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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1118**

State of Minnesota,
Respondent,

vs.

Damon Ray Garnett,
Appellant.

**Filed June 10, 2019
Affirmed
Jesson, Judge**

Hennepin County District Court
File No. 27-CR-17-7697

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Patrick R. Lofton, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

Mark D. Nyvold, Fridley, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Ross, Judge; and Johnson,
Judge.

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

JESSON, Judge

Appellant Damon Ray Garnett called the police to report a suspected burglary of his home. But after arriving, officers observed suspicious behavior by Garnett and smelled marijuana. They then obtained a search warrant and discovered a firearm, ammunition,

and marijuana in the home. Garnett, whose criminal history made it illegal for him to possess the firearm, now challenges his convictions of being a prohibited person in possession of a firearm and ammunition. Because the district court did not abuse its discretion in its evidentiary rulings and did not plainly err by failing to sua sponte direct the state to stop playing recordings of jail calls, we affirm.

FACTS

After observing a man attempting to break into his house on his self-installed security camera, appellant Damon Ray Garnett called the police. Officers arrived at Garnett's house about one minute later. By that time, Garnett was parked in his driveway and frantically gesturing to police and pointing west, indicating that the burglary suspect went that direction. Police officers apprehended the burglary suspect.

But after police stopped the burglary suspect, they noticed Garnett quickly running towards the suspect holding a weapon described as an "asp baton" above his head. The officers asked Garnett to stop and drop his weapon. After he refused to do so, officers tackled Garnett and detained him. In doing so, the officers noticed a large amount of cash—nearly \$3,000—in Garnett's pocket and smelled a strong odor of fresh marijuana.

Officers returned to Garnett's house to check for evidence of a burglary. Inspection of the exterior of the home revealed footprints matching the sneakers of the burglary suspect and a broken door handle. Additionally, officers smelled the odor of fresh marijuana coming from an open basement window well. Based on their observations, police asked Garnett for keys to enter his home to ensure no one was inside and that nothing was stolen. Garnett refused. Police expressed their observations about the marijuana odor

to Garnett and noted that they could get a search warrant. Garnett told police to “get a warrant.”

About two hours later, after obtaining a search warrant, police searched Garnett’s home. During the search, police discovered a safe in the basement, which contained a little over \$86,000 in cash and a box of ammunition for a 9mm handgun. Police also recovered a loaded 9mm handgun under a seat cushion on a chair in the dining room. Additionally, police found drug paraphernalia and marijuana amounting to around 1,000 grams throughout the house. As a result of the search, the state charged Garnett with one count of being a prohibited person in possession of a firearm,¹ one count of being a prohibited person in possession of ammunition, and fifth-degree drug possession.

Before trial, Garnett sought to exclude testimony about his behavior toward the suspected burglar. But the district court concluded that the testimony was necessary to provide jurors with context for the police investigation. The parties also discussed with the court several jail calls between Garnett and B.G., his ex-girlfriend and the mother of his child. The state agreed to not offer the jail calls as substantive evidence during its case-in-chief because they were not timely discovered or disclosed, but the district court and both parties agreed that the calls could potentially be used to impeach B.G. depending on her testimony.

¹ Garnett is prohibited from possessing a firearm or ammunition as a result of his conviction for second-degree murder in 2000.

At trial, several police officers testified about responding to the burglary call, Garnett's behavior toward the burglary suspect,² and their observations leading them to obtain a search warrant. The officers also described executing the search warrant and their discovery of marijuana, the handgun, ammunition, and the nearly \$86,000 in cash in Garnett's home. The state further presented forensic testimony³ that no latent fingerprints were found on the handgun or its magazine but that Garnett's DNA matched a sample taken from the handgun and the magazine.⁴

Garnett waived his right to testify. But he presented testimony from B.G., who testified that she purchased the handgun found in Garnett's house in 2013 after her brother was murdered and offered into evidence the receipt showing her purchase of the gun. She explained that on the day of the suspected burglary, she was at Garnett's house because he was taking their daughter to the Mall of America, and she brought her handgun and ammunition inside with her and put the ammunition in the safe. B.G. stated that she was scared because she was at the house alone, so she took the handgun out of its case and kept it next to her. According to B.G., her mother called her and the two argued, so B.G. put her handgun under the cushion of the dining room chair and left in a hurry. In her direct

² Garnett objected to testimony about his behavior toward the burglary suspect, but the district court overruled the objection.

