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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0265**

State of Minnesota,
Respondent,

vs.

Travis Clay Andersen,
Appellant.

**Filed November 27, 2017
Affirmed
Florey, Judge**

Carver County District Court
File No. 10-CR-15-1332

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

Mark Metz, Carver County Attorney, Angella Erickson, Assistant County Attorney,
Chaska, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael W. Kunkel, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Jesson, Judge; and Florey,
Judge.

UNPUBLISHED OPINION

FLOREY, Judge

Appellant challenges his convictions of third- and fourth-degree assault, arguing that the district court erred when it admitted an irrelevant and prejudicial recording of a 911 call. We affirm.

FACTS

On the evening of December 22, 2015, appellant Travis Clay Anderson pushed his girlfriend, M.R., against rocks and punched her in the shoulders, neck, and head, causing M.R. to suffer a concussion. M.R. was able to get away and call 911. Officers responded to the scene and contacted appellant's father, but were unable to locate appellant.

The next morning, appellant's mother, C.K., called 911 and reported that appellant was at her home. She told the dispatcher that appellant was "back, and I want him outta here." She told the dispatcher that appellant was "having a fight with his father" and that appellant had been "pestering us all night since he got back." When asked by the dispatcher if appellant was intoxicated, C.K. indicated that appellant was intoxicated, and stated, "He got a little bit upset with . . . what happened yesterday and he did somethin' he wasn't supposed to."

Officers were dispatched to the scene and pursued a person matching appellant's description. The officers were aware that there was probable cause to arrest appellant for a reported assault. The officers apprehended appellant, who struggled when the officers attempted to place him in a squad car. Once in the squad car, appellant spit on an officer's face.

For his acts on December 22 and 23, appellant was charged with domestic assault, third- and fourth-degree assault, obstructing legal process, and fleeing a peace officer. The case proceeded to trial, at which appellant waived his right to counsel and voluntarily absented himself from the trial. Both 911 calls were admitted into evidence without objection. The state dismissed the charge of fleeing a peace officer after it rested its case. The jury returned guilty verdicts on the remaining charges.

This appeal followed.

D E C I S I O N

Appellant argues that the recording of C.K.'s 911 call should have been excluded by the district court because it was not relevant to proving an assault on M.R., an assault on the officer, or obstruction.

In the absence of an objection at trial, we review the admission of evidence for plain error. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). Under the plain-error test, the defendant must show (1) error (2) that is plain and (3) that affected the defendant's substantial rights. Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "An error is plain if it is clear or obvious, and usually this is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Davis*, 735 N.W.2d 674, 681 (Minn. 2007) (quotation omitted). If the defendant establishes all three elements of the plain-error test, we assess whether reversal is necessary "to ensure fairness and the integrity of the judicial proceedings." *State v. Prtine*, 784 N.W.2d 303, 314 (Minn. 2010).

Relevant evidence is generally admissible, and includes "evidence having 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. Evidence that is not relevant is not admissible. Minn. R. Evid. 402. “Evidence is relevant and has probative value when it, in some degree, advances the inquiry.” *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). “A fact is relevant if, when taken alone or in connection with other facts, it warrants a jury in drawing a logical inference assisting, even though remotely, the determination of the issue in question.” *State v. Holmes*, 758 N.W.2d 326, 329 (Minn. App. 2008) (citing *State v. Upson*, 162 Minn. 9, 12-13, 201 N.W. 913, 914 (1925)), *aff’d*, 778 N.W.2d 336 (Minn. 2010).

At the time that the recording of the 911 call was admitted, appellant was on trial for fleeing a peace officer and obstructing legal process. To prove the fleeing charge, the state was required to show that appellant attempted to “evade or elude a peace officer . . . by means of running, hiding, or by any other means except fleeing in a motor vehicle” and that appellant did so “for the purpose of avoiding arrest, detention, or investigation.” Minn. Stat. § 609.487, subd. 6 (2014). During the 911 call, C.K. informed the dispatcher that appellant was presently in her house. While C.K. was communicating appellant’s whereabouts to the dispatcher, appellant left the house on foot. The fleeing charge was dismissed by the state prior to being submitted to the jury, but at the time the evidence was admitted it was relevant to the issue of whether appellant attempted to avoid arrest by running, hiding, or fleeing the police officers who had been dispatched to the scene in response to the call, and who were aware that there was probable cause to arrest appellant. It is also relevant to whether appellant attempted to obstruct the officers who were dispatched to apprehend him.

