STATE OF MINNESOTA
IN COURT OF APPEALS
A10-475

State of Minnesota,
Respondent,

vs.

Carlos Abrahim,
Appellant.

Filed March 8, 2011
Affirmed
Toussaint, Judge

Ramsey County District Court
File No. 62SU-CR-08-3649

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

Robb L. Olson, White Bear Lake City Prosecutor, White Bear Lake, 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 Bjorkman, Presiding Judge; Toussaint, Judge; and Stoneburner, Judge.

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

TOUSSAINT, Judge

Appellant Carlos Abrahim challenges his conviction of violation of an order for protection, arguing that improper prosecutorial vouching for the complainant's

credibility, prosecutorial misconduct in closing argument, and the district court's sua sponte no-adverse-inference instruction were plain error affecting his substantial rights. We conclude that vouching did not occur and that the evidence challenged in this regard was admissible relationship evidence. Although we agree with appellant that the prosecutor's statement in closing argument and the district court's sua sponte instruction were plain error, because we conclude that appellant's substantial rights were not affected, we affirm.

D E C I S I O N

None of the alleged errors raised in this appeal were objected to at trial. Consequently, the plain-error standard of review applies, under which we must affirm unless the defendant shows that (1) there was error, (2) the error was plain, and (3) the error affected his substantial rights. *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). If the three prongs are met, we then decide if we should address the error to ensure fairness and the integrity of judicial proceedings. *Id.* Error is plain if it is clear or obvious and not hypothetical or debatable, *State v. Leutschaft*, 759 N.W.2d 414, 420 (Minn. App. 2009), such as when it "contravenes case law, a rule, or a standard of conduct," *State v. Hersi*, 763 N.W.2d 339, 344 (Minn. App. 2009) (quotation omitted). Error affects a defendant's substantial rights when it deprives him of a fair trial. *State v. Tscheu*, 758 N.W.2d 849, 863 (Minn. 2008). "This prong is satisfied if the defendant meets his 'heavy burden' to show that the error was prejudicial and affected the outcome of the case." *Id.* at 864.

I.

Appellant argues that the district court abused its discretion by admitting evidence about the order for protection whose violation formed the basis for the charge in this case and about appellant's prior convictions of domestic abuse and violation of a no-contact order; he contends that this evidence amounted to improper vouching for the credibility of S.V., the complainant, and was not relationship evidence or otherwise relevant. S.V. was involved with appellant in a romantic relationship from 2001 to 2004; during that time they had a child together.

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

> Evidence of similar conduct by the accused against the victim of domestic abuse, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. "Similar conduct" includes, but is not limited to, evidence of domestic abuse, violation of an order for protection under section 518B.01; violation of a harassment restraining order under section 609.748; or violation of section 609.749 or 609.79, subdivision 1. "Domestic abuse" and "family or household members" have the meanings given under section 518B.01, subdivision 2.

Minn. Stat. § 634.20 (2006).

Section 634.20 provides for the admission of evidence of similar conduct by appellant against S.V., specifically including evidence of domestic abuse and evidence of violation of an order for protection. The statute under which appellant was charged also makes elements of the offense his knowledge of the order for protection and his previous

convictions. *See* Minn. Stat. § 518B.01, subd. 14 (2006).

"Evidence presented under section 634.20 is offered to demonstrate the history of the relationship between the accused and the victim of domestic abuse. For this reason, it is tailored to address the unique nature of domestic violence, which often is difficult to prosecute because of the abuser's control over the victim." *State v. Barnslater*, 786 N.W.2d 646, 650 (Minn. App. 2010) (citation omitted). The admissibility of relationship evidence is based on whether the accused's underlying conduct constitutes domestic abuse, which includes types of assaultive conduct as well as types of offenses. *Id.* at 651.

"Evidence that helps to establish the relationship between the victim and the defendant or which places the event in context bolsters its probative value." *State v. Kennedy*, 585 N.W.2d 385, 392 (Minn. 1998). "When balancing the probative value against the potential prejudice, unfair 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) (quotation omitted). Even if a district court erred by failing to exclude the full range of relationship evidence in a case, if the "evidence had substantial probative value which was not clearly outweighed by the danger of unfair prejudice," then the unobjected-to error was not plain error. *State v. Word*, 755 N.W.2d 776, 784 (Minn. App. 2008).

At trial, S.V. testified that appellant followed her in his car for approximately five miles one day in February 2005; she called the police, and appellant was arrested and later convicted of domestic assault. A copy of appellant's certified conviction for this

offense was admitted at trial, to which defense counsel expressly did not object. The certified conviction states that appellant was found guilty of one count of domestic assault following a bench trial.

