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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0088**

State of Minnesota,
Respondent,

vs.

LC Monroe Johnson,
Appellant.

**Filed February 4, 2019
Affirmed
Bratvold, Judge**

Meeker County District Court
File No. 47-CR-16-882

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Brandi Schiefelbein, Meeker County Attorney, Litchfield, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Cleary, Chief Judge; and
Bratvold, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant challenges his conviction for first-degree criminal sexual conduct on two grounds. First, appellant argues that the district court deprived him of his right to present a

complete defense by prohibiting him from eliciting testimony and introducing evidence about a witness's prior conduct, which he would have offered to prove bias. Second, appellant argues that the district court committed plain error "by responding to a jury question without consulting the parties and suggesting the jury could not return a partial verdict." We conclude that the district court did not abuse its discretion in excluding the offered evidence. But the district court plainly erred when it responded to the jury's question outside the presence of the appellant and without consulting the parties. Because appellant was not prejudiced by the district court's plain error, we affirm.

FACTS

Appellant LC Monroe Johnson and S.B. were in a romantic relationship, and lived together in Litchfield with S.B.'s 13-year-old daughter, D.B. Johnson and S.B. met in Mississippi and had been together for eight years, but had a rocky relationship. D.B. considered Johnson to be her stepdad.

On October 24, 2016, D.B. came home from school, ate dinner, and played video games with Johnson. S.B. was at work, and D.B. and Johnson were alone. Later, D.B. and Johnson watched a movie in S.B.'s bedroom. D.B. fell asleep watching the movie and when she woke up, Johnson was "[o]n top of [her]." D.B.'s pants and underwear were pulled down by her ankles, and Johnson was not wearing any clothes. D.B. felt pain in her vagina, and "pushed [Johnson] off of [her] and ran downstairs to the bathroom."

D.B. texted S.B. from the bathroom and told her that Johnson could not stay at their house anymore because he "put his thing in mine." S.B. called the police before she left work and reported an assault. Officer Rueckert of the Litchfield Police Department

responded to the home, where he found Johnson and D.B. alone. Rueckert told D.B. he would take her to the law enforcement center. Rueckert testified that D.B. “just kind of broke down and kind of visibly like started to shake” and it appeared D.B. “had been crying.”

At the law enforcement center, Rueckert interviewed D.B., who said that she woke up with Johnson on top of her. D.B. said that, after she ran into the bathroom, Johnson followed and “kept saying that he was sorry, and that he was . . . drunk.” Based on D.B.’s statement, officers went to D.B.’s home and retrieved the bed sheets, a cell phone, and alcohol. D.B.’s clothing and bedding were collected and sent to the Bureau of Criminal Apprehension (BCA) for testing. In a later interview conducted by Detective Hanson, Johnson denied any inappropriate contact with D.B.

S.B. took D.B. to Children’s Hospital in Minneapolis. A nurse interviewed and examined D.B., who stated that Johnson “put his thing . . . in her private.” The nurse testified that D.B. had a “normal” anal and genital exam, she did not find any bruising on D.B., but that a lack of injury “does not undermine a clear disclosure of abuse.” At trial, the nurse opined that D.B.’s disclosure and exam were consistent with sexual abuse. A Meeker County social worker also interviewed D.B.¹ Using anatomically correct dolls, D.B. demonstrated what happened and described that Johnson’s penis was in her vagina when she woke up.

¹ The social worker testified that she conducted a “Cornerhouse interview,” which she explained is a method of interviewing children about instances of abuse and “set up in a way so as to minimize erroneous information coming in” and make the child feel more “comfortable” to share information about the abuse.

The state charged Johnson with two counts stemming from the October 24 incident: (1) first-degree criminal sexual conduct (position of authority) under Minn. Stat. § 609.342, subd. 1(b) (2016) and (2) first-degree criminal sexual conduct (significant relationship to complainant) under Minn. Stat. § 609.342, subd. 1(g) (2016). Later, the state added a third charge: second-degree criminal sexual conduct (significant relationship) under Minn. Stat. § 609.343, subd. 1(g) (2016).

