

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0489**

State of Minnesota,
Respondent,

vs.

Jeffrey Alan Martin,
Appellant.

**Filed February 8, 2021
Affirmed in part, reversed in part, and remanded
Reyes, Judge**

Benton County District Court
File No. 05-CR-19-1014

Keith Ellison, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Philip K. Miller, Benton County Attorney, Foley, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Gaïtas, Presiding Judge; Connolly, Judge; and Reyes, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

On appeal from his convictions of second-degree assault, threats of violence, domestic assault-fear, and domestic assault-harm, appellant argues that (1) he is entitled to a new trial because of plain error affecting his substantial rights when the state's witness

testified about his request for an attorney; (2) his sentence for domestic assault-harm should be vacated because it arose from the same behavioral incident as his second-degree assault offense; and (3) the district court exceeded its authority by granting a victim's untimely request for restitution. We affirm in part, reverse in part, and remand with instructions to vacate appellant's domestic-assault-harm sentence and the restitution award.

FACTS

Appellant Jeffrey Alan Martin and victim C.P. had known each other for about 20 years and dated for the first 12 years. After the couple broke up in 2013, they remained friends and lived together at times. By 2017, appellant and C.P. had jointly purchased a trailer home with separate bedrooms for each.

On June 4, 2019, appellant had been drinking and became angry over an open window in the home, calling C.P. names in a loud and angry tone. C.P. took her dog into her bedroom after appellant started "blaring" music in his bedroom. C.P. tried watching TV while she stayed in her room. Appellant then began yelling and banging on C.P.'s door, eventually punching a hole in the door before returning to his room. B.T., C.P.'s sister, called C.P., and testified at trial she could hear appellant yelling in a loud, angry, and argumentative tone.

After ten minutes, appellant returned to C.P.'s doorway. Appellant racked the slide of a gun outside her doorway and said to C.P., "You know what, f--k you. The next one is for you" (the bedroom incident). C.P. knew that appellant owned a handgun that he generally kept in his room in a gun safe, and she was familiar with the sound of a gun racking.

Next, appellant went to his room for another ten minutes, at which point C.P. took her dog into the living room to put the dog's halter on. Appellant came out asking where she was going, and C.P. replied, "I'm leaving." Appellant responded, "The f--k you are, you ain't f--king leaving here, and you ain't taking the f--king dog with you either." C.P. stated, "Oh, yes, I am." Appellant then kicked and punched C.P. with closed fists while she tried to block the blows (the first living-room incident). He said he would "blow [C.P.'s] f--king head off" if she called the cops. He then returned to his room for a third time.

Before C.P. left the house, appellant came back to the living room, pointed his gun at C.P.'s chest and said, "My life is f--ked. I don't care if I shoot you" (the second living-room incident). C.P. thought, "Oh, God." Between the first living-room incident and the moment C.P. left the home, she believed about 10 to 15 minutes had passed.

C.P. got into her car with her dog and, as she was pulling out of the garage, she heard a loud "bam" sound. C.P. turned and saw appellant standing near her car, yelling and screaming at her. She noticed he threw something small at the car. She later saw a dent on the rear passenger side of her car. Appellant then called B.T. and told her that he would shoot her and her family if they came to the trailer.

Because appellant had taken C.P.'s phone from her, she could not call anyone. Within an hour of C.P. sitting parked on the side of a county road, an officer approached her. Meanwhile, B.T. had called the police. While other officers were setting up a perimeter around the mobile home, appellant called B.T. and said he knew she had called the police. Appellant told B.T., "I'm going to f--king shoot you" and "You can tell all the

cops I got a f--king bullet for every one of them too.” After two-and-a-half hours, appellant surrendered.

The police found blood on the entry door and C.P.’s bedroom door as well as four other places in the trailer. The officers took photos of appellant’s bloody right knuckle. Appellant admitted that the blood in the trailer was his.

In an amended complaint, respondent State of Minnesota charged appellant with one count of felony second-degree assault, two counts of threats of violence against C.P. and B.T. respectively, first-degree criminal damage to property, one count of misdemeanor domestic assault-fear, and one count of misdemeanor domestic assault-harm.