Appellant argues that the recording should have been excluded under Minn. R. Evid. 403 because any probative value of the contents of the recording was substantially outweighed by the danger of unfair prejudice to appellant. He argues that the recording invited the jury to convict him on the basis of his “bad character and propensity for violence.” To support this, he points to three of C.K.’s statements within the 911 call: (1) appellant was fighting with his father; (2) he was pestering his parents, which led them to want appellant removed from the home; and (3) he was intoxicated and had done “somethin’ he wasn’t supposed to.” He argues that these statements indicate he has a “predisposition towards antisocial behavior” and that he was involved in other bad acts.

Relevant evidence may be excluded if its “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Minn. R. Evid. 403. “The rule favors admission of relevant evidence, as the probative value of the evidence must be ‘substantially’ outweighed by prejudice” *Schulz*, 691 N.W.2d at 478 (quoting Minn. R. Evid. 403). Under the rule, 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.” *Id.*

Under Minn. R. Evid. 404(a), generally, “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith.” Nor may evidence of another crime, wrong, or bad act be admitted to prove character in order to show action in conformity therewith. Minn. R. Evid. 404(b).

Appellant has not established that the statements were admitted to prove that he has a bad character or that he acted in conformity with his “predisposition towards antisocial behavior.” Nor were the statements inadmissible as propensity evidence under Minn. R. Evid. 404(b), as “having a fight” with a parent, pestering parents, and being intoxicated are not *per se* bad acts. *See, e.g., State v. Kendell*, 723 N.W.2d 597, 612 (Minn. 2006) (holding that a defendant’s statement that he was “going to hell” did not prove a propensity to engage in certain conduct); *Ture v. State*, 681 N.W.2d 9, 17 (Minn. 2004) (concluding that evidence of the defendant’s collection and storage of information on women was not bad-act evidence where there was nothing *per se* wrong with the habit).

Appellant, likewise, has not demonstrated that the evidence should have been excluded under Minn. R. Evid. 403. Even if relevant evidence will have a “devastating impact” on a defendant’s case, it is admissible “unless the tendency of the evidence to persuade by illegitimate means overwhelms its legitimate probative force.” *Schulz*, 691 N.W.2d at 479. Appellant has not established that the evidence would persuade by illegitimate means. Nor has he established that it substantially overwhelmed the probative force of the evidence, which provided the context for appellant’s subsequent behavior and arrest. *See id.* at 477, 479 (concluding that incriminating voicemail message indicating that the defendant’s nickname was “Kill” had a “devastating impact” on the case but it did not give the state an unfair advantage).

But even if appellant had established that the district court plainly erred in admitting the recording, he has not established that his substantial rights were prejudiced. An error affects the defendant’s substantial rights “if there is a reasonable likelihood that the error

substantially affected the verdict.” *Strommen*, 648 N.W.2d at 688. We consider the following factors when determining whether the evidence significantly affected the verdict: (1) the manner in which it was presented by the state; (2) whether it was highly persuasive; (3) whether the state referenced the evidence in closing argument; and (4) whether the defense effectively countered the evidence. *State v. Peltier*, 874 N.W.2d 792, 802 (Minn. 2016); see *State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011) (“The court’s analysis under the third prong of the plain error test is the equivalent of a harmless error analysis.”).

Appellant argues that the 911 recording bolstered M.R.’s credibility concerning her account of the assault. But the recording is silent concerning M.R. or the substance of her testimony. It was therefore not highly persuasive on the issue for which appellant claims prejudice. The state did not reference the recording during closing arguments, nor was it admitted by the state in a manner that made it reasonably likely that it would substantially affect the verdict. Although appellant made no attempt to effectively counter whatever persuasive value the evidence held, on the record as a whole, the evidence held minimal persuasive value concerning guilt, so his failure to rebut the evidence did not significantly affect the verdict.

Even if the alleged error was persuasive of guilt, it was overwhelmed by ample other evidence implicating appellant. Multiple officers testified about appellant’s behavior when they attempted to stop and arrest him, including that he spit on the face of an officer and that he refused to follow the officers’ commands. M.R. testified that appellant punched her multiple times and that she suffered from a concussion, severe headaches, and buzzing in her head as a result of his actions. Photos admitted into evidence indicate redness at

M.R.'s scalp, and there was testimony that the concussion affected M.R.'s physical and cognitive abilities for months after the assault. There is no support for appellant's assertion that there is a reasonable likelihood that the jury would have returned a different verdict if the recording had not been played to the jury.

Affirmed.