The state filed motions in limine, arguing that the district court should prohibit Johnson from introducing evidence of “any prior bad act” by any state witnesses. In response, Johnson filed an affidavit seeking to admit evidence of the “deteriorating” relationship between him and S.B. Johnson also sought to introduce evidence of specific prior bad acts by S.B., for example, (1) S.B.’s assault of Johnson, which took place approximately five years ago in Mississippi, during which she used a box cutter, and permanently scarred Johnson’s chest; (2) S.B. had “stalked” and harassed Johnson’s former girlfriend to “convince her to give up her relationship with” Johnson; (3) S.B. stole and “cleaned out” Johnson’s debit card after his arrest; and (4) text messages between S.B. and Johnson, sent before D.B.’s assault, “which show[ed] a deteriorating relationship.”

After hearing the parties’ arguments, the district court granted the state’s motion, in part. In a written order, the district court explained additional reasoning for its evidentiary rulings. The district court ruled that Johnson could not admit evidence about the five-year-old assault, the claimed harassment of Johnson’s girlfriend, the allegedly stolen debit card, and the text messages between Johnson and S.B. The order stated that Johnson was

permitted to examine S.B. about the nature of her relationship with Johnson in the months preceding the assault.

At a jury trial, D.B., S.B., the Children's Hospital nurse, the social worker, Officer Rueckert, and Detective Hanson testified to the facts described above. S.B. testified that she and Johnson had broken up "two or three times," and that Johnson had lived with another woman during one of these break-ups, but that this did not bother her. S.B. also testified that things were going well in her relationship with Johnson before the incident, the relationship was not "tense," and that the couple had not recently argued about the "amount of time that" they were spending together.

After S.B. testified, the district court discussed the testimony outside the jury's presence, stating that S.B. had contradicted the "screen shots of some texts" between Johnson and S.B., and therefore, Johnson was permitted to offer the texts for impeachment purposes. When S.B.'s testimony resumed, Johnson's trial counsel questioned her about the texts. S.B. agreed that she and Johnson had argued in September and October 2016, and that Johnson had moved out previously. S.B. also testified that Johnson had texted her that he was looking for "an alternative relationship."

The state also presented testimony from Alice Swenson, M.D., a child-abuse pediatrician from Children's Hospital. Dr. Swenson reviewed the nurse's report and made a diagnosis of sexual assault and sexual abuse. Next, a BCA scientist testified that D.B.'s underwear tested positive for the presence of semen. The BCA scientist also testified that semen was not detected in D.B.'s vaginal or perineal swabs. A second BCA scientist testified that the "sperm cell" on D.B.'s underwear matched Johnson's DNA sample.

The jury began to deliberate at approximately 3:00 p.m. on August 24. At 5:00 p.m., the jury asked to listen to Detective Hanson's recorded interview with Johnson. The district court, in the presence of Johnson and the attorneys, played the recording for the jury. At 8:05 p.m., the jury asked to listen to D.B.'s interview with the social worker. Again, with Johnson and the attorneys present, the district court played the recording. The jury continued deliberating.

At approximately 9:10 p.m., the district court received a note from the jury which stated, "If we're not agreeable on [counts one and two], but have a verdict on [count three], what does that mean for us? Where do we go from here?" The district court responded in writing: "You keep deliberating." The district court did not consult the parties before responding. At 9:30 p.m., the district court retired the jury for the night.

On August 25, 2017, the following morning, the jury convicted Johnson of all three counts. On October 18, 2017, the district court denied Johnson's motion for a downward durational departure, and sentenced Johnson to 144 months and committed him to the Commissioner of Corrections. Johnson appeals.

D E C I S I O N

I. The district court's evidentiary rulings were not an abuse of its discretion and did not deprive Johnson of his right to present a complete defense.