At a jury trial, appellant testified in his own defense. The jury found appellant not guilty of first-degree criminal damage to property and guilty of the other five charges. The district court sentenced appellant to 36 months imprisonment for second-degree assault with a deadly weapon, 15 months for threats of violence against B.T., and 90 days for domestic assault-harm against C.P., and ordered him to pay \$300.00 in restitution for “damage to the doors.” This appeal follows.

DECISION

I. The detective’s testimony that he attempted to get a statement from appellant before appellant “asked for an attorney” is error that is plain but it did not affect appellant’s substantial rights.

Appellant argues that an unobjected-to statement from the detective that appellant requested an attorney constitutes prejudicial plain error warranting a new trial on the second-degree-assault charge. We are not persuaded.

We review an unobjected-to error under a plain-error standard. *See State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). Under this standard, the defendant has the burden of demonstrating (1) error (2) that is plain, and (3) that affects the defendant’s substantial rights. *Id.* “An error is plain if it is ‘clear’ or ‘obvious’” by ““contraven[ing] case law, a rule, or a standard of conduct.”” *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quoting *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If those three prongs are met, then this court may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

A. Plain error

A criminal suspect has a constitutional right, under the Fifth Amendment, to counsel during a custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 442, 86 S. Ct. 1602, 611 (1966). The state may not use a defendant’s decision to exercise the constitutional right to counsel against the defendant at trial. *State v. Litzau*, 650 N.W.2d 177, 185 (Minn. 2002). The state has a duty to prepare its witnesses to avoid unsolicited references to a defendant’s exercise of his constitutional rights. *Id.* Testimony regarding defendant’s request to speak with an attorney is inadmissible because it has “no legitimate probative value” and serves as a “badge of guilt.” *State v. Roberts*, 208 N.W.2d 744, 747 (Minn. 1973).

Here, the state called a detective to testify about a statement C.P. made to him and the evidence he gathered from the home. On cross-examination, appellant’s counsel asked: “What other involvement did you have besides that?” The detective answered:

“I was there when they were looking for stuff. It was mainly [two other detectives], *but then I tried getting a statement from [appellant], and he asked for an attorney, which was totally fine, and ended that conversation,* I collected the bullet, and eventually I went back to the office and put it into evidence and did my report.”

(Emphasis added.) Appellant’s counsel then asked: “[S]o essentially you took the statement from [C.P.], did the search warrant, and then were there when the officers were looking through the house?”

Appellant’s request for an attorney had no legitimate probative value, and the state had a duty to properly prepare its own witness to avoid unsolicited references to appellant’s exercise of his constitutional rights. We conclude that appellant has established that admission of the detective’s statement referencing appellant’s request for counsel is error that is plain because it violated the rule in *Litzau* and *Roberts*.

B. Substantial rights

Next, appellant bears the “heavy burden” of showing the error affected his substantial rights by showing prejudice and that it affected the outcome. *Griller*, 583 N.W.2d at 741. “To evaluate the effect on substantial rights, we consider various factors, including the pervasiveness of improper suggestions and the strength of evidence against the defendant.” *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017) (quotations omitted).

Regarding the first factor, the detective’s statement is the only reference to appellant’s request for counsel. *Cf. State v. Pearson*, 775 N.W.2d 155, 161-62 (Minn. 2009) (supreme court noted “numerous references” to request for counsel). Neither party

further referenced the detective's comment. As such, the single comment was not pervasive.

Appellant cites to *State v. Litzau* in which the Minnesota Supreme Court concluded that the *cumulative* effect of the admission of several hearsay statements denied defendant a fair trial. 650 N.W.2d at 187. But appellant does not allege a *cumulative* effect of evidentiary errors, and the record reflects no others.

On the second factor, the state presented strong evidence against appellant beyond the victims' testimony. Appellant admitted that he threatened to physically harm C.P.'s and B.T.'s family members if they arrived. And the physical evidence included photos of appellant's blood on the doors, floors, appellant's bedsheets, and foam within the gun safe; loose bullets on appellant's bedroom floor; appellant's open gun safe located outside of his closet when it was normally stored inside the closet; and photos of bruising on C.P.'s forehead and leg.

