth-degree assault, a violation of Minn. Stat.

§ 609.224, subd. 1(2) (2008), arguing that the district court erred by admitting irrelevant and prejudicial audio recordings. Appellant also argues that the district court erred by denying his motion for a new trial based on newly discovered evidence of witness recantation. We affirm.

FACTS

On April 26, 2008, appellant Todd David Jenson entered a residence owned by T.L. and occupied by A.W., T.L.'s tenant. A.W. was in lawful possession of the residence and had authority to consent to Jenson's entrance. Whether A.W. consented in this instance was disputed at trial.

At the time of the offense, T.L. was dating J.L., Jenson's ex-girlfriend. A.W. knew that there were bad feelings between Jenson and T.L. because of this relationship. On the morning of April 26, A.W. sent Jenson the following text message: "[T.L.] and [J.L.] are in my bedroom and the door is locked. Please help." Jenson called A.W. in response and, according to Jenson, A.W. asked him to come to the residence and help retrieve her clothes from the locked bedroom. A.W., however, denied asking Jenson to come to the residence. Rather, she maintained that she told Jenson only that her bedroom door was locked and that she could not retrieve her work clothes, which were inside the room. A.W. was in the shower when Jenson arrived. He entered through the unlocked garage door and forced his way into the locked bedroom, where he found J.L. and T.L. in bed together. An altercation between Jenson and T.L. occurred, during which Jenson punched T.L. in the face.

Jenson was arrested and charged with first-degree burglary, a violation of Minn. Stat. § 609.582, subd. 1(c), and fifth-degree assault, a violation of Minn. Stat. § 609.224, subd. 1(2). A jury trial followed, during which two audio recordings were admitted in evidence and played for the jury. The first recording was a telephonic interview between St. Cloud Police Officer Dustin Weleski and Jenson, which occurred shortly after the altercation. The state disclosed this evidence and produced a transcript of the interview to Jenson in an exhibit list dated August 25, 2008, one day before it was admitted in evidence. The interview includes Officer Weleski's statements asserting that Jenson needs to prove his innocence to the police and that Jenson is a liar. They also discussed the existence of an outstanding arrest warrant for Jenson that is unrelated to the altercation at issue here. The second recording contains four voicemail messages left by Jenson on T.L.'s telephone nine days before the altercation, in which Jenson threatens T.L. with physical violence. The state produced a transcript of this recording in discovery on May 7, 2008, included it on its exhibit list dated August 25, 2008, and offered it in evidence the next day at trial. Both audio recordings were played for the jury without objection except as to the prejudicial effect of presenting audio recordings as evidence rather than transcripts of the recordings.

A jury returned guilty verdicts on each of the charged offenses. The district court subsequently sentenced Jenson to a term of 41 months' imprisonment, and Jenson appealed.

In November 2008, while Jenson was incarcerated for these offenses and T.L. was serving a sentence on an unrelated offense, T.L. encountered Jenson in the "chow line."

During this encounter, T.L. told Jenson that A.W. had recanted part of her trial testimony. Jenson petitioned for postconviction relief, seeking a new trial based on newly discovered evidence—namely, A.W.'s allegedly false testimony at trial. We stayed Jenson's direct appeal pending the postconviction proceedings. At a November 12, 2009, postconviction evidentiary hearing, T.L. testified that, after Jenson was found guilty, he called A.W. to discuss a tenancy dispute. According to T.L., A.W. volunteered during that conversation that she had given Jenson permission to enter the residence on April 26, 2008. Because A.W. could not be located to testify at the postconviction evidentiary hearing, the district court admitted A.W.'s hearsay statement as a statement against penal interest made by an unavailable witness. Minn. R. Evid. 804(b)(3).

The district court denied Jenson's petition for a new trial, finding that T.L.'s testimony that A.W. made the statement attributed to her was not credible. Jenson also appealed the postconviction decision. We reinstated the direct appeal and granted Jenson's motion to consolidate the direct and postconviction appeals.

D E C I S I O N

I.

Jenson argues that the district court erred by admitting the audio recordings of voicemail messages that he left on T.L.'s telephone nine days before the altercation and the telephone call with Officer Weleski shortly after the incident.

