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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1288**

State of Minnesota,
Respondent,

vs.

Jason David Hoversten,
Appellant.

**Filed July 17, 2017
Affirmed
Reyes, Judge**

Stearns County District Court
File No. 73-CR-15-11857

Lori Swanson, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Hooten, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

REYES, Judge

Appellant challenges his convictions of first degree-burglary and domestic assault, resulting in a 90-month sentence. Appellant argues that the district court abused its

discretion in (1) admitting a witness's prior inconsistent statements; (2) denying appellant's request to instruct the jury on the definition of licensee; (3) admitting an expert witness's testimony; (4) admitting evidence of appellant's prior domestic conduct as relationship evidence; and (5) denying appellant's motion for a downward dispositional sentencing departure and imposing an upward durational departure. Appellant also argues that the prosecutor committed misconduct during closing argument by stating that a witness lied. We affirm.

FACTS

Appellant Jason David Hoversten and A.P. have been involved in an on-and-off relationship for 13 years and have a child, T.H. A.P. lived in an apartment with T.H., A.P.'s sister, and A.P.'s sister's two sons. On December 29, 2015, A.P.'s neighbor called 911 to report a domestic dispute between appellant and A.P. While speaking with A.P., a police officer took both an informal recording, without A.P.'s knowledge, and a formal recording of A.P.'s statements.

While being informally recorded, A.P. told the officer that she did not want appellant to enter her residence. Appellant, however, made his way inside and took A.P. into the bedroom where he hit her twice in the face and grabbed her on the throat, constricting her airway while she screamed for help. During the informal recording, appellant's mother called A.P. A.P. told appellant's mother that appellant "just busted into [her] house, beat the crap outta [her] and the kids ran upstairs and got the neighbor." Appellant also called A.P., and A.P. put the call on speaker phone. A.P. said to appellant, "[Y]ou asked to come into my house and gather things, I told you no, I did not want you

here, I did not want you around me and then you barge in my house and pin me down and put your hands on me.”

The officer then took a formal recording of A.P.’s statement, and A.P. reiterated what she said during the informal recording. A.P. informed the officer that appellant does not have a key to her residence. A.P. also told the officer that she thought appellant was going to kill her.

Respondent State of Minnesota charged appellant with burglary in the first degree in violation of Minn. Stat. § 609.582, subd. 1(c) (2014), domestic assault by strangulation in violation of Minn. Stat. § 609.2247, subd. 2 (2014), and two counts of felony domestic assault in violation of Minn. Stat. § 609.2242, subd. 4 (2014). Prior to the jury trial, the state filed a motion for an upward durational sentencing departure on the aggravating factor that a child saw, heard, or witnessed the crime. Appellant waived his right to a jury trial on the aggravating factor pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). For the felony domestic assault charges, appellant stipulated that he was previously convicted of domestic assault against A.P. in 2010 and convicted of violating a domestic abuse no contact order (DANCO) that prohibited him from contacting A.P. in 2011.

At the trial, multiple witnesses testified for the state, including: A.P.; the police officer; T.H.; D.R., one of A.P.’s nephews; and A.P.’s sister. The state also called Scott Miller as an expert witness to testify about domestic violence.

A.P.’s trial testimony was inconsistent with her prior statements to the police. On direct examination, A.P. testified that she could not recall the 2010 domestic assault, the 2011 DANCO violation, or the details of the events that took place on December 29, 2015.

On cross examination, A.P. testified that appellant was living with her during the weeks leading up to December 29, she let appellant into her residence, she could not remember if a verbal or physical confrontation occurred while they were in the bedroom, and she could not remember what she said to the police on that day. At closing argument, the state asserted that “[A.P.] lied on the stand to protect [appellant.]”

Appellant’s mother testified for the defense, stating that appellant was living with A.P. in the weeks leading up to December 29 and that A.P. called her after the incident. During its closing argument, the state said that appellant’s mother lied.

The jury found appellant guilty of first-degree burglary and the two counts of felony domestic assault but not guilty of domestic assault by strangulation. The district court also found that the state proved beyond a reasonable doubt the aggravating factor of the actual presence of a child for these counts.

The presentence investigation report (PSI) recommended that appellant be sentenced to supervised probation for 20 years. At sentencing, appellant moved for a downward dispositional departure to probation in accordance with the PSI. The state moved for an upward durational departure to 162 months in prison. The district court entered judgment of conviction on the burglary count and imposed a 90-month sentence, an upward departure from the top-of-the-box sentence of 81 months. The district court also imposed a concurrent 18-month prison sentence on one of the felony domestic assault counts. This appeal follows.