Finally, appellant contends that the detective's statement operated as a general "badge of guilt," one of the concerns that the Minnesota Supreme Court has expressed in other cases involving testimony about a defendant's request for counsel. *Roberts*, 208 N.W.2d at 747. It is unlikely that the single reference operated as a general "badge of guilt" here, considering the jury found appellant not guilty of the criminal damage to property charge.

We conclude that appellant has not met his burden to show that the detective's single reference to appellant's request for counsel affected his substantial rights. Consequently, appellant is not entitled to a new trial.

II. The domestic-assault-harm sentence should be vacated because it arose out of the same single behavioral incident as the second-degree assault with a dangerous weapon.

Appellant challenges the district court’s imposition of sentences for second-degree assault with a dangerous weapon and domestic assault-harm, arguing that the offenses arose out of a single behavioral incident. We agree.

With exceptions not relevant here, “[i]f a person’s conduct constitutes more than one offense . . . , the person may be punished for only one of the offenses.” Minn. Stat. § 609.035 (2018). Whether multiple offenses arose out of a single behavioral incident is a mixed question of law and fact. *State v. Barthman*, 938 N.W.2d 257, 265 (Minn. 2020). This court reviews the district court’s findings of fact for clear error and its application of the law to those facts de novo. *Id.* Determining whether two crimes are part of a single behavioral incident requires consideration of (1) the time and place of the crimes and (2) whether the criminal conduct was motivated by a single criminal objective. *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011). The state bears the burden of proving that the crimes were not part of a single behavioral incident. *State v. Zuehlke*, 320 N.W.2d 79, 82 (Minn. 1982).

A. Time and place of the crimes

Because the parties do not dispute that the first living-room incident of domestic assault-harm and the second living-room incident of second-degree assault with a dangerous weapon occurred in the same place, we focus on the time of the two acts.

To evaluate the unity of time, this court asks whether “the offenses occurred at *substantially* the same time.” *Compare State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014)

(concluding that 33 text messages sent during a two and one-half hour period, averaging one text every four minutes, occurred at substantially same time) (emphasis added), *with State v. Degroot*, 946 N.W.2d 354, 366 (Minn. 2020) (concluding that a morning solicitation for sex and afternoon attempted third-degree criminal sexual conduct did not occur at substantially the same time). Because the bedroom incident and the second living-room incident occurred within minutes of the first living-room incident, and C.P. did not have enough time to leave the home, we conclude the offenses occurred at substantially the same time.

B. Single criminal objective

Next we must address “whether all of the acts performed were necessary to or incidental to the commission of a single crime and motivated by an intent to commit that crime.” *Barthman*, 938 N.W.2d at 267 (quoting *State v. Krampotich*, 163 N.W.2d 772, 776 (1968)). In *Jones*, the Minnesota Supreme Court recognized that the appellant’s conduct constituted a singular intent to “intimidate and harass” the victim. 848 N.W.2d at 533 (citing *Bauer*, 792 N.W.2d at 829 (noting that we examine the relationship of offenses to each other when determining whether the offenses constitute a single behavioral incident)). In *State v. Williams*, the supreme court concluded that a sexual assault and attempted murder were “part of a continuum of escalating violence beginning” when he broke into the victim’s apartment and ending when he tied a scarf around her neck. 608 N.W.2d 837, 842 (Minn. 2000) (concluding that state failed to meet its burden of proving separate criminal objectives).

Here, appellant's threats and physical beatings were motivated by a singular intent: to make C.P. fear for her life. The record is replete with examples of how appellant sought to make C.P. fear for her physical safety through a continuum of escalating violence. Appellant began by insulting and threatening C.P., punching a hole in her door, and racking his gun in C.P.'s doorway. Then, appellant physically beat C.P. in the living room. This then escalated to appellant grabbing his gun again, pointing it at C.P., and threatening her life. Appellant's physical assault of C.P. was incidental to committing assault with a dangerous weapon, unified by the singular criminal objective.

