

*This opinion is nonprecedential except as provided by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
A22-0744**

State of Minnesota,
Respondent,

vs.

Jeramy John Wharton,
Appellant.

**Filed March 27, 2023
Affirmed
Slieter, Judge**

Kandiyohi County District Court
File No. 34-CR-20-865

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

Shane D. Baker, Kandiyohi County Attorney, Julianna F. Passe, Assistant County Attorney, Willmar, Minnesota (for respondent)

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

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

NONPRECEDENTIAL OPINION

SLIETER, Judge

Appellant argues that he is entitled to a new trial because (1) the district court abused its discretion by admitting relationship evidence pursuant to Minn. Stat. § 634.20 (2022), and (2) the prosecutor committed misconduct by eliciting prejudicial testimony from

witnesses and failing to prepare its witnesses. In the alternative, appellant asserts that the cumulative effect of these errors requires a new trial. Because the district court acted within its discretion by admitting relationship evidence and because the prosecutor did not commit misconduct, we affirm.

FACTS

Respondent State of Minnesota charged appellant Jeramy John Wharton with two counts of second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1(a), (g) (2012). The complaint alleged that Wharton committed the offense against M.B. when she was approximately 11 years old. M.B. is Wharton's daughter and the offense occurred when she was staying with Wharton at his home.

Prior to trial, the state sought to introduce evidence pursuant to Minn. Stat. § 634.20, of three instances of similar sexual misconduct Wharton committed against other family or household members. One instance resulted in Wharton's 2017 conviction of first-degree criminal sexual conduct involving another daughter, A.S. The other two instances involved pending charges of criminal sexual conduct.

Over Wharton's objection, the district court granted the state's motion in part by allowing evidence related to the 2017 conviction pursuant to section 634.20, but excluding evidence of the other two alleged instances of criminal sexual conduct.

During the trial, A.S. testified about the facts underlying Wharton's 2017 conviction for criminal sexual conduct against her. Prior to A.S.'s testimony and during its final instructions, the district court provided limiting instructions to the jury about how it should consider A.S.'s testimony.

M.B., the victim of the current offense, also testified. She said that Wharton is her biological father and that some time in spring 2013, when she was temporarily living at Wharton's residence, Wharton "grabbed" her arm, causing her to fall onto his bed where he proceeded to inappropriately touch her.

The jury returned guilty verdicts on both charges of second-degree criminal sexual conduct. Following conviction of one count of second-degree criminal sexual conduct, the district court imposed a presumptive executed prison sentence of 36 months.¹

Wharton appeals.

DECISION

I. The district court acted within its discretion by admitting the relationship evidence.

In general, evidence about criminal activity unrelated to the crime for which a person is on trial is inadmissible. *See State v. Spreigl*, 139 N.W.2d 167, 169 (Minn. 1965). However, the district court may allow the state to present "[e]vidence of domestic conduct by the accused . . . against other family or household members," which is commonly referred to as "relationship evidence." Minn. Stat. § 634.20; *State v. Matthews*, 779 N.W.2d 543, 549 (Minn. 2010). "Domestic conduct" includes "domestic abuse," which is defined, in part, as criminal sexual conduct. Minn. Stat. §§ 634.20, 518B.01, subd. 2(a)(3)

¹ At the time of his sentence, Wharton was serving a prison sentence for another criminal-sexual-conduct offense. That offense, as well as this second-degree criminal-sexual-conduct offense, are eligible for a permissive consecutive sentence. Minn. Sent'g Guidelines 6 (2012). The district court imposed a permissive consecutive sentence with a duration based on a zero criminal history score, as required by the sentencing guidelines. Minn. Sent'g Guidelines 2.F.2.a (2012).

(2022). “Family or household members” include “parents and children.” Minn. Stat. § 518B.01, subd. 2(b) (2022). Such relationship evidence is generally admissible “unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury.” Minn. Stat. § 634.20; *State v. McCoy*, 682 N.W.2d 153, 156 n.1 (Minn. 2004); *see also State v. Fraga*, 864 N.W.2d 615, 627 (Minn. 2015) (adopting the statute as a rule of evidence).

We review the district court’s decision to admit relationship evidence for an abuse of discretion. *McCoy*, 682 N.W.2d at 161. “A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *Bobo v. State*, 969 N.W.2d 829, 836 (Minn. 2022) (quotation omitted). “For a reversal of a district court’s evidentiary ruling, [an appellant] must prove that the admission of evidence was erroneous and prejudicial.” *State v. Loving*, 775 N.W.2d 872, 879 (Minn. 2009). This court “will reverse the district court’s ruling if the error substantially influenced the jury’s decision.” *Id.*

Probative Value

Wharton asserts that the district court abused its discretion by allowing A.S.’s testimony about Wharton’s prior criminal-sexual-conduct offense, arguing that “[t]here was little, if any, legitimate probative value to A.S.’s testimony.”