DECISION

I. The district court did not abuse its discretion in admitting A.P.'s prior inconsistent statements.

Appellant argues that the district court abused its discretion when it admitted the informal and formal recordings of A.P.'s statements to the police officer because the statements did not meet the requirements of circumstantial guarantees of reliability under Minn. R. Evid. 807. Specifically, appellant asserts that A.P.'s prior inconsistent statements were not made under oath, were not against A.P.'s penal interests, and were inconsistent with testimony from T.H., D.R., and appellant's mother. We disagree.

We review objected-to evidentiary rulings for an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). On appeal, the appellant bears the burden of establishing that the district court abused its discretion. *Id.*

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Minn. R. Evid. 801(c). Hearsay is inadmissible unless an exception applies. Minn. R. Evid. 802. Minn. R. Evid. 807 provides a residual exception to the hearsay rule where

(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.

For hearsay evidence to be admitted under rule 807, there must be circumstantial guarantees of trustworthiness, which are shown when (1) there is no confrontation issue; (2) the identity of the declarant or the content of the statement is undisputed; (3) the

statement is against the witness's penal interest; and (4) the statement is consistent with the other evidence introduced. *State v. Ortlepp*, 363 N.W.2d 39, 44 (Minn. 1985) (holding that witness's prior inconsistent statement was admissible under catchall exception of Minn. R. Evid. 803(24)¹). The *Ortlepp* factors "are not an exclusive list," and our analysis under rule 807 requires consideration of the totality of the circumstances. *State v. Martinez*, 725 N.W.2d 733, 738 (Minn. 2007).

Here, prior to trial, the district court analyzed the three rule 807 factors, considered the circumstantial guarantees of trustworthiness of A.P.'s prior statements, and concluded that A.P.'s statements were admissible as substantive evidence under rule 807 if A.P. testified inconsistently with those statements. First, A.P.'s prior statements were admitted as evidence of the material fact that appellant committed the charged offenses. Second, A.P.'s statements were the most probative evidence on whether appellant assaulted A.P. because she was the only person in the bedroom with appellant. Third, the general purposes of the rules of evidence and interests of justice were served because, as discussed below, the statements were trustworthy and integral to the state's case.

With reference to the circumstantial guarantees of trustworthiness, the first and second *Ortlepp* factors are clearly satisfied. There is no confrontation issue because A.P. testified and was cross examined. There is also no issue regarding identity or content because A.P. is the declarant and the prior statements were recorded and undisputed.

¹ After *Ortlepp*, rule 803(24) was combined with Minn. R. Evid. 804(b)(5) into rule 807.

The third *Ortlepp* factor may be satisfied where a witness's prior statement is against her relationship interest with the defendant. *State v. Plantin*, 682 N.W.2d 653, 659 (Minn. App. 2004). At trial, A.P. was hostile toward the prosecution and supportive of appellant, seeming to protect her relationship with him, which indicates that A.P.'s prior statements were against her relationship interest. *Id.* Therefore, the third *Ortlepp* factor is met.

The fourth *Ortlepp* factor is also satisfied. At trial, the state presented testimony from other witnesses, including T.H., D.R., and A.P.'s sister, that was consistent with A.P.'s prior statements. T.H. testified that appellant "had a mad face," A.P. looked scared, and that he heard appellant "growling" and A.P. screaming from behind the closed bedroom door. D.R. testified, consistently with A.P.'s prior statements, that A.P. did not want to let appellant into her residence, but that appellant grabbed A.P. and took her into the bedroom. D.R. also heard A.P. screaming through the bedroom door. D.R. then went to ask the upstairs neighbor to call the police. D.R. testified that, after the event, A.P. called D.R.'s mother, and A.P. seemed a "little bit" scared. A.P.'s sister testified that A.P. called her and told her that appellant beat her up. A.P. "was crying and she sounded upset and sad. Probably a little scared maybe."

The state also presented text messages sent between appellant and A.P. on the date of the offense that show that A.P. did not want appellant to enter her residence. Moreover, the responding police officer testified that A.P. had redness on her cheek and neck. The evidence the state presented was consistent with A.P.'s statements to the officer, both of which indicate that appellant came into A.P.'s residence and assaulted her. Thus, A.P.'s prior inconsistent statements have circumstantial guarantees of trustworthiness, and the

district court did not abuse its discretion in admitting the statements substantively under rule 807.