Every defendant has the right to present a complete defense under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and under Article I, section 7, of the Minnesota Constitution. *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992). Defendants have a right to present their theory of the case, including presenting

evidence describing the defense’s version of the facts. *Id.* at 194. The defendant’s evidence is subject to the rules of evidence. *State v. Mosley*, 853 N.W.2d 789, 798 (Minn. 2014); *see also State v. Pass*, 832 N.W.2d 836, 840-41 (Minn. 2013). The right to present a complete defense yields to the application of evidentiary rules. *See id.* at 841-42. After an objection, the defendant has the burden to establish that evidence is relevant and admissible. *State v. Svoboda*, 331 N.W.2d 772, 775 (Minn. 1983). Evidentiary rulings—even those that invoke constitutional rights—are reviewed for an abuse of discretion. *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006).

On appeal, Johnson argues that the district court deprived him of his right to present a defense because the excluded evidence of S.B.’s prior bad conduct supported his theory that D.B.’s allegations were fabricated. Johnson also argues that the excluded evidence would have proved S.B.’s bias against him. We discuss each argument in turn.

A. Evidence of S.B.’s prior bad conduct to prove D.B. fabricated

Johnson argues that the evidence of S.B.’s prior bad acts—the five-year-old assault, the claimed harassment of Johnson’s girlfriend, the allegedly stolen debit card, and the text messages between Johnson and S.B.—supported his defense. Johnson contended that D.B. was motivated to “fabricate or embellish her story based upon her mother’s past problems with Johnson.” The state argues that the disputed evidence was not relevant to “the core issue of the case,” which is whether D.B. testified truthfully about the assault.

“The threshold test for the admissibility of evidence is the test of relevancy.” Minn. R. Evid. 401 1977 comm. cmt. Generally, evidence is relevant if it has “any tendency to make the existence of any [material] fact . . . more probable or less probable.” Minn. R.

Evid. 401. All parties are entitled to present relevant evidence at trial so long as the probative value of the evidence is not substantially outweighed by its prejudicial effect. Minn. R. Evid. 403. When determining whether any piece of evidence should be introduced, the court must weigh the probative value of that evidence against the “danger of unfair prejudice.” *Id.*

In its written order, the district court explained that the five-year-old assault was not admissible because it was “removed in time from the acts involved in this matter, and since that time, the parties had resumed living together.” At the hearing, the district court also explained that evidence regarding the allegedly stolen debit card was irrelevant because it took place after the October 24 assault, and thus, could not have played a role in D.B.’s alleged motivation to fabricate the assault. The district court did not expressly discuss its reasons for excluding evidence of S.B.’s claimed harassment of Johnson’s girlfriend.

We conclude that the district court’s evidentiary rulings were not an abuse of discretion. First, the five-year-old assault, the allegedly stolen debit card, and the claimed harassment of Johnson’s girlfriend did not involve D.B. Therefore, the evidence does not support Johnson’s theory that these incidents—or other relationship problems between S.B. and Johnson—motivated D.B. to fabricate the assault. In fact, Johnson never even alleged, and there is no evidence in the record that shows, that D.B. was aware of these incidents. Second, evidence that S.B. allegedly stole Johnson’s debit card and withdrew money from his account *after* the October 24 assault is not relevant to Johnson’s theory that D.B. “fabricated or embellished” the assault, even if we assume that D.B. knew about the debit card. *See State v. Lanz-Terry*, 535 N.W.2d 635, 641 (Minn. 1995) (noting that events that

took place after the victim reported the incident “would not have affected” the victim’s decision to report). Third, while the five-year-old assault and claimed harassment of Johnson’s girlfriend tend to prove that relationship problems existed between S.B. and Johnson, the probative value is limited because the events are remote in time and S.B. and Johnson moved on, stayed in a relationship, and lived together for five years after the assault.

Because the evidence at issue was only tangential to Johnson’s theory of the case, did not involve the victim, and presented a risk of confusing the jury, we conclude that the district court did not abuse its discretion in excluding it. *See id.* at 640-41 (district courts “may exclude evidence of extraneous matters based on concerns about such things as harassment, decision making on an improper basis, confusion of the issues, and cross-examination that is repetitive or only marginally relevant”).

