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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1911**

State of Minnesota,
Respondent,

vs.

Mark David Malin,
Appellant.

**Filed November 23, 2010
Affirmed
Lansing, Judge**

Aitkin County District Court
File No. 01-KX-04-000510

Lori Swanson, Attorney General, Kelly O'Neil Moller, Assistant Attorney General, St. Paul, Minnesota; and

Jim Ratz, Aitkin County Attorney, Aitkin, Minnesota (for respondent)

Mark D. Nyvold, Special Assistant State Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

LANSING, Judge

In an appeal from conviction, Mark Malin challenges an evidentiary ruling, the denial of a mistrial motion, and the district court's failure to instruct the jury on proper use of relationship evidence in his prosecution for first-degree, criminal sexual conduct. We conclude that the rulings on the evidentiary issue and the mistrial motion were not an abuse of discretion and that the absence of a cautionary instruction, although it constitutes error, does not require a new trial. In affirming the conviction, we also reject the new-trial claims raised in Malin's pro se, supplemental brief because they lack factual support.

FACTS

A jury found Mark Malin guilty of first-degree, criminal sexual conduct for the sexual penetration of fifteen-year-old KMJ in June 2004. Malin is the boyfriend of KMJ's mother and lived in the same household as KMJ for eleven years. KMJ told her grandmother about Malin's sexual abuse in August 2004. That same day, KMJ's grandmother called the police. A short time later Malin was arrested and charged with first-degree, criminal sexual assault.

At trial, KMJ testified that Malin began sexually abusing her when she was five or six years old. Her testimony included an account of multiple incidents of abuse over a period of approximately ten years and a detailed description of the June 2004 sexual assault. When the prosecutor asked KMJ if Malin had used drugs or alcohol before the June assault, she responded, "He did, daily." The defense attorney objected, and the district court sustained the objection and instructed the jury to disregard both the

prosecutor's question and KMJ's answer. KMJ was questioned by both the prosecution and the defense about her 1998 allegations that Malin had sexually abused her. KMJ testified that she recanted the 1998 allegations because her mother threatened that KMJ would never see her family again unless she said the allegations were false.

Following conviction and sentencing, Malin appeals. In his main brief he alleges three district court errors: a relevancy ruling on Malin's drug or alcohol use at the time of the assault, the denial of a mistrial motion after KMJ's answer to the question on Malin's drug or alcohol use, and the failure to give a cautionary instruction on the relationship evidence. In a pro se, supplemental brief, Malin seeks a new trial based on a failure to advise him of his *Miranda* rights and the district court's failure to recuse.

D E C I S I O N

I

Evidentiary rulings on relevancy are generally left to the sound discretion of the district court and will be sustained on appeal unless the ruling is an abuse of discretion. *State v. Schulz*, 691 N.W.2d 474, 477 (Minn. 2005). "Relevant evidence" is evidence that tends to make the existence of any fact of consequence more or less probable than it would be without the evidence. Minn. R. Evid. 401.

The district court concluded that evidence of Malin's drug use at or near the time of the June 2004 assault was relevant and ruled that the state could elicit testimony from KMJ for that limited time period. Malin argues that the evidence was not relevant and that the district court abused its discretion by permitting any questions on Malin's drug or alcohol use.

During the in-chambers discussion on Malin's motion in limine to exclude questions on drug or alcohol use, both the prosecutor and the defense attorney referred to KMJ's statement, during the 2004 investigation, that Malin had offered her marijuana. The district court ruled that evidence of Malin's offering marijuana to KMJ at the time of the June sexual assault was probative and admissible.

The state argued at the motion hearing and on appeal that any offers or acceptance of marijuana between Malin and KMJ could have caused a guilt-response that would explain the delay between the June assault and KMJ's August report to her grandmother. Malin's theory of the case was that KMJ was fabricating her account of the June 2004 sexual assault and that it was part of a continuous fabrication that began with her 1998 allegations. Prompt report of a sexual assault is one of the factors that supports the reporter's veracity. *See Marshall v. State*, 395 N.W.2d 362, 365 (Minn. App. 1986) (recognizing prompt complaint of incident is "strong corroborating evidence"), *review denied* (Minn. Dec. 17, 1986). KMJ's account of Malin's providing her with marijuana potentially offered an alternative explanation for the delay that would not undermine her veracity. Because this explanation would tend to make fabrication less probable, the district court did not abuse its discretion by ruling that KMJ's testimony on the offer and use of marijuana at the time of the incident was relevant.

