STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1705

State of Minnesota,
Respondent,

vs.

Kenneth Lewis Morgan,
Appellant.

Filed August 31, 2010
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CR-09-15140

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Worke, Judge.

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

HALBROOKS, Judge

Appellant Kenneth Lewis Morgan challenges his conviction of violating a no-contact order on several grounds. Because there is sufficient evidence to support the

jury's verdict, the district court's jury instruction was not plainly erroneous, and the district court did not abuse its discretion by permitting certain testimony to be re-read to the jury during deliberations, we affirm.

FACTS

A no-contact order was in place prohibiting appellant from having contact with T.M., his ex-girlfriend and the alleged victim in a domestic-assault case. Appellant was charged with violating this order because of an incident on March 24, 2009, at T.P.'s apartment. There are differing accounts of what transpired during the incident, but there are a few undisputed facts. T.P. was watching T.M.'s three children—two of whom are appellant's children. A 911 call was placed from a cell phone. A transcript of the 911 call was admitted into evidence, and a recording of the call was played to the jury. Yelling and loud arguing can be heard on the recording. The call was prematurely terminated, but the caller was able to give the location of the disturbance. The police arrived at T.P.'s apartment—the location given by the caller—and entered through the back door. Appellant and T.M. were both there, along with T.P. and several children. There were no other people present at that time. Appellant was arrested and charged with violating the no-contact order.

At trial, the witnesses told varying versions of the incident. T.P. testified that she was having a few people over on the night of the incident, and that T.M. arrived to pick up her children at some point in the evening. T.P. stated that she used T.M.'s cell phone to call 911 after T.M. arrived because two people named Alisha and John John were

arguing, and it was getting physical. T.P. testified that she believed it was T.M. who hung up the phone during the 911 call.

T.M. testified that she was *not* present when T.P. called 911, but that she arrived afterwards. She agreed that T.P. used her cell phone to dial 911, but claimed that she owned two cell phones and that she had left one with T.P. T.M. denied being the one to hang up the phone. T.M. also testified that after appellant's arrest, he called her and said, "What I need you to do is tell them you didn't even know I was there."

Minneapolis Police Officer Jarrod Kunze, one of the officers who responded to the incident, also testified. He testified that he heard yelling and shouting when he first arrived and that he went around to the rear of the building where the entrance for the upper-level residence was located and where "the disturbance sounded like it was taking place." Officer Kunze stated that T.M. and appellant were not in the same room when he arrived, but that "other officers brought [appellant] out from someplace else and I immediately recognized him as someone that I had been involved with about a month prior and as I looked at [T.M.], then I recognized that she was the person who had been assaulted at that previous call[]." Officer Kunze testified that he did not see appellant and T.M. speak to each other. Officer Kunze also testified that he was told that there had been some sort of domestic altercation between appellant and T.M. and not that it involved two other people.

There were several objections during closing arguments by respondent State of Minnesota regarding whether T.P. had testified that T.M. had hung up the cell phone or whether she testified that she could not remember. During deliberations, the jury asked

the district court if it could hear T.P.'s testimony regarding who had hung up the cell phone during the 911 call. Over appellant's objection, the district court granted the jury's request. The following day, the jury returned a guilty verdict. Because appellant had stipulated to previous qualifying convictions, he was convicted of a felony and sentenced to 24 months in prison. This appeal follows.

D E C I S I O N

I. The district court's jury instruction was not plain error.

The standard jury instruction for violation of a no-contact order contains four elements. 10 *Minnesota Practice*, CRIMJIG 13.54 (2006). The elements are: (1) there was an existing domestic-abuse no-contact order; (2) the defendant violated a term or condition of the order; (3) the defendant knew of the no-contact order; and (4) the date and location of the offense. *Id.* The district court instructed the jury on these four elements, but added that "[t]here is no violation of a no-contact order if a defendant accidentally or unintentionally sees the other person as long as the defendant immediately leaves the presence of the other person." Appellant argues that the district court's addition to the standard instruction was erroneous.