B. Evidence of S.B.’s bias against Johnson

Johnson argues that the five-year-old assault, the claimed harassment of Johnson’s girlfriend, the allegedly stolen debit card, and the text messages between Johnson and S.B. were admissible to show S.B.’s bias against him. Johnson has a right to confront witnesses under the Sixth Amendment of the United States Constitution, and under Article I, section 6, of the Minnesota Constitution. *State v. Byers*, 554 N.W.2d 744, 748 (Minn. App. 1996), *aff’d as modified*, 570 N.W.2d 487 (Minn. 1997). These rights afford the defendant the opportunity to reveal witness bias. *See Lanz-Terry*, 535 N.W.2d at 640. “Bias is a catchall term describing attitudes, feelings, or emotions of a witness that might affect her testimony, leading her to be more or less favorable to the position of a party for reasons

other than the merits.” *Id.* Extrinsic evidence may be admitted to show that a witness is motivated by bias, but “the extent to which extraneous matters are permitted into a criminal case . . . rests largely in the discretion of the trial court.” *Id.* at 640-41. A defendant must “establish the relevance and admissibility of the evidence” they wish to introduce to show bias. *Svoboda*, 331 N.W.2d at 775.

We conclude that the district court did not abuse its discretion in declining to admit the disputed evidence for two reasons. First, Johnson was afforded an opportunity to reveal S.B.’s bias. At trial, Johnson’s attorney asked S.B. about her relationship with Johnson, and she admitted that they had recently fought, they had broken up “two or three” times, and Johnson was looking for an alternative relationship. In addition, several text messages between Johnson and S.B. were received into evidence, from which Johnson’s attorney argued that animosity existed between S.B. and Johnson.

Second, the district court determined that the additional evidence that Johnson sought to admit was only “marginally useful” to show witness bias. Courts may exclude cumulative evidence in these instances. *Lanz-Terry*, 535 N.W.2d at 640. Johnson was permitted to elicit testimony that he and S.B. had recently fought and Johnson told her he would end their relationship. Although the additional evidence may have *further* demonstrated the soured relationship between Johnson and S.B., the district court did not abuse its wide discretion by excluding the evidence. *Id.* at 640-41 (“[T]he extent to which

extraneous matters are permitted into a criminal case . . . rests largely in the discretion of the trial court.”).²

In sum, we conclude that the district court’s evidentiary rulings did not prevent Johnson from presenting a complete defense and were not an abuse of its discretion.

II. The district court did not affect Johnson’s substantial rights when it communicated with the jury outside Johnson’s presence and told the jury to “keep deliberating.”

Johnson argues that the district court committed plain error when it “communicat[ed] with the jury about a substantive matter without consulting the parties and by implying the jury could not return a partial verdict.” Johnson contends that the district court erred in instructing the jury to “keep deliberating,” and that this error prejudiced him. The state responds that the district court did not plainly err.

Johnson concedes that he did not object when the district court informed him that it told the jury to “keep deliberating.” We generally do not consider an alleged error unless

² Even assuming that the district court abused its discretion in excluding this disputed evidence, Johnson was not prejudiced by the exclusion of the disputed evidence and is not entitled to a new trial. When an error implicates a constitutional right, this court will “award a new trial unless the error is harmless beyond a reasonable doubt.” *State v. Davis*, 820 N.W.2d 525, 533 (Minn. 2012). An error is harmless beyond a reasonable doubt “if the jury’s verdict was ‘surely unattributable’ to the error.” *Id.*

Here, as stated, Johnson was permitted to elicit testimony about the relationship and S.B.’s bias against him. The state’s case against Johnson relied “almost exclusively on the testimony of D.B. that she awoke to find [Johnson’s] penis in her vagina.” D.B.’s statements consistently described what happened to Rueckert, the nurse, the Meeker County social worker, and in her testimony to the jury. D.B.’s testimony regarding the assault does not depend on S.B.’s credibility. In fact, S.B. only testified that on October 24 D.B. texted her about the assault. Because the state relied on D.B.’s testimony in its case against Johnson, and D.B.’s credibility is not undermined by the disputed evidence, we conclude that Johnson was not prejudiced by the district court’s evidentiary rulings.

the appellant objected at trial. *See State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002) (jury instructions). But, even without an objection, we review trial procedure and jury instructions for plain error affecting an appellant’s substantial rights or an error of fundamental law. *Id.*; *see also* Minn. R. Crim. P. 31.02.