³ A forensic scientist from the Hennepin County Crime Lab who performed DNA testing on the handgun and the magazine stated that a DNA mixture from three or more people was found on the handgun. The majority contributor's DNA matched a DNA sample taken from Garnett. Similarly, the magazine contained a DNA mixture from four or more people, and the majority contributor's DNA profile matched Garnett's.

⁴ At the end of the state's case, per the agreement of the parties, the district court judge read a stipulation to the jury that Garnett was prohibited from possessing firearms or ammunition.

testimony, B.G. admitted that during several jail calls between her and Garnett, they discussed the gun, the search of the home, and that she apologized for leaving her gun at Garnett's house.

During cross-examination, the state also asked B.G. about her jail calls with Garnett, including her statement that she hoped police did not find any fingerprints on the handgun. B.G. testified that by that statement, she meant that she hoped police found her fingerprints on the gun, would know the gun was hers, and that the case would go away. The state asked her about other statements during the jail calls involving going to a gun range with Garnett, but B.G. testified that she did not remember saying those things or going to a gun range with Garnett. On re-direct, Garnett's counsel pointed out that the statements the state referenced were only a snippet of what was said during the jail calls.

Based on B.G.'s testimony and cross-examination, the district court—over defense counsel's objection—allowed recordings of these jail calls to be played for the jury, reasoning that B.G.'s testimony "opened the door." In those calls, Garnett referred to the money seized as "his money," and B.G. commented about hoping police did not find fingerprints on the handgun. When questioned regarding her statement about testing for fingerprints, B.G. testified that "I said that, but in reverse meaning that I hope they do."

After the case was submitted to the jury, jury members asked if they could listen to one of the jail calls again, but the district court denied that request. The jury subsequently found Garnett guilty of all three counts. The district court sentenced Garnett to 60 months on each count of being a prohibited person in possession of a firearm and being a prohibited

person in possession of ammunition, and 15 months for fifth-degree drug possession, all to be served concurrently. Garnett appeals.⁵

D E C I S I O N

Garnett alleges that during his trial, the district court abused its discretion in two ways: by admitting evidence about his behavior toward the suspected burglar and by allowing the state to play the recorded jail calls to impeach B.G. Further, Garnett contends that the district court plainly erred by allowing the state to continue playing recordings of jail calls containing potentially prejudicial information, despite the fact that the state promised to redact the prejudicial information. We review each argument in turn.

I. The district court did not abuse its discretion by admitting evidence about Garnett’s behavior toward the suspected burglar.

Garnett first argues that the district court abused its discretion by allowing the state to present evidence of Garnett’s behavior toward the burglary suspect because the evidence was irrelevant and more prejudicial than probative. We review a district court’s evidentiary rulings for an abuse of discretion, and on appeal, the appellant bears the burden of demonstrating an abuse of discretion resulting in prejudice. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Rule 402 of the Minnesota Rules of Evidence provides that “[a]ll relevant evidence is admissible . . . ” unless prohibited by the United States or Minnesota Constitution or other laws or rules. Minn. R. Evid. 402. Relevant evidence is “evidence having any

⁵ Garnett challenges only his convictions of being a prohibited person in possession of a firearm and ammunition.

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. But even if evidence is relevant, a district court may exclude it “if its probative value is substantially outweighed by the danger of unfair prejudice.” Minn. R. Evid. 403.

Here, the district court concluded that the evidence of Garnett’s behavior—which included running toward the burglary suspect with an asp baton over his head, resulting in officers tackling and detaining him—was more probative than prejudicial. The evidence was probative, the district court concluded, because it provided jurors with necessary context for how and why the police investigation of Garnett began. We agree.

As the district court correctly noted, “[e]vidence is admissible to give jurors the context for an investigation.” *State v. Griller*, 583 N.W.2d 736, 743 (Minn. 1998). It was reasonable for the district court to conclude that jurors would need context to understand why Garnett went from being a burglary victim to being arrested by police and having his home searched. Excluding evidence of Garnett’s behavior toward the burglary suspect would have presented an incomplete picture of how officers obtained a search warrant for Garnett’s home and ultimately discovered the firearm, ammunition, and marijuana resulting in the criminal charges. Nor was the evidence of Garnett’s behavior unfairly prejudicial. Evidence is unfairly prejudicial when it persuades by illegitimate means. *State v. Kendell*, 723 N.W.2d 597, 609 (Minn. 2006). Nothing in the record suggests that evidence of Garnett’s behavior was so inflammatory or outrageous so as to persuade by illegitimate means; rather, some or many members of the jury could have believed

Garnett's behavior toward the suspected burglar was reasonable or justified given that the suspect had allegedly broken into Garnett's home. See *Griller*, 583 N.W.2d at 742 (noting that district courts have "great latitude" in their evidentiary decisions).