Because the second-degree assault with a deadly weapon and domestic assault-harm are unified in time, place, and criminal objective, we conclude that these offenses arose from a single behavioral incident. We therefore reverse and remand with instructions to vacate the domestic assault-harm sentence.

III. The district court erred by granting C.P.'s untimely request for restitution at the sentencing hearing.

Appellant argues that the district court lacked authority to grant C.P.'s untimely request for restitution under the plain language of Minn. Stat. § 611A.04, subd. 1 (2018). We agree.

This court reviews the decision to award restitution for an abuse of discretion. *State v. Andersen*, 871 N.W.2d 910, 913 (Minn. 2015). A district court has broad discretion in awarding restitution, *id.*, but it abuses its discretion “when its decision [regarding restitution] is based on an erroneous view of the law.” *State v. Boettcher*, 931 N.W.2d 376,

380 (Minn. 2019). Questions about the district court’s authority to grant restitution are subject to de novo review. *Andersen*, 871 N.W.2d at 913.

The district court may order restitution sua sponte or, as here, upon a victim’s request. *See State v. Gaiovnik*, 794 N.W.2d 643, 648 (Minn. 2011). If the victim requests restitution, “all information regarding restitution *must* be received . . . *at least three business days* before the sentencing or dispositional hearing” to be considered at the hearing. Minn. Stat. § 611A.04, subd.1 (emphasis added). Additionally, the court administrator “shall provide copies of [the victim’s] request” to the defendant or defendant’s attorney “at least 24 hours” before the hearing. *Id.* The statute also provides: “The issue of restitution is reserved or [the hearing] on the restitution request may be continued if the victim’s affidavit or other competent evidence is not received in time.” *Id.*

Minn. Stat. § 611A.045 (2018) governs the process defendants must follow to challenge a request for restitution. Respondent argues that relevant here is the requirement that a defendant request a hearing “within 30 days of receiving written notification of the amount of restitution requested, or within 30 days of sentencing, whichever is later.” *Id.*, subd. 3(b). But the Minnesota Supreme Court has held that section 611A.045, subdivision 3(b), does not apply to a challenge to the district court’s legal authority to award restitution. *Gaiovnik*, 794 N.W.2d at 648-49.

Here, appellant did not file a challenge to the request within thirty days of the hearing. But because appellant’s argument challenges the district court’s legal authority to order restitution, the procedural bars under section 611A.045 do not apply. *Id.* at 647.

Additionally, at the sentencing hearing, the state offered a request for restitution from C.P. for \$300.00 for “the doors.” Appellant’s counsel said: “In regards to the house, this is the first I have seen about it. They own the property together. Well, from what I know that wasn’t in dispute based on the trial. There was no criminal conduct that was alleged from that so at this point I don’t necessarily think restitution is appropriate.”

Because the restitution order was based on one of the victims’ request, and not the district court’s sua sponte power, section 611A.04 controls. *Gaiovnik*, 794 N.W.2d at 652. The plain language of section 611A.04 is clear that “[i]n order to be considered at the sentencing or dispositional hearing” all information on restitution must be received three business days before the hearing and the defendant must have sufficient notice of the restitution request. Minn. Stat. § 611A.04, subd. 1. This plain-language interpretation tracks the supreme court’s reasoning under *Gaiovnik*, that the procedures of section 611A.04 are *necessary* to provide defendant with notice of the specific items and their dollar amounts, and an opportunity to respond. 794 N.W.2d at 652 (“The procedures set forth in sections 611A.04, subdivision 1, were therefore necessary to allow H.A.D. to receive notice of [the victims’] restitution requests and an opportunity to respond to these requests.”) (citing *In re Welfare of H.A.D.*, 764 N.W.2d 64, 66-67 (Minn. 2009)). Because appellant did not receive statutory notice under section 611A.04, the district court lacked authority to order the restitution. The district court had authority to reserve the issue of restitution or to continue the hearing, but it lacked authority to grant C.P.’s request for

restitution because it did not follow the procedures under section 611A.04. We therefore reverse and remand with instructions to vacate the restitution award of \$300.00 to C.P.

Affirmed in part, reversed in part, and remanded.