Plain error requires the appellant to show: “1) error, 2) that is plain, and 3) that affects substantial rights.” *Baird*, 654 N.W.2d at 113. A district court error is plain “when it contravenes a rule, case law, or a standard of conduct, or when it disregards well-established and longstanding legal principles.” *State v. Brown*, 792 N.W.2d 815, 823 (Minn. 2011). A defendant’s substantial rights are affected when “there is a reasonable likelihood that the error substantially affected the verdict.” *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002). If the first three prongs are met, this court “may 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).

A. Plain error

1. Communicating with the jury without the parties present

A defendant in a criminal proceeding has a due process right to be present at all critical stages of trial. *State v. Martin*, 723 N.W.2d 613, 619 (Minn. 2006); *see also* Minn. R. Crim. P. 26.03, sub. 1. Generally, a communication with the jury by the district court after deliberations have begun is a critical trial stage at which a defendant has a right to be present. *State v. Sessions*, 621 N.W.2d 751, 755-56 (Minn. 2001). Absent a waiver, it is

improper for the district court to communicate with the jury on a non-housekeeping matter outside the presence of the defendant. *See Martin*, 723 N.W.2d at 619-21.

After six hours of deliberating, the district court received a note from the jury asking: “If we’re not agreeable on [counts one and two], but have a verdict on [count three], what does that mean for us? Where do we go from here?” The district court responded in writing to the jury’s note: “You keep deliberating.” The district court did not inform the parties and did not consult the parties before responding.³

The state does not argue, and it does not appear in the record, that Johnson waived his right to be present. Further, the district court’s instruction to “keep deliberating” is not a housekeeping matter. *See State v. Kelley*, 517 N.W.2d 905, 908 (Minn. 1994) (holding that court’s instruction to “keep working” to the jury during deliberations was plain error and took place during a critical stage of trial). We conclude, therefore, that the district court plainly erred when it responded to the jury’s question without consulting or informing Johnson. *See Brown*, 792 N.W.2d at 823 (noting an error is plain “when it contravenes a rule, case law, or a standard of conduct, or when it disregards well-established and longstanding legal principles”).

2. *Inaccurately stating the law*

In general, a district court must instruct a jury in a way that “fairly and adequately explain[s] the law of the case” and does not “materially misstate[] the applicable law.”

³ Before this question, the jury had asked twice to review testimony during its deliberation. On both of these occasions, the district court properly recalled Johnson and both attorneys, and communicated with the jury once the parties were present.

State v. Koppi, 798 N.W.2d 358, 362 (Minn. 2011). “If the instructions, when read as a whole, correctly state[] the law in language that can be understood by the jury, there is no reversible error.” *State v. Laine*, 715 N.W.2d 425, 432 (Minn. 2006) (quotation omitted). If a jury is unable to agree, the district court “may require the jury to continue their deliberations and may give or repeat an instruction. . . . The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.” *Kelley*, 517 N.W.2d at 909. “[I]t is reversible error in Minnesota to coerce a jury towards a unanimous verdict. A court, therefore, can neither inform a jury that a case must be decided, nor allow the jury to believe that a ‘deadlock’ is not an available option.” *State v. Jones*, 556 N.W.2d 903, 912 (Minn. 1996) (citations omitted). Our caselaw has referred to this as an impermissible “dynamite” instruction. *See State v. Peterson*, 530 N.W.2d 843, 846 (Minn. App. 1995).