Appellant also argues that the district court abused its discretion in admitting A.P.'s prior statements because *State v. Dexter*, 269 N.W.2d 721 (Minn. 1978), precludes the state from calling a witness to testify only to impeach the witness with a prior inconsistent statement. Where A.P.'s prior inconsistent statements are properly admitted as substantive evidence under rule 807, there is no *Dexter* issue. See *Ortlepp*, 363 N.W.2d at 43 (concluding that no *Dexter* violation occurred where prior statement was admissible as substantive evidence). Thus, appellant's argument fails.²

II. The district court did not abuse its discretion in denying appellant's request to instruct the jury on the definition of licensee.

Appellant argues that the district court "erred" when it denied appellant's request to instruct the jury on the definition of licensee because in the absence of the instruction, the jury was unable to determine whether appellant was in lawful occupancy of A.P.'s residence with regard to the burglary charge. Appellant's argument lacks merit.

This court reviews the district court's jury-instruction determination for an abuse of discretion. *State v. Koppi*, 798 N.W.2d 358, 361 (Minn. 2011). "A jury instruction is erroneous if it materially misstates the applicable law." *Id.* at 362.

² Even if we were to assume that the district court erred in admitting A.P.'s prior statements under rule 807, the error is harmless because A.P.'s statements could also be admitted under the excited-utterance exception of Minn. R. Evid. 803(2) where the statements related to a starting event and were made soon after the event. See *State v. Copeland*, 656 N.W.2d 599, 602 (Minn. App. 2003) (noting that district court's erroneous admission of evidence is harmless if evidence was also admissible on different basis).

Under Minn. Stat. § 609.582, subd. 1(c) (2014):

Whoever enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building, either directly or as an accomplice, commits burglary in the first degree . . . , if:

. . . the burglar assaults a person within the building or on the building's appurtenant property.

One meaning of “enters a building without consent” is that the person in lawful possession did not consent to the entry. Minn. Stat. § 609.581, subd. 4(a) (2014). A person in lawful possession for the purpose of the burglary statute has “the right to consent to the entry of others into that building.” *State v. Spence*, 768 N.W.2d 104, 109 (Minn. 2009).

Here, Appellant did not have a key to the apartment, but he had stayed overnight and had some personal belongings there. However, A.P. was the only individual listed on the lease agreement for the residence, and A.P.’s prior statements indicate that she did not consent to appellant entering on December 29. Moreover, the Minnesota burglary statute does not contain an express-licensee defense. *Compare* Minn. Stat. § 609.582, subd. 1, *with* Model Penal Code § 221.1 (Am. Law Inst. 1980) (describing defense to burglary where “actor is licensed or privileged to enter”). Therefore, the district court did not abuse its discretion because declining to instruct the jury on the definition of licensee did not render the jury instruction incorrect.

III. The district court did not abuse its discretion in admitting Miller’s expert witness testimony.

Appellant argues that the district court “erred” in allowing Miller to testify because he was not qualified as an expert, and his testimony was not helpful to the jury. We disagree.

First, because appellant did not object to Miller’s qualifications at trial, we review the district court’s determination for plain error. *State v. Mosley*, 853 N.W.2d 789, 797 (Minn. 2014) (noting that, where appellant objects on different ground at trial than appellant argues on appeal, it is reviewed under plain-error analysis). Under the plain-error analysis, an appellant is entitled to a new trial if she establishes that there was (1) an error, (2) that was plain, and (3) that affected her substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If appellant satisfies this burden, this court determines whether the error should be addressed “to ensure fairness and the integrity of the judicial proceedings.” *Id.*

Miller has worked for 15 years at a company that facilitates domestic-abuse intervention programs and that devised a model for criminal-justice agencies to use to address domestic abuse. He runs a men’s nonviolence program created with the input of female domestic-violence victims. And Miller had testified about domestic violence 20 times prior to this trial. Based on Miller’s experience and training, we agree with the district court that he is qualified to testify about domestic violence. *See* Minn. R. Evid 702 (noting that witness qualifies as expert based on “knowledge, skill, experience, training, or education”); *see also State v. Valentine*, 787 N.W.2d 630, 639 (Minn. App. 2010)

(concluding that police officer with degree in criminal justice qualified to testify as expert witness on battered-woman syndrome). Therefore, there was no error, which ends the plain-error analysis.

Next, because appellant objected at trial, we review the district court's admission of Miller's testimony on the basis that it was helpful to the jury for an abuse of discretion. *Valentine*, 787 N.W.2d at 638. Expert testimony is admissible if the witness's "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. Expert testimony on the behavior of domestic-violence victims "is admissible since it would help to explain a phenomenon not within the understanding of an ordinary lay person." *State v. Hennum*, 441 N.W.2d 793, 798 (Minn. 1989). This evidence, however, is "limited to a description of the general syndrome," and an expert witness must not testify about whether a particular witness exhibits characteristics of a victim of domestic violence. *Id.* at 799.