But Garnett contends that the district court's reliance on *Griller* was misplaced. According to Garnett, it was unnecessary for the jury to hear about his behavior toward the suspected burglar because the officers' observations regarding marijuana would have provided enough context for the jury to understand the police investigation. We disagree. Garnett's behavior toward the suspected burglar is what resulted in police detaining him, and *then* seeing a large amount of cash in his pocket, and smelling the odor of marijuana on his person. In short, Garnett's own actions toward the suspected burglar initiated police officers' suspicion of Garnett. Accordingly, it was not an abuse of discretion for the district court to determine that this context was important for the jury to understand.

Garnett further argues that his case is similar to *State v. Strommen*, a case in which the supreme court concluded an individual's testimony that she participated in a robbery because of violent behavior exhibited by the defendant was irrelevant and overly prejudicial. 648 N.W.2d 681, 686-87 (Minn. 2002). Garnett contends that the reason he charged at the burglary suspect was not relevant to show why police had a basis to obtain a search warrant. But again, Garnett's behavior toward the burglary suspect is what initiated police suspicion. Further, district courts are in the best position to evaluate whether evidence is prejudicial in nature, and we generally defer to a district court's evidentiary ruling. *State v. Diggins*, 836 N.W.2d 349, 357 (Minn. 2013). For the reasons

set out above, the district court did not exceed its broad discretion by admitting evidence of Garnett's behavior toward the suspected burglar.

II. The district court did not abuse its discretion by allowing the state to play recorded jail calls to impeach B.G.

Garnett also contends that the district court abused its discretion by allowing the state to impeach B.G.'s testimony by playing recordings of jail calls during recross-examination. Nothing in his redirect, Garnett maintains, opened the door to allow playing the jail calls in their entirety. Again, we review evidentiary decisions for an abuse of discretion. *Amos*, 658 N.W.2d at 203.

Any party may impeach a witness's credibility. Minn. R. Evid. 607. Impeachment can take many forms, including using evidence of bias or prejudice or a witness's prior statements. Minn. R. Evid. 613, 616. But a party may only use extrinsic evidence of a prior statement when a witness has been given an opportunity to explain or deny the prior inconsistent statement and the other party has also been given the opportunity to question the witness about the statement. Minn. R. Evid. 613(b). And "opening the door" occurs when a party introduces certain material, creating a right for the opposing party to respond with otherwise inadmissible material.⁶ *State v. Guzman*, 892 N.W.2d 801, 814 (Minn. 2017). The doctrine "is essentially one of fairness and common sense, based on the proposition that one party should not have an unfair advantage . . . and that the factfinder should not be presented with a misleading or distorted representation of reality." *State v.*

⁶ The district court did not rule the jail calls inadmissible; rather, the state agreed to not use them as substantive evidence during its case-in-chief because they were discovered and disclosed in an untimely fashion.

Valtierra, 718 N.W.2d 425, 436 (Minn. 2006). To determine whether B.G.’s testimony “opened the door” to allow the state to play the jail calls for impeachment purposes, we turn to B.G.’s testimony about the jail calls.

During direct examination, B.G. admitted that she discussed the gun and the search of the home during several jail calls between her and Garnett and that she apologized to Garnett for leaving her gun at his house. This testimony opened the door for the state to question B.G. about the jail calls. And during cross-examination, the state questioned B.G. about specific statements she made during jail calls with Garnett, including comments she made regarding fingerprints on the handgun and Garnett accompanying her to a gun range. B.G. attempted to explain her jail call statements. On redirect, Garnett’s counsel referenced the state’s use of “a few snippets” of the jail calls, and allowed B.G. to explain what she said in the jail calls. This characterization of the state’s use of “a few snippets” of the jail calls opened the door for the state to play the jail calls in their entirety.