Johnson correctly notes that Minnesota allows a partial jury verdict in some instances. *See* Minn. R. Crim. P. 26.03, subd. 20(7) (“The court may accept a partial verdict if the jury has reached a verdict on fewer than all of the charges and is unable to reach a verdict on the rest.”). But we do not agree with Johnson that the district court’s written response materially misstated the applicable law. First, the district court properly instructed the jury before it began its deliberation by stating: “[I]n this case, [Johnson] has been charged with multiple offenses. You should consider each offense, and the evidence pertaining to it, separately. The fact that you may find [Johnson] guilty or not guilty as to one of the charged offenses should not control your verdict as to any other offense.” Thus, the jury was adequately informed that it could return a partial verdict. *See State v. Buggs*,

581 N.W.2d 329, 338-39 (Minn. 1998) (reasoning that an earlier instruction reduced prejudicial effect of subsequent potentially coercive instruction).

Second, the district court did not threaten or coerce the jury to deliberate for an unreasonable length of time. In *Buggs*, the supreme court held that the district court's instruction for the jury to continue deliberating was not coercive when the jury communicated to the district court that it was at an impasse. *Id.* In this case, the jury had only been deliberating for six hours when the district court told them to continue deliberating. This timeframe was "not excessive in light of the length and complexity of the trial." *See id.* Also the district court allowed the jury to retire for the evening at 9:30 p.m., only twenty minutes after it instructed them to keep deliberating. The district court "may require the jury to continue their deliberations," and did not err in requiring the jury to continue in this case. *Kelley*, 517 N.W.2d at 909. In short, we conclude that the district court did not materially misstate the law and did not coerce or threaten the jury to deliberate for an unreasonable amount of time when it instructed the jury to "keep deliberating."

B. Affecting substantial rights

Because we conclude that the district court committed plain error by communicating with the jury without the parties present, we must next consider whether the district court's error was prejudicial. *State v. Hurd*, 763 N.W.2d 17, 31 (Minn. 2009) ("[A] defendant is not entitled to a new trial . . . unless the error was prejudicial."). An appellant has the burden to demonstrate that he was prejudiced by the error. *Id.*; *Leake v. State*, 737 N.W.2d 531, 537 (Minn. 2007) (noting that it is appellant's burden to demonstrate that he was prejudiced by the district court's erroneous communication with the jury).

Johnson argues that the district court's communication with the jury prejudiced him because if the jury had been "properly instructed that it was possible to return a partial verdict, there is a reasonable likelihood it would have done so." We disagree. First, the district court properly instructed the jury on this subject before it began deliberating and the jury was adequately informed that it could return a partial verdict. *See Buggs*, 581 N.W.2d at 338-39.

Second, the district court's comments to the jury in this case are similar to those in *Buggs*, where the judge encouraged the jury to keep deliberating after they indicated they were at an impasse. *Id.* at 338. The supreme court concluded that *Buggs* was not prejudiced because the district court did not instruct or imply that the jury must deliberate until it reached a verdict. *Id.* Similarly, in *Hurd*, the supreme court held that the appellant was not prejudiced because the jury did not indicate that it was deadlocked when it reached out to the district court. *Hurd*, 763 N.W.2d at 32. Here, the jury did not state that it was deadlocked. Additionally, the district court's instruction did not suggest that the jury must deliberate until a verdict was achieved. Because Johnson has not demonstrated that he was prejudiced by the district court's error of communicating without him present, he is not entitled to relief.

To be clear, the district court should have called the jury, attorneys, and Johnson into open court to read the jury's question and discuss the answer. Alternatively, the district court should have specifically obtained Johnson's waiver of his right to be present. While it was not a plain error to instruct the jury to keep deliberating, better practice would have

been, after consulting with the parties, to provide a repeat instruction. *See Kelley*, 517 N.W.2d at 909.

In sum, the district court did not abuse its discretion in excluding disputed evidence. Additionally, Johnson has failed to demonstrate that he was prejudiced when the district court plainly erred by communicating with the jury without consulting the parties. Thus, we affirm his conviction for first-degree criminal sexual conduct.

Affirmed.