Miller testified on the characteristics of abuse victims and abusers, and he did not draw conclusions about appellant and A.P. Miller described different tactics that abusers use to carry out domestic violence, such as coercion and threats of suicide. Miller further testified that many domestic-violence victims recant after telling the truth to police and decide that they do not want to pursue prosecution. In addition, Miller testified that leaving an abusive relationship is "about the hardest thing" a victim can attempt to do.

It is reasonable to conclude that Miller's testimony assisted the jury in understanding the inconsistency between A.P.'s statements to the police officer and A.P.'s conduct on the witness stand. See *State v. Greninger*, 569 N.W.2d 189, 195 (Minn. 1997)

(“[T]he jury might believe that a woman who is beaten by her mate would immediately seek to have him arrested and that such a woman would not recant such a statement despite threats made by the batterer.”). Therefore, the district court did not abuse its discretion in allowing Miller’s testimony.

IV. The district court did not abuse its discretion in admitting evidence of appellant’s prior domestic conduct as relationship evidence under Minn. Stat. § 634.20 (2014).

Appellant asserts that the district court abused its discretion in admitting evidence of his prior domestic conduct because, in light of the other evidence, the prior acts were overly prejudicial. We are not persuaded.

We review a district court’s admission of relationship evidence for an abuse of discretion. *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006). “Evidence of domestic conduct by the accused against the victim of domestic conduct . . . is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice.” Minn. Stat. § 634.20. 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. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). “‘Domestic conduct’ includes, but is not limited to, evidence of domestic abuse” or violation of an order for protection. Minn. Stat. § 634.20. “[E]vidence of prior [domestic] conduct between the accused and the alleged victim” may put “the crime charged in the context of [their] relationship,” *State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004), and may bolster its probative value. *State v. Kennedy*, 585 N.W.2d 385, 392 (Minn. 1998).

Here, the district court admitted into evidence appellant's prior domestic conduct, including the stipulated 2010 and 2011 convictions, a 2013 jail call between appellant and A.P., and a February 2016 video visit between appellant and A.P.'s sister. The district court reasoned that the probative value of the evidence in establishing the relationship between appellant and A.P. was not substantially outweighed by the danger of unfair prejudice to appellant.

We agree. The evidence was probative because it provided the jury with an understanding of why A.P.'s testimony was inconsistent with her prior statements. *State v. Meyer*, 749 N.W.2d 844, 850 (Minn. App. 2008) (prior acts of domestic violence probative of relationship history and provided context to analyze witness's credibility). In addition, the district court's cautionary instructions to the jury, before the introduction of the evidence and in the final jury instructions, decreased the potential for unfair prejudice to appellant. *See Kennedy*, 585 N.W.2d at 392. Thus, it cannot be said that the admission of the prior domestic-conduct evidence gave the state an unfair advantage at trial. Accordingly, the district court's decision to admit the evidence was not an abuse of discretion. *See McCoy*, 682 N.W.2d at 161 (admission of domestic-conduct evidence not abuse of discretion where victim, only eyewitness, testified that she could not remember what she told police regarding alleged assault).

Even if it was error for the district court to admit prior domestic-conduct evidence, we conclude that any error was harmless because the state presented other evidence, in the form of T.H.'s and A.P.'s sister's testimony, on the relationship between appellant and A.P. The district court also gave a cautionary instruction before the introduction of the

domestic-conduct evidence and in the final jury instruction. Further, the prosecutor did not dwell on the relationship evidence during closing argument. Finally, as described previously, the evidence supporting appellant's convictions was strong. Thus, any alleged error in admitting the relationship evidence was harmless.

V. The district court did not abuse its discretion when it denied appellant's motion for a downward dispositional departure to probation and imposed an upward durational departure of nine months from the top-of-the-box presumptive sentence.

Appellant asserts that the district court abused its discretion when it imposed the 90-month sentence for the burglary count because the sentence exaggerated the criminality of appellant's conduct, the aggravating factor of the actual presence of children during the offense "should not have made a difference," and the district court sentenced appellant for "other, uncharged misconduct." We are not persuaded.

