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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1148**

State of Minnesota,
Respondent,

vs.

Luis Alberto Muniz,
Appellant.

**Filed August 6, 2018
Affirmed
Florey, Judge**

Ramsey County District Court
File No. 62-CR-16-8428

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

John Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and
Florey, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

Appellant challenges his domestic-assault conviction. He argues that the district court failed to properly instruct the jury on the elements of the crime. He also argues that

the district court committed reversible error by permitting evidence of prior domestic-abuse conduct. We affirm.

FACTS

In November 2016, appellant Luis Alberto Muniz got into an argument with his wife, D.M., after she asked him for a ride to get milk for her two children. Appellant threw a key at D.M. and told her to find her own ride. He then called D.M. a b-tch and threw a ceramic figurine at her, hitting her in the shoulder. D.M. called 911 and told the dispatcher that appellant threw something at her shoulder. She told a responding officer that appellant threw a ceramic figurine at her.

Appellant was arrested and charged with felony domestic assault, a violation of Minn. Stat. § 609.2242, subd. 4 (2016).¹ The state gave notice of its intent to introduce, pursuant to Minn. Stat. § 634.20 (2016), evidence of prior domestic-abuse conduct by appellant against D.M. Appellant moved to prohibit the evidence. In a pretrial ruling, the district court concluded that the bulk of the evidence was admissible, but that cautionary instructions would be given to mitigate potential prejudice.

In March 2017, a jury trial was held. During opening statements, counsel for appellant argued that appellant threw the figurine at a wall and did not intend to cause injury or fear. Testimony was received from D.M. and three officers. D.M. testified that appellant did not apologize after throwing the figurine. She thought “it was an accident.” However, she acknowledged that she told police appellant threw something at her, and she

¹ At trial, appellant stipulated to four prior convictions, with at least two qualifying as domestic-violence-related convictions under Minn. Stat. § 609.2242, subd. 4.

was afraid. She admitted that appellant harmed her in the past and that she sought orders for protection in the past, but she testified that these past incidents were accidents.

Appellant was convicted of felony domestic assault and sentenced to 24 months' imprisonment. This appeal followed.

D E C I S I O N

I. The district court did not plainly err in its domestic-assault jury instructions.

Appellant first argues that the jury instructions on the elements of the charge were plainly erroneous because they failed to properly differentiate between assault by infliction of fear and assault by infliction of harm. Appellant asserts that these are two distinct crimes, with distinct mens rea requirements. He argues that the jury was permitted to reach a verdict that was not unanimous, with some reaching a guilty verdict on assault-fear, and others assault-harm. Appellant did not object at trial to the jury instructions.

The failure to object to jury instructions “generally constitutes a waiver of the right to appeal” any error in the instructions. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). Nonetheless, “a failure to object will not cause an appeal to fail if the instructions contain plain error affecting substantial rights or an error of fundamental law.” *Id.*; see also *State v. Gunderson*, 812 N.W.2d 156, 159 (Minn. App. 2012) (reviewing unobjected-to jury instructions for plain error). “Under the plain-error standard, [an appellate court] review[s] the jury instructions to determine whether there was error, that was plain, and that affected [appellant’s] substantial rights.” *Gunderson*, 812 N.W.2d at 159. If the three prongs of the plain-error test are met, an appellate court must then decide whether to “address the

error to ensure fairness and the integrity of the judicial proceedings.” *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

Appellant was convicted of domestic assault under Minn. Stat. § 609.2242, subd. 4, which imposes felony liability when a person has certain prior convictions and commits an assault. The underlying assault may be either “an act with intent to cause fear in another of immediate bodily harm or death” or the intentional infliction of, or attempt to inflict, bodily harm upon another. See Minn. Stat. §§ 609.224, subd. 1, .2242, subds. 1, 4 (2016).

The district court gave the following instruction:

Under Minnesota law whoever commits an act with intent to cause fear in another of immediate bodily harm or death or intentionally inflicts or attempts to inflict bodily harm upon another is guilty of a crime if the person assaulted is a member of the defendant’s family or household.²

The elements of domestic assault are:

First, the defendant assaulted [D.M.]. The term assault as used in this charge is the intentional infliction of bodily harm upon another or the attempt to inflict bodily harm upon another. It also means an act done with intent to cause [D.M.] to fear immediate bodily harm or death. Bodily harm means physical pain or injury, illness or impairment, any impairment of a person’s physical condition.