District courts are allowed "considerable latitude" in the selection of language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). And appellant did not object to the jury instruction at the time of trial. A defendant's failure to object to a particular jury instruction generally forfeits the issue for appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). But we have the discretion to consider an allegation of error if the appellant can show "plain error affecting substantial rights or an error of

fundamental law." *Id*. Substantial rights are affected when "there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury verdict." *State v. Vance*, 734 N.W.2d 650, 659 (Minn. 2007) (quotation omitted).

The standard jury instruction follows the language of the statute. Minn. Stat. § 518B.01, subd. 22(b) (2008), states that "[a] person who knows of the existence of a domestic abuse no contact order issued against the person and violates the order is guilty of a misdemeanor." This subdivision also states that "[a] person is guilty of a felony . . . if the person knowingly violates this subdivision." Minn. Stat. § 518B.01, subd. 22(d) (2008). Appellant argued to the district court that accidental contact would not constitute a violation of a no-contact order under this statutory scheme. The state countered that the plain language of the statute and the standard jury instruction require no knowledge on the part of the defendant beyond knowledge of the existence of the order. But the district court agreed with appellant's interpretation of the statute and added the caveat that accidental contact would not constitute a violation of the no-contact order as long as appellant immediately left T.M.'s presence.

While appellant now contends that it was plain error to include a requirement that appellant "immediately leave" T.M.'s presence to avoid violating the order, he did not make this argument to the district court. Specifically, appellant argued to the district court that "it's not a violation if it's indirect where you end up in the same place, however, you have to have the opportunity to leave . . . . If you come to a restaurant, and the two of you are there . . . you know you are going to have to leave." The district court accepted appellant's argument and gave the now-challenged jury instruction. It would be

illogical to allow a person subject to a domestic-abuse no-contact order to remain indefinitely in contact with his victim merely because their meeting was accidental. Accordingly, we conclude that the district court's decision to give the requested jury instruction was not plain error.

II. There is sufficient evidence to support the jury's guilty verdict.

Appellant also argues that there is insufficient evidence to support the jury's verdict. 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, was sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing 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).

According to Minn. Stat. § 518B.01, subd. 22(d), "[a] person is guilty of a felony . . . if the person knowingly violates this subdivision: (1) within ten years of the first of two or more previous qualified domestic violence-related offense convictions." And as mentioned, to violate the subdivision, the person must "know[] of the existence of a domestic abuse no contact order issued against the person and violate[] the order." Minn. Stat. § 518B.01, subd. 22(b). The parties stipulated to the previous qualifying

offenses and to the fact that appellant knew of the existence of the order. Accordingly, the jury was charged with determining whether appellant violated the order. As discussed, the jury was instructed that accidental contact would not constitute a violation of the order as long as appellant immediately left T.M.'s presence.

The evidence at trial consisted of the 911 call and the testimony of the three witnesses. The testimony established that appellant and T.M. were in T.P.'s apartment at the same time, but there was no direct evidence that appellant knew that he was going to see T.M. The jury's determination that appellant knowingly violated the no-contact order was based on circumstantial evidence. And "[w]hile it warrants stricter scrutiny, circumstantial evidence is entitled to the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). A jury is in the best position to evaluate circumstantial evidence, and its verdict is entitled to due deference. *Webb*, 440 N.W.2d at 430.

Viewing the evidence in a light most favorable to the guilty verdict, it was reasonable for the jury to have concluded that appellant knew that T.M. would be arriving at T.P.'s apartment, based on the fact that T.M.'s children were there. In addition, T.P. testified that T.M was there when she placed the 911 call and that T.M. hung up the phone. According to this testimony, the jury also could have reasonably concluded that the shouting and yelling heard on the 911 tape and by Officer Kunze was T.M. and appellant arguing. And finally, the jury could have reasonably concluded that, even if appellant did not realize that T.M. would pick up her children, appellant had an opportunity to leave when T.M. arrived to pick up her children or after T.P. called 911,

and he did not do so. Accordingly, there is sufficient evidence to support the jury's verdict.