Jenson did not object at trial to the admission of this evidence. Ordinarily, an appellant who fails to object at trial forfeits the right to object on appeal to the admission of evidence. *State v. Bauer*, 598 N.W.2d 352, 363 (Minn. 1999). Because Jenson failed

to object at trial, we address the merits of his claims under the plain-error standard. *See* Minn. R. Crim. P. 31.02 (stating that appellate court may consider plain error affecting substantial rights even if such error was not raised before district court); *see also State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (applying rule 31.02). Under this standard, we consider (1) whether there is an error, (2) whether such error is plain, and (3) whether it affects the defendant's substantial rights. *Griller*, 583 N.W.2d at 740. "An error is plain if it is clear or obvious," *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (quotation marks omitted), or if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Such an error affects a defendant's substantial rights if it was "prejudicial and affected the outcome of the case." *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002). Even if the three plain-error factors are established, a defendant is not entitled to relief unless the error seriously affected the fairness and integrity of the judicial proceedings. *See Griller*, 583 N.W.2d at 740, 742 (explaining that district court may exercise discretion to correct plain error if the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings" (quotation omitted)).

A.

We first consider Jenson's argument that the district court improperly admitted a recording of his four voicemail messages to T.L., which contain expletive-laden threats to cause physical harm. Jenson contends that this evidence was proffered without adequate notice and it was irrelevant and prejudicial evidence of prior bad acts. Jenson concedes that he objected to the admission of this evidence at trial on different grounds.

Evidence of other crimes, wrongs, or acts is "not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). This evidence, however, may be admissible for other purposes, including to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* Such evidence is admissible only if the following five requirements are met:

> (1) the prosecutor gives notice of its intent to admit the evidence consistent with the rules of criminal procedure; (2) the prosecutor clearly indicates what the evidence will be offered to prove; (3) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; (4) the evidence is relevant to the prosecutor's case; and (5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant.

Id; *see also State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006) (citing this standard). Jenson argues that four of these requirements were not met.[1] We address each in turn.

The state must give notice of its intent to admit evidence under rule 404(b). Jenson did not receive an exhibit list from the state containing the voicemail messages until the day before trial. But a transcript of these voicemail messages was served on Jenson's attorney on May 7, 2008, well before trial, albeit without notice of the state's intent to offer it as evidence.

The circumstances here are akin to those in *Wanglie v. State*, in which we held that the district court did not commit reversible error when it admitted rule 404(b)

[1] Jenson does not dispute that he left the voicemail messages, satisfying the clear-and-convincing-evidence requirement.

evidence without adequate notice to the defendant because the defendant was familiar with and had access to the contents of that evidence. 398 N.W.2d 54, 57-58 (Minn. App. 1986); *see also State v. Bartylla*, 755 N.W.2d 8, 20-22 (Minn. 2008) (holding that district court did not abuse its discretion by admitting rule 404(b) evidence despite state's failure to provide notice or specify its purpose). Jenson was familiar with this evidence because he left the voicemail messages, and he testified as to his familiarity with their contents. Moreover, Jenson had access to the evidence for several months before the trial.

The purpose of rule 404(b)'s notice requirement is to prevent unfair surprise to a defendant "who is unprepared to demonstrate that the evidence is unsubstantiated." *Wanglie*, 398 N.W.2d at 57; *see State v. Grilli*, 304 Minn. 80, 86, 230 N.W.2d 445, 450 (1975) (stating that purpose for notice requirement is to avoid surprise to defendant by giving defendant time to prepare for defense). Because the voicemail messages are contextually related and proximate in time to the altercation, there is little risk that Jenson was unfairly surprised by the evidence. Thus, the lack of notice in advance of admitting the voicemail recording does not support a determination of plain error affecting Jenson's substantial rights.

When introducing rule 404(b) evidence, the state also must "'specify the exception to the general exclusionary rule under which it is admissible.'" *State v. Babcock*, 685 N.W.2d 36, 40 (Minn. App. 2004) (quoting *State v. Billstrom*, 276 Minn. 174, 178, 149 N.W.2d 281, 284 (1967)), *review denied* (Minn. Oct. 19, 2004). The record establishes, and the state concedes, that it failed to satisfy this requirement.

The Minnesota Supreme Court recently determined that the admission of rule 404(b) evidence despite the state's failure to specify the permissible use for which it was offered is not reversible error. *Bartylla*, 755 N.W.2d at 21-22. Here, the voicemail recording contained threats of physical violence that Jenson made to T.L. only nine days before the assault. The district court might have determined that establishing Jenson's motive and intent were valid purposes for the admission of the voicemail recording. But without an express determination by the district court, our plain-error inquiry requires us to consider whether any error in admitting the evidence without a proffered reason for doing so was "prejudicial and affected the outcome of the case." *See Griller*, 583 N.W.2d at 741.