II

The prosecutor's initial question framed the issue of Malin's drug or alcohol use narrowly in an apparent attempt to avoid a leading or improper inquiry. KMJ's answer, however, was unfortunately broad:

- Q. Answer this specific question, Ms. [KMJ]: On this occasion did you see the defendant use drugs or alcohol?
- A. (No response)
- Q. Only, I'm not asking about any other time.
- A. I don't understand, are you asking beforehand or - -
- Q. Yes, shortly beforehand.
- A. He did, daily.

Following a defense objection, which was sustained, the district court instructed the jury to disregard both the prosecutor's question and KMJ's answer. At the close of evidence, Malin moved for a mistrial, which the district court denied. For the duration of the trial, the state asked no further questions about Malin's drug or alcohol use.

Malin challenges the district court's denial of his mistrial motion. He contends that testimony indicating that he used drugs or alcohol "daily" was so prejudicial that it substantially affected the verdict.

We review the district court's denial of a motion for a mistrial for abuse of discretion. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). The district court judge who conducted the trial remains in the best position to determine whether the nonresponsive answer resulted in prejudice that requires a new trial. *Id.* A mistrial should not be granted unless there is a reasonable probability that the outcome would be different but for the error. *Id.*

We conclude for two reasons that there is no reasonable probability that the verdict would have been different if KMJ had not improperly exceeded the scope of the prosecutor's question about Malin's drug or alcohol use. First, the district court's instruction to the jury to disregard the question and testimony followed the question and

answer in the trial sequence and was directly aimed at mitigating any prejudice. *See id.* (determining that any prejudice from witness’s improper comment was mitigated by court’s instructions). It is presumed “that the jury followed the district court’s instruction.” *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002). Second, the issue at trial was not Malin’s use of drugs or alcohol, but whether he committed first-degree, criminal sexual conduct by sexually penetrating KMJ in June 2004. Following the denial of the mistrial, the district court commented on the strength and discernible credibility of KMJ’s testimony. The district court’s ruling rested on its perception that, in light of the compelling testimony, KMJ’s brief answer—which was promptly stricken—did not influence the jury. The district court was in the best position to determine the effect of and the proper remedy for KMJ’s overbroad response.

The district court’s prompt instruction—that the jury should disregard the prosecutor’s question and KMJ’s answer—served a curative purpose and it was not an abuse of discretion to deny the motion for a mistrial. The record supports the district court’s decision that there was no reasonable probability that the outcome of the trial would have been affected by the stricken question and response.

III

“Evidence of similar conduct by the accused against the victim of domestic abuse, or against other family or household members, is admissible unless” the prejudicial effect of the evidence substantially outweighs its probative value. Minn. Stat. § 634.20 (2008). “Domestic abuse” is defined to include criminal sexual conduct inflicted on a family or household member. Minn. Stat. § 518B.01, subd. 2(a) (2008). When evidence of similar

conduct is submitted to the jury, the district court has the responsibility of providing a cautionary instruction on the proper use of the evidence, both at the time of submission and in the final instructions. *State v. Word*, 755 N.W.2d 776, 785 (Minn. App. 2008).

Malin argues that the district court's failure to instruct the jury on the proper use of relationship evidence denied him a fair trial. At trial, Malin did not object to the lack of a cautionary instruction. The absence of a trial objection ordinarily results in forfeiting the right to object on appeal. *Manthey*, 711 N.W.2d at 504. To overcome forfeiture, the appellant must show that the district court committed plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

Plain error requires an error that is plain and affects substantial rights. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error is plain if it "contravenes caselaw, a rule, or a standard of conduct." *Id.* If these requirements are met, we will correct the error only if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (quotation omitted).