The Minnesota Supreme Court has stated that the rationale for admitting relationship evidence is to illuminate the relationship between the defendant and the victim, as well as to put the crime in the context of that relationship. *McCoy*, 682 N.W.2d at 159. In *Ware*, we concluded that “the probative value of relationship evidence involving a

family or household member is high because ‘evidence showing how a defendant treats his family or household members . . . sheds light on how the defendant interacts with those close to him, which in turn suggests how the defendant may interact with the victim.’” *State v. Ware*, 856 N.W.2d 719, 729-30 (Minn. App. 2014) (quoting *State v. Valentine*, 787 N.W.2d 630, 637 (Minn. App. 2010), *rev. denied* (Minn. Nov. 16, 2010)).

During A.S.’s testimony, she explained that when she was between ages 12 and 14, Wharton would touch her inappropriately and “have sexual intercourse” with her. She testified that, as a result, she became pregnant at age 14 and Wharton was the biological father of the child.

In support of his argument that the district court erred by allowing this evidence, Wharton emphasizes that A.S.’s testimony did not provide any evidence about M.B. Wharton’s argument misapprehends the purpose of relationship evidence. A.S.’s testimony sheds light on Wharton’s relationship with M.B., his daughter, by showing his conduct with another daughter when she was about the same age as M.B. at the time of the incident. This falls squarely within probative relationship evidence as defined by controlling caselaw. *See Valentine*, 787 N.W.2d at 637.²

² As to Wharton’s assertion that the district court abused its discretion by admitting A.S.’s testimony because it did not affect M.B.’s credibility, we disagree. Relationship evidence can be probative in part because it may assist a jury in assessing the credibility of the victim’s account. *See Matthews*, 779 N.W.2d at 549. By these facts, the district court acted within its discretion by admitting the testimony of A.S.

Danger of Unfair Prejudice

“When balancing the probative value against the potential prejudice, 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.” *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted). Persuasion by illegitimate means includes “leading the jury to improperly conclude that [the defendant] has a propensity to behave criminally and should now be convicted, and punished, for the charged offenses.” *State v. Hormann*, 805 N.W.2d 883, 891 (Minn. App. 2011), *rev. denied* (Minn. Jan. 17, 2012).

Wharton argues that unfair prejudice from A.S.’s testimony “easily outweighed its probative value, and should have been excluded” because A.S.’s testimony amounted to propensity evidence that “merely impugned Wharton’s character and suggested he was worthy of punishment.” Based on the record, we disagree.

As discussed, the evidence has probative value pursuant to *Valentine* because it reveals how Wharton interacted with another young daughter while she was in his home. This, in turn, suggests how Wharton may have interacted with M.B. And, although “[a]ll evidence offered against defendants in criminal trials is prejudicial to some extent,” *State v. Spaeth*, 552 N.W.2d 187, 195 (Minn. 1996), the district court provided two sets of limiting instructions to the jury. The district court carefully prefaced the introduction of A.S.’s testimony with the following:

You are about to hear evidence of conduct by the defendant from April 2015 in Kandiyohi County. This evidence is being offered for the limited purpose of demonstrating the nature and

extent of the relationship between the defendant and his household or family members in order to assist you in determining whether the defendant committed those acts with which the defendant is charged in the complaint.

The defendant is not being tried for and may not be convicted of any behavior other than the charged offenses. You are not to convict the defendant on the basis of conduct from April 2015 in Kandiyohi County.

And the district court repeated a similar limiting instruction during its final instructions to the jury.

A district court's limiting instruction "lessen[s] the probability of undue weight being given by the jury to the evidence." *State v. Lindsey*, 755 N.W.2d 752, 757 (Minn. App. 2008) (quotation omitted), *rev. denied* (Minn. Oct. 29, 2008). Courts trust that juries follow the cautionary instructions the district court issues. *See Matthews*, 779 N.W.2d at 550. The danger of unfair prejudice in this case is therefore low because the district court gave the jury a cautionary instruction twice. *See Lindsey*, 755 N.W.2d at 757. And, as we have already noted, the evidence was highly probative. Accordingly, the record supports the district court's finding that the probative value of Wharton's prior acts of criminal sexual conduct against another daughter was not substantially outweighed by the danger of unfair prejudice.

II. Prosecutorial misconduct was not committed.

Wharton argues that the prosecutor committed misconduct by failing to prevent two witnesses from making inadmissible statements during direct examination. Wharton did not object to this alleged misconduct.

When prosecutorial misconduct is unobjected to during trial, appellate courts apply a modified plain-error test. *State v. Ramey*, 721 N.W.2d 294, 297-98 (Minn. 2006). Plain error consists of (1) error, (2) that is plain, and (3) affects substantial rights. *State v. Leake*, 699 N.W.2d 312, 327 (Minn. 2005) (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). The appellant bears the burden of satisfying the first two prongs of the plain-error test. *Ramey*, 721 N.W.2d at 302. “An error is plain if it was clear or obvious,” and plain error may be demonstrated “if the error contravenes case law, a rule, or a standard of conduct.” *Id.* (quotations omitted).