The state referred to the voicemail recording during its opening statement and closing argument. But the recording only gave voice to facts that were presented to the jury in other testimony. For example, Jenson testified that he hit T.L. in the face on the day of the assault, and he described his anger with T.L. in the weeks leading up to the assault as "rage." Although this admission responded to the state's question about the voicemails, the state could have elicited similar testimony without referring to the voicemails in light of other evidence regarding the relationship between Jenson and T.L. In addition, Jenson used this evidence of his rage in support of his defense to explain A.W.'s invitation to Jenson to come to the residence. For example, defense counsel argued that A.W. wanted to solve her personal problems with T.L. by getting Jenson to "come over and beat the hell out of [T.L.]"

Because many of the potentially prejudicial aspects of the voicemail recording were presented to the jury through other evidence, and because Jenson relied heavily on these facts in his defense theory, we are not persuaded that admission of the voicemail recording affected the outcome of the case. Thus, even without the state's notice of the purpose for which the voicemail recording was offered and Jenson's opportunity to rebut that purpose, Jenson has not established that the admission of the voicemail recording affected his substantial rights.[2]

Jenson next argues that the voicemail recording was neither relevant nor material because it did not address a consequential disputed fact, as required by rule 404(b). *See Ness*, 707 N.W.2d at 686 (requiring district court to consider relationship between consequential fact and disputed issues in case). We disagree. Evidence is relevant when it has "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. Jenson maintains that only evidence addressing the issue of consent is relevant because consent was the only contested issue at trial. But absent a knowing and voluntary stipulation by the defense, the state must prove every element of a charged offense. Jenson did not stipulate to the assault charge, which required the state to prove that Jenson "intentionally inflict[ed] or attempt[ed] to inflict bodily harm upon another." Minn. Stat. § 609.224, subd. 1(2). The voicemail recording provided relevant

[2] The state also argues that plain-error review should not be exercised when, for strategic reasons, defense counsel chose not to object. Because admission of the voicemail recording was not plain error affecting Jenson's substantial rights, we need not address this argument.

evidence that Jenson intended to assault T.L. It also demonstrated Jenson's motive for entering the residence without consent, making it relevant to the burglary offense as well.

Jenson also argues that the probative value of the voicemail recording is outweighed by its potential for unfair prejudice because it portrayed him as a menacing person prone to commit violent acts without justification. *See* Minn. R. Evid. 404(b). "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *State v. Smith*, 749 N.W.2d 88, 95 (Minn. App. 2008) (citing *Old Chief v. United States*, 519 U.S. 172, 180, 117 S. Ct. 644, 650 (1997)). "[U]nfair 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. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quoting *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005)). Jenson argues that he was unfairly prejudiced by the voicemail recording's depiction of him as a menacing person. But other evidence, including Jenson's admissions that he felt rage toward T.L., kicked in a door, and punched T.L. in the face, portrayed him similarly. Although the voicemail recording added to this other relevant evidence, its admission did not result in unfair prejudice when balanced against the probative value of the evidence.

Of the four contested rule 404(b) requirements, the state's failure to give notice of the purpose of the proffered evidence is the only requirement that arguably involved an

error that is plain. But because Jenson failed to establish that the error affected his substantial rights, admission of the voicemail recording does not warrant reversal.[3]

B.

Jenson also argues that the admission of his recorded telephone conversation with Officer Weleski on the morning of the assault was reversible error because Officer Weleski (1) asserted during his questioning that Jenson had to prove his innocence, (2) improperly denigrated Jenson's credibility, and (3) referenced and elicited references to Jenson's prior bad acts. Because Jenson objects for the first time on appeal, we also apply plain-error analysis to these claims. *See* Minn. R. Crim. P. 31.02 (stating that appellate court may consider plain error affecting substantial rights even if such error was not raised before district court); *see also Griller*, 583 N.W.2d at 740 (applying that rule).

Officer Weleski told Jenson several times during the telephone conversation that Jenson had to prove that he had not assaulted T.L. Jenson contends that these statements were inadmissible because they misstated the burden of proof. Statements made by police during interviews generally are admissible to provide context to the defendant's statements. *State v. Vance*, 714 N.W.2d 428, 443 (Minn. 2006). But any misstatement of the state's burden of proof is highly improper. *State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000). It is also improper to comment on a defendant's failure to produce evidence or make statements to an investigator. *State v. Richardson*, 514 N.W.2d 573,

[3] Because Jenson failed to satisfy the third prong of the *Griller* test, we need not address whether the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *See Griller*, 583 N.W.2d at 740, 742.