After the certified conviction was received into evidence, the district court gave the jury a limited-purpose instruction: "You may use this evidence to assess the history of the relationship between [S.V.] and [appellant] and the circumstances surrounding this case; however, you may not use this evidence as a reason to find [appellant] guilty of the offense charged in this case."

S.V. testified that she had also requested a no-contact order because she was afraid of appellant, who was abusive while they were living together and had threatened to kill her. The basis of his conviction of violating the 2005 no-contact order was that he called S.V.'s sister and threatened S.V. The certified conviction for this offense was admitted without objection, and the district court told the jury to keep in mind the limited-purpose instruction it had just given. Defense counsel again stated that he had no objection.

In July 2007, S.V. applied for and received an order for protection against appellant. S.V. had been at a gas station with their daughter when appellant showed up and swore at and threatened her. She testified that there was a hearing regarding the order for protection, which appellant opposed, and that the judge issued a final order for protection. A certified copy of the order for protection was admitted without objection.

The evidence showing that appellant was found guilty of domestic abuse for following S.V. with his car and of violation of a no-contact order for calling S.V.'s sister to pass on a threat helps establish the context of appellant's relationship with S.V. and is

made admissible by section 634.20 unless its usefulness for this purpose is substantially outweighed by the potential for unfair prejudice. The evidence showing that a court issued the order for protection over appellant's objection following an evidentiary hearing and the circumstances necessitating the order for protection—in other words, the background of the order for protection—is also relationship evidence that is probative of the context of S.V. and appellant's relationship, including what actions would or would not cause S.V. fear, which was an element of the charged offense. Further, the state was required to prove the existence of the order for protection.

Appellant argues that this evidence bore a high risk of unfair prejudice because it amounted to the state vouching for S.V.'s credibility in this matter. Appellant is correct that vouching is improper. *See State v. Patterson*, 577 N.W.2d 494, 497-99 (Minn. 1998). Vouching occurs "when the government implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness's credibility." *United States v. Beasley*, 102 F.3d 1440, 1449 (8th Cir. 1996), *cited in Patterson*, 577 N.W.2d at 497. "It is not for the prosecutor to tell the jury what he believes the truth to be." *State v. McNeil*, 658 N.W.2d 228, 235 (Minn. App. 2003). Thus, the prosecutor "may not throw his own opinion onto the scales of credibility." *Id.*

Appellant contends that evidence of the fact that there was a trial or hearing in a previous matter and that S.V.'s claims of domestic abuse or similar conduct by appellant were then believed "was purely and simply an effort to tell the jury that the court and/or another jury believed [S.V.] and not [appellant]." But by this logic, any prior conviction involving the same victim would be improper vouching. Here, the prosecutor never

stated that S.V. was telling the truth in this matter or claimed that she was a truthful person. No other witness testified about S.V.'s truthfulness, in general or in this particular case. No one vouched for S.V.'s credibility as a witness, and appellant's claim that this evidence amounted to improper vouching for her credibility is without merit.

We conclude that appellant has not shown any error, let alone plain error, in the admission of the challenged evidence. Further, even if this evidence were admitted in error, appellant's claim of prejudice is founded on his mistaken argument that the state improperly vouched for S.V.'s credibility; thus, he has not shown prejudice.

II.

Appellant argues that the prosecutor in closing argument urged the jury to convict appellant because of the similarities between his previous order-for-protection violation and the allegations in this case—in short, that he did it before, rendering it more likely that he did it here—and that this argument was prosecutorial misconduct. Appellant further contends that the district court's instruction to the jury did not cure the prejudice resulting from this argument and that a new trial should be ordered.

It is prosecutorial misconduct to intentionally misstate the evidence or to make arguments that are not supported by the evidence. *State v. Bobo*, 770 N.W.2d 129, 142 (Minn. 2009); *State v. Mayhorn*, 720 N.W.2d 776, 788 (Minn. 2006). During closing argument, a prosecutor may argue all reasonable inferences from the evidence in the record, but may not mislead the jury as to the inferences it may draw. *Bobo*, 770 N.W.2d at 142. Unobjected-to prosecutorial misconduct is reviewed under a modified plain-error test: the burden remains on the defendant to show that plain error occurred, but shifts to

the state to prove lack of prejudice. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

In the state's closing argument, the prosecutor stated:

> [T]he instruction you get on that is . . . a reasonable doubt is a doubt based on reason and common sense. Use your brain, just what's common sense. What happened here? The circumstances of this case are so similar to the previous conviction that it's just uncanny. Reason and common sense. I believe if you exercise your reason and common sense and you evaluate all the evidence, which you have here, you had testimony of [S.V.], Detective Johnson, you'll conclude that the State has proved beyond a reasonable doubt that [appellant] is guilty of violating that order for protection.