Given this back-and-forth regarding the jail calls, the district court did not abuse its discretion by ruling that the state could play redacted recorded versions of relevant jail calls for the jury during recross-examination. The jail call recordings were admissible for impeachment purposes as evidence of both a prior inconsistent statement and evidence of bias. Minn. R. Evid. 613, 616. Before the jail calls were played, the state questioned B.G. about her comments and gave her the opportunity to explain or deny them. Only after she was given this opportunity did the state play the jail calls. Minn. R. Evid. 613(b). Further, the jail call recordings served as evidence that, because of her relationship with Garnett, B.G.’s testimony could be biased. Minn. R. Evid. 616. Because the jail call recordings

were admissible for impeachment purposes based on B.G.’s testimony and the reference to the state playing “a few snippets” of the jail call recordings, it was not an abuse of discretion for the district court to allow the state to play the recordings so that the jury would know the context of B.G.’s statements within the jail calls.⁷

III. The district court did not plainly err by failing to sua sponte direct the state to stop playing the jail calls.

Finally, Garnett argues that it was plain error for the district court to allow the state to continue playing recordings of jail calls containing potentially prejudicial information that the state may not have redacted. Specifically, Garnett contends that the recordings played for the jury contained phrases like “felon,” “parole officer,” “do my time,” and “I’ll beat this on appeal.” Garnett did not object on this point at trial. We generally do not consider issues not raised before the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But we will consider an issue if it constitutes plain error. *Griller*, 583 N.W.2d at 740. To establish plain error, a defendant must show error that is plain which affects their substantial rights.⁸ *Id.* If a defendant “fails to establish that the claimed error

⁷ Garnett contends that the jail calls should have been played during cross-examination, rather than recross. Garnett is perhaps correct that it may have been more prudent to play the jail calls during cross-examination. But because Garnett’s counsel further opened the door to playing the recording of the jail calls during redirect when he referenced the state as quoting “a few snippets” of the jail calls, it was not an abuse of discretion for the district court to allow the state to play them during recross. Additionally, Garnett correctly notes that at trial, the state argued that the evidence was admissible for impeachment purposes under rule 608(b), which only applies to a specific bad act that is relevant to showing untruthful character. But the record does not indicate that the district court exclusively, and erroneously, relied on rule 608(b) when allowing the state to play the jail calls.

⁸ If plain error affecting substantial rights is established, this court determines if it should address the error to ensure the “fairness and integrity of the judicial proceedings.” *Griller*, 583 N.W.2d at 740.

affected his substantial rights, [this court] need not consider the other factors.” *State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007).

Here, Garnett bears the burden of demonstrating that the alleged error affected his substantial rights, meaning that he must show “there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury’s verdict.” *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quotation omitted). To evaluate the likelihood that the error significantly affected the verdict, we consider factors including “the strength of the [s]tate’s case, the pervasiveness of the error, and whether the defendant had an opportunity to respond.” *State v. Sontoya*, 788 N.W.2d 868, 873 (Minn. 2010).

We conclude that any error in allowing the state to continue playing the jail call recordings did not affect Garnett’s substantial rights. First, the jury did not have transcripts of the jail call recordings during the trial, and the alleged prejudicial statements contained in the recordings are not clearly and distinctly audible. In fact, the approximately four potentially prejudicial references are buried in jail calls lasting roughly 32 minutes. Additionally, the state presented significant evidence against Garnett, including officers’ testimony about finding the handgun and ammunition in his home and testimony that Garnett was the major contributor to DNA found on the handgun and the magazine. Further, any error in playing the jail call recordings was not pervasive. The jail call recordings were played one time during recross-examination of a defense witness. And although the state referenced statements made in the jail calls during its closing arguments, the references were in the context of B.G.’s credibility and were very brief. Finally, we note that Garnett did not object to the recordings during trial or seek a curative instruction

after it was played. *See State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994) (noting that failing to object or seek a curative instruction weighs against reversal). All of these considerations, taken together, support our conclusion that any error in playing the jail call recordings did not affect Garnett's substantial rights.

In sum, the district court did not abuse its discretion by admitting evidence of Garnett's behavior toward the suspected burglar and by allowing the state to play the recorded jail calls to impeach B.G. Further, any error by the district court in failing to sua sponte stop the jail calls did not affect Garnett's substantial rights.⁹

Affirmed.

⁹ Because we conclude that Garnett's identified errors are not in fact errors, we do not address his argument regarding the cumulative effect of the alleged errors.