578 (Minn. App. 1994). Thus, the first two prongs of the *Griller* plain-error test are satisfied.

The statements to which Jenson now objects, however, did not affect Jenson's substantial rights. The evidence was clearly presented as a police interrogation. The district court properly instructed the jury on the burden of proof and the presumption of innocence at both the start and at the close of the one-day trial. Although redaction by the parties of the objectionable comments or a cautionary instruction given in advance of admitting the evidence would have been preferable, the record does not support the conclusion that these isolated statements by Officer Weleski affected the outcome of the case.

Several times during the telephone conversation Officer Weleski accused Jenson of lying. Because evaluating witness credibility is solely the province of the jury, a witness cannot vouch for or against the credibility of another witness. *State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995). But under Minnesota law, Officer Weleski's statements during the recorded telephone conversation did not constitute vouching testimony, and it was not plain error for the district court to fail to give a sua sponte limiting instruction. *See Vance*, 714 N.W.2d at 443-44 (holding that district court did not commit plain error by failing to give sua sponte cautionary instruction regarding unredacted police statements that defendant was lying).

In *State v. Ferguson*, the Minnesota Supreme Court held that the district court did not err by permitting the jury to consider an interrogation transcript containing police statements that accused the defendant of lying because the district court instructed the

jury that the police statements were not evidence. 581 N.W.2d 824, 835 (Minn. 1998). The *Ferguson* court found that the statements provided context for the defendant's answers and concluded that it was unlikely that the jury would have been unduly influenced by the statements. *Id.* at 835-36 ("The jury was made aware of the context of the questioning. It knew that [the defendant] was at the police station when the questioning occurred and could infer that [the officer] was attempting to get as much information from [the defendant] as possible."). The same is true here. The jury was advised that the recording was made during the investigation. Moreover, the conversation makes this context clear. In addition, Jenson began the telephone conversation by giving the officer a false name and denying that he had been at T.L.'s residence. He later recanted these assertions implicitly in the same recorded conversation. Jenson's own statements, not those of Officer Weleski, offered the best evidence of Jenson's credibility. Jenson's argument, therefore, fails.

Finally, Jenson argues that the admission of references to three prior bad acts during the recorded telephone conversation was reversible error. Specifically, the telephone conversation refers to the following: the threatening voicemail messages addressed in Section I.A., *supra*; a separate telephone call that Jenson made to the police earlier that morning wherein he provided a false name and telephone number when reporting that T.L. had violated his probation; and Jenson's statement during the recorded conversation that he cannot meet with Officer Weleski because he has an outstanding arrest warrant for an unrelated traffic matter. Because we have concluded that admission

of the voicemail recording was not reversible error, we consider in turn the two remaining bases for Jenson's claim.

Evidence of offenses committed as part of a single course of conduct, also called immediate-episode evidence, "is a separate category from evidence of other bad acts under Minn. R. Evid. 404(b)." *State v. Kendell*, 723 N.W.2d 597, 608 (Minn. 2006). When determining whether two acts constitute a single episode, we evaluate the temporal and geographic proximity of the acts and whether the acts were motivated by an effort to obtain a single criminal objective. *See id.* at 607-08 (discussing immediate-episode evidence in context of severance of offenses). The false information that Jenson supplied during his telephone call to the police reporting T.L.'s probation violation meets that definition.

To be inadmissible, the probative value of immediate-episode evidence must be "substantially outweighed" by the danger of unfair prejudice under Minn. R. Evid. 403. Here, Jenson's telephone call to the police is probative of his presence at T.L.'s residence that morning and provides circumstantial evidence that Jenson had a reason to shift blame to T.L. and away from himself. Given the limited nature of the statements and the fact that Jenson's telephone call to the police was never addressed at trial beyond the fleeting reference in the recorded telephone conversation, the danger of unfair prejudice did not substantially outweigh the probative value of this evidence.[4]

[4] Indeed, Jenson does not dispute that he also provided a false name to Officer Weleski at the start of the recorded telephone conversation that was admitted in evidence. The jury, therefore, was otherwise exposed to the same type of fabrication.