Admitting relationship evidence without providing the cautionary instruction creates a risk that the jury will misuse the evidence as proof that a person acted in conformity with his prior conduct. It was error for the district court not to instruct the jury on the proper use of KMJ's relationship testimony when the evidence was received and in the final jury instructions. This omission was a contravention of caselaw that potentially affected Malin's substantial rights and the fairness of the proceedings. *See, e.g., State v. Barnslater*, 786 N.W.2d 646, 654 (Minn. App. 2010) (concluding that

absence of cautionary instruction resulted in plain error); *Word*, 755 N.W.2d at 785 (similarly concluding that failure to instruct resulted in plain error).

In the specific circumstances of Malin's trial we conclude, however, that reversal is not required because the error did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. We base this conclusion on the postulate that when the probative value of relationship evidence "far outweighs the potential for unfair prejudice resulting from the district court's failure to instruct the jury sua sponte," the error, by itself, does not compel a determination that the fairness, integrity, or public reputation of the judicial proceedings was seriously affected. *Barnslater*, 786 N.W.2d at 654.

The probative value of the relationship evidence, in questions propounded both by the prosecutor and the defense, significantly outweighed any unfair prejudice resulting from the omission of the cautionary instruction. *See id.* (similarly evaluating potential for unfair prejudice resulting from district court's failure to give cautionary instruction). Both the prosecution and the defense used the relationship evidence extensively to develop the context and history of the interaction between KMJ and Malin. Malin had been notified of the state's intent to introduce the relationship evidence and did not object to its introduction. The introduction of the evidence did not surprise Malin, and the prosecutor did not improperly use the evidence. Finally, the district court instructed the jury that it was Malin's charged offense of sexually penetrating KMJ in June 2004 that was at issue and must be proved beyond a reasonable doubt. The district court's instruction focused the jury's attention on the charged offense and avoided the risk that

the jury would improperly convict Malin for his prior conduct. Under these circumstances, the lack of a cautionary instruction did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings, and the error does not require reversal.

In light of our analysis of the alleged errors, we reject the last argument in Malin's main brief that the cumulative effect of the district court's errors deprived him of a fair trial. Neither the district court's evidentiary ruling nor the denial of the mistrial constituted error and thus do not aggregate with the failure to give the cautionary instruction on the use of relationship evidence to result in cumulative error.

IV

In his pro se, supplemental brief, Malin claims that the district court judge who tried the case should have recused and that statements admitted at trial violated his *Miranda* rights. We conclude that neither claim provides a ground for reversal.

We start from the requirement that the record must be "sufficient to show the alleged errors and all matters necessary for consideration of the questions presented." *Truesdale v. Friedman*, 267 Minn. 402, 404, 127 N.W.2d 277, 279 (1964). Pro se litigants are generally held to the same standards as attorneys. *State v. Seifert*, 423 N.W.2d 386, 372 (Minn. 1988). And, although these two claims are advanced by Malin pro se, he was represented by counsel in both the district court proceedings and on appeal.

Malin contends that the district court judge who tried this case in 2007 had previously recused himself in 2004 because of bias and that the judge's recusal was

similarly required in 2007. Malin's claim of a 2004 recusal for bias or personal interest is not supported by the record. Malin has presented no evidence to substantiate the claim of a 2004 recusal. Because the record is insufficient to support consideration of Malin's allegation, we reject his claim of reversible error for the district court judge's failure to recuse.

Malin's second pro se claim is that statements he made during his 2004 arrest were used against him in violation of his *Miranda* rights. Statements made by a suspect during a "custodial interrogation" are admissible only if the statement was preceded by a *Miranda* warning. *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 1612 (1966); *State v. Edrozo*, 578 N.W.2d 719, 724 (Minn. 1998). Thus, a *Miranda* warning is required if a suspect is both in custody and subject to interrogation. *Edrozo*, 578 N.W.2d at 724.

This claim fails because, again, the record is insufficient to support the alleged violation. Although the arresting officer testified at trial and referred to statements made by Malin, the record provides no basis to determine the status of a *Miranda* warning, where or when the statements were made, and whether Malin was in custody or subject to interrogation. Because no objections were made to the officer's testimony at trial, the record is insufficiently developed to allow for legal analysis.

The record fails to establish that Malin is entitled to relief on the grounds raised in his pro se, supplemental brief.

Affirmed.