In order for an assault to have been committed, it is not necessary that there have been any physical contact with the

² This instruction combines separate pattern instructions for assault-fear and assault-harm. The relevant pattern instruction for assault-fear is as follows: “First, the defendant assaulted ____ (the victim). The term ‘assault’ as used in this (case) (charge) means an act done with intent to cause ____ (the victim) to fear immediate bodily harm or death.” 10 *Minnesota Practice*, CRIMJIG 13.47 (2015). The relevant pattern instruction for assault-harm is as follows: “First, the defendant intentionally inflicted or attempted to inflict bodily harm on ____.” 10 *Minnesota Practice*, CRIMJIG 13.48 (2015).

body of the person assaulted. It is not necessary for the [s]tate to prove that the defendant intended to inflict bodily harm or death, but only that the defendant acted with intent that [D.M.] would fear that the defendant would so act.

Intentionally means that the actor either . . . has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause the result.

In addition, the actor must have knowledge of those facts that are necessary to make the actor's conduct criminal and that are set forth after the word intentional.

To have knowledge requires only that the actor believes that the specified facts exist.

With intent to or with intent that means that [the] actor either has a purpose to do the thing or [cause] the result specified, [or]³ believes that the [act], if successful, will cause that result.

We must first determine whether the district court's instructions constitute plain error. Generally, an error is plain if it "contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). A district court has significant latitude to select its own jury instructions, as well as the language it uses. *State v. Huber*, 877 N.W.2d 519, 522 (Minn. 2016). Those instructions must, however, "fairly and adequately explain the law of the case and not materially misstate the law." *Id.*

"The jury's verdict must be unanimous in all cases." Minn. R. Crim. P. 26.01, subd. 1(5). The jury must unanimously conclude that each element of an offense has been

³ Although 10 *Minnesota Practice*, CRIMJIG 13.47 contains no "or" after "specified," and the "or" was not included in the instructions given by the district court, the "or" is included under the statutory definition. Minn. Stat. § 609.02, subd. 9(4) (2016). The remaining bracketed alterations in this paragraph address errors and omissions in the transcript.

proved. *State v. Pendleton*, 725 N.W.2d 717, 730-31 (Minn. 2007). Appellant points to *State v. Fleck*, 810 N.W.2d 303 (Minn. 2012), to support his argument that the instructions here, which allowed the jury to find assault by fear or harm, likewise allowed the jury to reach a verdict that was not unanimous. In *Fleck*, the supreme court concluded that assault-fear, under Minn. Stat. § 609.02, subd. 10(1) (2010), and assault-harm, under Minn. Stat. § 609.02, subd. 10(2) (2010), have different mens rea requirements, with assault-fear requiring specific intent, and assault-harm requiring general intent. 810 N.W.2d at 309-10. The supreme court reached this conclusion while determining whether a voluntary-intoxication instruction should have been given for a charge of assault-harm.⁴ *Id.*

We effectively addressed appellant’s argument in *State v. Dalbec*, in which we stated that domestic assault-fear and assault-harm are simply various means of satisfying the assault element. 789 N.W.2d 508, 513 (Minn. App. 2010), *review denied* (Minn. Dec. 22, 2010). Though a jury must unanimously agree on elements of a crime, the jury need not agree on the facts underlying those elements, and unanimity is not required with respect to alternate means or ways of satisfying an element of an offense. *Pendleton*, 725 N.W.2d at 731; *State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002).

In *Dalbec*, “[t]he district court instructed the jury on the elements of domestic assault in the alternative, stating that the state must prove” that the defendant “committed

⁴ The statute at issue in *Fleck*, section 609.02, subdivision 10, defines assault as “an act done with intent to cause fear in another of immediate bodily harm or death,” or “the intentional infliction of or attempt to inflict bodily harm upon another.” The statutory language at issue in *Fleck* closely matches the language at issue in this case. *Compare* Minn. Stat. § 609.02, subd. 10, with Minn. Stat. §§ 609.224, subd. 1, .2242, subds. 1, 4.

an act with the intent of causing fear of immediate bodily harm or intended to inflict or attempted to inflict bodily harm on” the victim. 789 N.W.2d at 510. No specific unanimity instruction was given. *Id.* On appeal, this court stated that a jury need not agree that a domestic assault “was accomplished by causing fear or inflicting or attempting to inflict bodily harm.” *Id.* at 513. This is because “the act of assault is the element of the crime of domestic assault, and an assault can be committed in any of three ways,” which are “by intentionally causing fear of immediate bodily harm or death or by intentionally inflicting or attempting to inflict bodily harm.” *Id.* at 512-13. Given our holding in *Dalbec*, the district court did not plainly err in its jury instructions by allowing the alternative means of assault-fear or assault-harm to satisfy the assault element.⁵

Appellant argues that *Dalbec* was decided before *Fleck* and is no longer good law. However, this court is bound by its published opinions. *State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010). We will overrule our own precedent only if there is a compelling reason to do so. *Ariola v. City of Stillwater*, 889 N.W.2d 340, 356 (Minn. App. 2017), *review denied* (Minn. Apr. 18, 2017). We have previously declined to overrule *Dalbec* based on *Fleck*. We decline to do so here.