The district court then instructed the jury that the previous event referred to by the prosecutor "was offered only for the purpose of showing the relationship between the parties" and that any "similarity between that past event and the present event is not to be considered" in determining appellant's guilt.

The prosecutor's statement was plainly error because the evidence was admitted for one limited purpose and then the prosecutor asked the jurors to use it for another purpose by drawing an impermissible inference. Nevertheless, we conclude that appellant was not prejudiced by this statement, especially in light of the court's instruction to disregard this argument and reiteration of the purpose for which the evidence was admitted. *See State v. Matthews*, 779 N.W.2d 543, 550 (Minn. 2010) ("We presume that juries follow instructions given by the court.").

S.V. testified that in April 2008, appellant drove by as she was turning onto a city street less than half a block from her residence while driving to pick up their daughter from daycare, which made her afraid. Appellant drove past her, but after she picked up their daughter and started driving home, she "noticed his car just a short distance down

the road just sitting there, and cars were going by." After S.V. left from the daycare facility, she "saw [appellant] pull out onto the road and speed up to the bumper of [her] car." Appellant's vehicle was only inches away from her car, and he followed her for about a mile. S.V. was scared and she called the police.

White Bear Lake Detective Ben Johnson testified that he met with S.V. to take a report about an order-for-protection violation. S.V. told Detective Johnson that she saw appellant near her residence and by their child's daycare facility, which is about a quarter mile away from S.V.'s residence. S.V. told Detective Johnson about the tailgating. When they spoke, she "seemed upset," had tears in her eyes, and reported being terrified during the incident.

Detective Johnson followed up by calling appellant, who admitted being in the area but denied seeing S.V. and "was simply driving from his work [in] downtown St. Paul to his post office box that was [in] downtown White Bear Lake." Detective Johnson testified that the route appellant took "would have been well out of his way." Detective Johnson testified that appellant was not allowed to drive past S.V.'s residence on that route because it took him within a half block of S.V.'s residence. Apart from the testimony of S.V. and Detective Johnson, as well as the certified copies of appellant's convictions and the order for protection, no evidence was presented at trial.

In response to interrogatories posed on the special verdict form, the jury specifically found that appellant caused fear of harm to S.V. or the child and traveled within one block of S.V.'s residence, both of which violated provisions of the order for protection. The jury likely found appellant guilty because it believed the only evidence

offered in this case—that appellant drove close to the victim's house and also tailgated her, thereby causing her fear—rather than because the prosecutor's statement convinced the jury to draw an impermissible inference from evidence that appellant had done similar things before. Thus, we conclude that appellant was not prejudiced by the prosecutor's statement in closing argument.

III.

Appellant also seeks a new trial on the ground that the district court's no-adverse-inference instruction in the absence of his on-record consent was prejudicial plain error. In its jury instructions after the parties finished presenting evidence, the district court stated that appellant had a constitutional right not to testify and that the jury "should not and must not draw any inference" from his silence. Although appellant did not object, the record also does not contain his request for or consent to such an instruction.

It is plain error for a district court to give a no-adverse-inference instruction regarding a defendant's decision not to testify unless the defendant clearly consents and insists on the record that the instruction be given. *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006). Because the record does not reflect appellant's consent, we must determine whether the error affected appellant's substantial rights; this inquiry asks whether there is a "reasonable likelihood that giving the instruction in question had a significant effect on the jury verdict." *Id.*

In determining whether the erroneous instruction prejudiced the defendant, we consider "the totality of the evidence" and the context of the trial, keeping in mind that "[t]he credibility of . . . witnesses is for the jury to decide." *See id.* at 881. Giving this

jury instruction "may have . . . the deleterious effect of emphasizing [the defendant's] failure to take the witness stand and deny the allegations." *State v. Duncan*, 608 N.W.2d 551, 558 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). This concern is heightened when "the central issue in the case was the credibility of the [alleged victim's] statements." *Id.*

In this case, we conclude that the error was not prejudicial. Emphasizing the defendant's failure to testify is troublesome because it makes it seem like he has something to hide. But here, appellant did not present any evidence, and the conviction likely rested on the fact that all of the evidence presented at trial pointed to appellant's guilt, rather than on any improper inference drawn from his silence.

Affirmed.