Finally, Jenson argues that reversal is warranted because the recorded telephone conversation included references to Jenson's outstanding arrest warrant. The state concedes, and we agree, that this reference was error and that it should have been redacted. Thus, the focus of our analysis is whether this error was "prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741. When Jenson testified at trial, he was asked by his attorney to explain the warrant. Jenson testified that the warrant was for his failure to pay a $200 fine in a traffic matter. This explanation to the jury negates Jenson's contention that the erroneous reference to his outstanding arrest warrant affected the outcome of his case.

In sum, Jenson fails to establish that admission of the recorded telephone conversation with Officer Weleski or voicemail messages entitles him to relief. *See supra* n.3.

II.

Jenson next challenges the district court's denial of his postconviction petition for a new trial based on A.W.'s recantation of her trial testimony. An appellant seeking postconviction relief has the burden of establishing, by a fair preponderance of the evidence, facts that warrant such relief. Minn. Stat. § 590.04, subd. 3 (2008). A new trial based on the recantation of trial testimony is warranted if the "*Larrison* test" has been satisfied. *State v. Turnage*, 729 N.W.2d 593, 597 (Minn. 2007) (citing *Larrison v. United States*, 24 F.2d 82, 87-88 (7th Cir. 1928), *overruled by United States v. Mitrione*, 357 F.3d 712, 718 (7th Cir. 2004) (modifying test)). The first element of the *Larrison* test requires the district court to be reasonably well-satisfied that the trial testimony was false.

Ferguson v. State, 779 N.W.2d 555, 559 (Minn. 2010). The second element requires the record to establish that, without the false testimony, the jury might have reached a different verdict. *Id.* A third relevant factor, albeit not a required element of the *Larrison* test, is that the petitioner was taken by surprise at trial or did not know that the testimony was false until after trial. *Id.* We review the district court's application of the *Larrison* test for an abuse of discretion. *Turnage*, 729 N.W.2d at 597.

T.L. testified at the postconviction hearing that, after Jenson had been convicted, A.W. admitted during a telephone conversation that, contrary to her testimony, she had given Jenson consent to come to the residence on April 26, 2008, thereby negating an essential element of the burglary offense. The district court found that, even though A.W.'s statement was admissible as a statement against penal interests, Minn. R. Evid. 804(b)(3), T.L.'s testimony that he had the conversation with A.W. was not credible. The district court held that Jenson had not met the first element of the *Larrison* test because it was not satisfied that A.W. told T.L. that she had consented to Jenson's entry onto the property.[5]

Citing *State v. Jackson*, Jenson argues that T.L.'s credibility as to A.W.'s recantation is an issue for a jury in a new trial, not the district court in a postconviction proceeding, to decide. 655 N.W.2d 828, 835 (Minn. App. 2003), *review denied* (Minn. April 15, 2003). Jenson misstates the law. In *Jackson*, we held that "[t]he credibility of trial witnesses is the domain of the trier of fact." *Id.* Jenson erroneously equates "trier of

[5] The district court found that the second element of the *Larrison* test was met. The state did not contest the third element of the *Larrison* test, and the district court did not address that element, stating that it is not a precondition to granting a new trial.

fact" with "jury." But in a postconviction hearing, the district court is the trier of fact. *See Opsahl v. State*, 677 N.W.2d 414, 423-24 (Minn. 2004). The *Opsahl* court held that the district court in a postconviction proceeding abused its discretion by failing to hold an evidentiary hearing to evaluate the credibility of a witness offering recantation evidence. *Id.* The *Opsahl* court remanded the case to the district court to conduct an evidentiary hearing and to "make findings of fact and conclusions of law on the issues of recanted testimony and prosecutorial misconduct." *Id.* at 425. Contrary to Jenson's argument, the district court did not abuse its discretion when it evaluated T.L.'s credibility as to whether A.W. recanted her trial testimony.

In rejecting T.L.'s testimony, the district court found that T.L. had reason to be biased in favor of his long-time friend Jenson and biased against A.W., with whom he was having a separate legal dispute. The district court also found that T.L. had a motive to provoke anger between Jenson and A.W. or to implicate A.W. in perjury. In addition, the district court found T.L.'s inability to recall details regarding what A.W. said and his testimony about the circumstances surrounding his conversation with A.W. rendered T.L.'s testimony incredible. The *Larrison* test requires the district court to be "reasonably well-satisfied that the trial testimony was false." *Ferguson*, 779 N.W.2d at 559. For well-founded reasons, that legal standard was not met here. The district court did not abuse its discretion by denying Jenson's postconviction petition for a new trial based on witness recantation.

Affirmed.