Once the defendant demonstrates plain error, the burden shifts to the state “to demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights.” *Id.*; Minn. R. Crim. P. 31.02. “Plain error affects a defendant’s substantial rights if there is a reasonable likelihood that the errors had a significant effect on the jury’s verdict.” *State v. Bustos*, 861 N.W.2d 655, 663 (Minn. 2015) (quotation omitted).

Wharton argues that the two statements are plainly misconduct because the prosecutor either intentionally elicited inadmissible and prejudicial answers from the testifying witnesses or failed to properly prepare the witnesses to prevent them from offering inadmissible testimony.

Two lines of caselaw are relevant to this analysis. First, “[i]t is improper for a prosecutor to ask questions that are calculated to elicit or insinuate an inadmissible and highly prejudicial answer.” *State v. Henderson*, 620 N.W.2d 688, 702 (Minn. 2001). And second, because “Minnesota law is crystal clear” that “the state has an absolute duty to prepare its witnesses to ensure that they are aware of the limits of permissible testimony,”

failure to prevent a witness from spontaneously offering inadmissible testimony is misconduct. *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003), *rev. denied* (Minn. June 25, 2003).

M.B.'s Testimony

The first purportedly inadmissible statement came from M.B., when the prosecutor questioned her about disclosing the incident with Wharton to her mother:

Q: And why did you tell your mom?

A: 'Cause I felt that it needed to come out since I knew he wasn't gonna come out and hurt me since he was already in prison but I was still nervous to come out sooner because I didn't know if he had friends that would come to the house and hurt me in any way.

Wharton contends that M.B.'s reference to his imprisonment was inadmissible and that the state had a duty not to elicit such testimony or, alternatively, to prepare its witnesses not to offer such testimony. References to a defendant's incarceration can be unfairly prejudicial, but there is no general rule that such references are *per se* error. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). We must consider the context of the reference. *See State v. Shaka*, 927 N.W.2d 762, 770-71 (Minn. App. 2019) (revealing defendant's custody status to lay foundation for recorded jail phone calls was not plain error), *rev. dismissed* (Minn. Nov. 19, 2019); *see also State v. Guzman*, 892 N.W.2d 801, 813 (Minn. 2017) (considering the context and purpose of a statement by a witness about incarceration).

In this case, the context of M.B.'s statement was relevant. *See* Minn. R. Evid. 401 (“‘Relevant evidence’ means 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.”). Wharton’s incarceration provided the circumstances for M.B. to feel safe enough to report the incident. Considering the context of M.B.’s statement and that nothing in the record suggests that the prosecutor intended to elicit objectionable or prejudicial statements regarding Wharton’s imprisonment, the statement did not amount to error.

Detective’s Testimony

Wharton argues that the second inadmissible statement came from the detective who interviewed M.B. The detective was questioned by the prosecutor as follows:

Q: Are you familiar with Mr. Wharton?

A: I heard his name, maybe had some dealings with him in the past but I mean I’ve heard his name just from working for so long so.

Wharton contends that the detective’s answer, whether elicited intentionally or “merely blurted out,” amounts to plain error. It can be plain error for a prosecutor to elicit testimony from an officer about knowing a defendant from “prior contacts and incidents.” *State v. Strommen*, 648 N.W.2d 681, 686-89 (Minn. 2002) (holding that it was plain error to elicit statements from a police officer regarding prior contacts with the defendant when identity was not at issue and another witness testified that the defendant had been charged for killing someone). However, “*Strommen* did not hold that the officer’s comments about prior contacts, on their own, were reversible plain error.” *Valentine*, 787 N.W.2d at 641.

Unlike *Strommen*, the detective’s statement that he knew Wharton from prior “dealings” was not coupled with an earlier, inadmissible statement that Wharton had

committed a crime. Moreover, the detective's vague statements about "maybe" having had "dealings" with Wharton and having "heard his name just from working so long" did not imply that the detective's familiarity was based on bad acts committed by Wharton. In addition, the prosecutor quickly changed the topic after the detective's statement, making it clear that he did not intend to elicit the testimony. Therefore, even if the detective's statement was an error, it was not plain.

Wharton did not meet his burden to show prosecutorial misconduct due to inadmissible testimony under the plain-error test. Therefore, we need not address whether Wharton's substantial rights were affected.

III. The cumulative effect of any errors did not impact the fairness of the trial.

In rare cases, "the cumulative effect of trial errors can deprive a defendant of his constitutional right to a fair trial when the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant's prejudice by producing a biased jury." *State v. Davis*, 820 N.W.2d 525, 538 (Minn. 2012) (quotation omitted). "The test is whether the effect of the errors considered together denied appellant a fair trial." *Valentine*, 787 N.W.2d at 642.

Because the preceding analysis did not establish multiple errors, there is no cumulative effect that deprived Wharton of a fair trial. *See id.*

Affirmed.