A. Downward dispositional departure

We review a district court's sentence determination for an abuse of discretion. *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014). The determination of whether to depart dispositionally focuses on a defendant's characteristics indicating amenability to probation. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). The district court may consider "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). A district court is not required to impose a downward dispositional departure even when mitigating circumstances are present. *State v. Pagel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011) (quotation omitted). We will affirm where the record demonstrates that "the district

court carefully considered circumstances for and against departure and deliberately exercised its discretion.” *Id.* at 255.

Here, appellant moved for a downward dispositional departure to probation based on the following *Trog* factors: appellant’s age; support from family, friends, and community; amenability to past treatment programming; successful completion of treatment programming; his cooperation during trial; and his completion of parenting classes. Additionally, at the sentencing hearing, appellant testified about his remorse for his actions and the steps he had taken toward rehabilitation.

The district court declined to impose a downward dispositional departure after considering multiple times the PSI’s recommendation for probation, appellant’s arguments in support of the dispositional departure, and other relevant factors. The district court stated that it could not “get past” what appellant has said and done to A.P. over time. The district court also noted that “statistically [appellant’s] next step is killing [A.P.], and [the district court judge] could not risk that.” The district court then stated that it did not find that appellant was particularly amenable to probation.

The district court did not abuse its discretion in declining to impose a downward dispositional sentencing departure. Further, we defer to the district court’s determination of whether appellant’s statement of remorse “was genuine or should be given much weight.” *Soto*, 855 N.W.2d at 311.

B. Upward durational departure

A district court may impose an upward durational departure only if aggravating circumstances are present and they provide a substantial and compelling reason to depart.

Id. at 308. An upward durational departure may be based on one aggravating factor. *Solberg*, 882 N.W.2d at 624.

Here, the state moved for an upward durational departure that would result in a 162-month sentence. The district court ordered an upward durational departure to 90 months, which was nine months above the top-of-the-box presumptive sentence, based on the single aggravating factor proved of the actual presence of children at the time of the offense.

Appellant's argument that the district court considered improper factors in its sentencing decision misconstrues the district court's reasoning. The district court's statements at the sentencing hearing clearly distinguished its reasons for ordering the upward durational departure and declining appellant's motion for a downward dispositional departure. Thus, the district court did not abuse its discretion in sentencing appellant.

VI. The state did not commit prosecutorial misconduct when it asserted in its closing argument that A.P. lied on the stand.

Appellant argues that the state committed error that was plain because the prosecutor expressed a personal opinion about A.P.'s credibility during closing argument and the state cannot show that the error did not affect appellant's substantial rights. We disagree.

This court reviews unobjected-to prosecutorial misconduct under the modified plain-error test. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under this standard, "there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." *Griller*, 583 N.W.2d at 740. An appellant bears the burden to prove that an error occurred

and that the error was plain. *Ramey*, 721 N.W.2d at 302. If the appellant satisfies his burden, the state must prove that the plain error does not affect the appellant’s substantial rights. *Id.* Where the plain error affects the appellant’s substantial rights, this court determines whether the error should be addressed to ensure the fairness and integrity of judicial proceedings. *Id.*

Prosecutorial misconduct occurs when a prosecutor “expresses a personal opinion as to a witness’s credibility.” *State v. Martin*, 773 N.W.2d 89, 106 (Minn. 2009) (quotation omitted); *see also State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006) (concluding that prosecution impermissibly vouched for credibility of witness when it said that state “believed” witness was “believable”). However, a prosecutor’s statement that a witness lied is not automatically misconduct. *State v. Anderson*, 720 N.W.2d 854, 865 (Minn. App. 2006) (concluding that no plain error occurred where prosecutor stated that witness “flat out lied” because prosecutor drew reasonable inference from evidence, “did not insinuate that he knew anything the jury did not, and he did not misrepresent any testimony”), *aff’d* 733 N.W.2d 128 (Minn. 2007). A prosecutor has the “right to analyze the evidence and vigorously argue” about a witness’s credibility. *State v. Googins*, 255 N.W.2d 805, 806 (Minn. 1977).

Here, the prosecutor argued that A.P. “lied on the stand to protect the defendant.”³ The prosecutor’s statement was not misconduct. The prosecutor’s statement was not an assertion of her personal opinion but a reasonable inference drawn from A.P.’s testimony

³ At closing argument, the state also asserted that appellant’s mother’s testimony was a lie. Appellant does not argue that this was misconduct.

which was inconsistent with her prior statements to the police officer. In addition, the prosecutor's statement did not misrepresent A.P.'s testimony. Thus, appellant cannot satisfy his burden of proving that the prosecutor's statement that A.P. lied on the witness stand was error, which ends our analysis.

Affirmed.