III. The district court did not abuse its discretion by admitting evidence of appellant's past domestic assault.

Appellant argues that the district court improperly allowed Officer Kunze to testify that he recognized appellant from appellant's previous arrest for domestic assault. Appellant claims that this testimony was inadmissible under Minn. Stat. § 634.20 (2008). Evidentiary rulings are reviewed for an abuse of discretion. *State v. Word*, 755 N.W.2d 776, 781 (Minn. App. 2008). In addition, appellant must show prejudice as a result of the ruling. *Id.*

Minn. Stat. § 634.20 provides an exception to the standard evidentiary rule that prior bad acts cannot be introduced as character evidence to prove that a defendant acted in conformity therewith. Minn. R. Evid. 404(b); *State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004). Section 634.20 allows for evidence of similar conduct by the accused to be admitted for purposes of illuminating the relationship between the victim and the accused or to put the crime in context. *McCoy*, 682 N.W.2d at 159. But the state did not offer Officer Kunze's testimony as relationship or character evidence. Although the state initially moved to admit relationship evidence under Minn. Stat. § 634.20, the district court deferred its ruling on the motion until it had heard T.M.'s testimony. Ultimately, the state never offered the relationship evidence.

But unrelated to the section 634.20 motion, the district court allowed Officer Kunze to testify to the fact that he recognized appellant from a prior domestic-assault call

for the purpose of explaining Officer Kunze's actions at the scene. Officer Kunze was explaining why he believed that there was a no-contact-order violation. The district court concluded that the testimony was relevant for this purpose and that evidence that appellant had been involved in one prior domestic assault, without going into details of the assault, would not be prejudicial. The district court based its conclusion on the fact that the jury would be aware of the previous domestic-abuse charge because of the current charge—violating a domestic-abuse no-contact order. There would not have been a no-contact order in place if there had not been a previous incident. Evidence that is relevant, offered for a legitimate purpose and not unduly prejudicial, is admissible. Minn. R. Evid. 402, 403. Because Officer Kunze's testimony was not offered as relationship or character evidence and because it was not prejudicial, we conclude that the district court did not abuse its discretion by allowing this limited testimony.

IV. The district court did not abuse its discretion when it allowed testimony to be re-read to the jury.

Appellant also claims that the district court abused its discretion when it allowed testimony to be re-read to the jury. Minn. R. Crim. P. 26.03, subd. 19(1)-(2), governs the materials that may go to the jury room and requests by the jury to review evidence. *State v. Kraushaar*, 470 N.W.2d 509, 514 (Minn. 1991). The rule provides in part:

> If the jury, after retiring for deliberation, requests a review of certain testimony or other evidence, the jurors shall be conducted to the courtroom. The court, after notice to the prosecutor and defense counsel, may have the requested parts of the testimony read to the jury and permit the jury to reexamine the requested materials admitted into evidence.

Minn. R. Crim. P. 26.03, subd. 19(2). "The decision to grant a jury's request to review evidence is within the discretion of the district court, and [appellate courts] will not overturn it absent an abuse of that discretion." *State v. Everson*, 749 N.W.2d 340, 345 (Minn. 2008). In *Everson* the supreme court directed:

> When a jury makes a request such as this, the court "should" consider three factors: (i) whether the material will aid the jury in proper consideration of the case; (ii) whether any party will be unduly prejudiced by submission of the material; and (iii) whether the material may be subjected to improper use by the jury.

Id.

Appellant's attorney objected to the testimony being re-read to the jury on the ground that it would be "nothing but prejudicial because we are highlighting a certain portion of the testimony." The district court addressed the possible prejudice to appellant by asking appellant's attorney if there was other testimony on cross-examination that he would like included. Appellant's attorney did not identify any such testimony. The district court also addressed whether the material would aid the jury when it stated

> [t]his is evidence and it's a question of whether . . . something they have already heard[] can . . . be repeated to answer their question and the objection is well made, well founded. It's rare that I—I don't like reading back testimony, but this is a case where there was such dramatic disparities between each party's recollection of matters, that I did, in fact, tell them they could get that clarified and that's what I'll do.

The testimony that was re-read dealt with the identity of the person who hung up during the 911 call, a narrow factual issue on which counsel had disagreed during closing arguments. Thus, re-reading the testimony plainly assisted the jury in its deliberations.

Because the district court considered the factors in *Everson*, its ultimate conclusion to allow the testimony to be re-read was within its discretion.

Affirmed.