Appellant also argues that the district court conflated the separate mens rea components in a confusing manner. Again, the district court did not plainly err. The instructions given were similar to those given in *Dalbec* and required the jury to find that

⁵ To the degree that the instructions were erroneous, any error was certainly not plain. See *State v. Kelley*, 855 N.W.2d 269, 275 (Minn. 2014); *State v. Jones*, 753 N.W.2d 677, 689 (Minn. 2008) (declining to find plain error where law was undecided).

appellant either acted with intent to cause fear (specific intent) or intentionally inflicted or attempted to inflict bodily harm (general intent). The district court gave additional instructions taken from the pattern instructions defining “with intent to” and “intentionally.” 10 *Minnesota Practice*, CRIMJIG 13.47, .48. The separate means for satisfying the element of assault were stated with sufficient clarity.

II. The district court did not clearly abuse its discretion by permitting prior domestic-abuse evidence.

Appellant next argues that the district court abused its discretion by permitting evidence concerning his prior domestic-abuse conduct. The district court ruled that the evidence was admissible under Minn. Stat. § 634.20, except for one allegation, which the district court found “highly inflammatory and prejudicial.”

We review the district court’s evidentiary ruling for a clear abuse of discretion, and appellant has the burden of showing both that the district court abused its discretion and that he was thereby prejudiced. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Under section 634.20:

Evidence of domestic conduct by the accused against the victim of domestic conduct, 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.

“Evidence is admissible under section 634.20 if (1) it is similar conduct by the accused, (2) it is perpetuated against the victim of domestic abuse or against another family or household member, and (3) the probative value of the evidence is not substantially

outweighed by the danger of unfair prejudice.” *State v. Meyer*, 749 N.W.2d 844, 849 (Minn. App. 2008) (quotation omitted).

Appellant challenges the admission of testimony from both D.M. and an officer, as well as a recording of a prior statement from D.M. He asserts that the evidence was not relevant and was unfairly prejudicial. D.M. testified that appellant hurt her in the past, and she obtained an order for protection because she was afraid he would hit her or throw something. One officer testified about a 2015 domestic-assault investigation during which D.M. alleged that appellant pushed her against a wall and that she was afraid. During the testimony of a second officer, a recorded statement from D.M. was played for the jury. D.M. stated that appellant was “a really manipul[at]ive person . . . [and] he knows my feelings and he knows how to control me.” The district court gave cautionary instructions in connection with the aforementioned evidence.

Appellant concedes that “[r]elationship evidence may be relevant in domestic abuse cases where the complainant’s story changes and the defendant pressures the complainant to change her story prior to trial,” but that such is not the case here because “D.M.’s story remained consistent.” We disagree.

D.M. qualified appellant’s conduct during her trial testimony by referring to his act of throwing the ceramic figurine as an accident. The prior domestic-abuse evidence was relevant because it provided context for D.M.’s testimony and her claims that appellant’s actions were accidental. The supreme court has recognized “the inherent value of evidence of past acts of violence committed by the same defendant against the same victim.” *State v. Williams*, 593 N.W.2d 227, 236 (Minn. 1999). The evidence here had probative value.

As for the danger of unfair prejudice, the district court repeatedly gave cautionary instructions. *See State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002) (noting that appellate courts presume a jury follows a district court's instructions). The district court did not clearly abuse its discretion by admitting the evidence.

Regarding appellant's burden of showing that he was prejudiced, appellant asserts that there is a reasonable possibility that the testimony significantly affected the jury's verdict because it painted appellant as a bad man and a violent drunk. An erroneous admission of evidence is harmless "if there is no reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Holliday*, 745 N.W.2d 556, 568 (Minn. 2008) (quotation omitted). Even if the evidence was wrongly admitted, it was not sufficiently prejudicial given the limiting instructions and the strong evidence that appellant assaulted D.M.

Affirmed.