STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1366

State of Minnesota,
Respondent,

vs.

Richard M. Benike,
Appellant.

Filed September 23, 2008
Affirmed
Hudson, Judge

Wright County District Court
File No. CR-06-4533

Lori Swanson, Attorney General, Kimberly Middendorf, Assistant Attorney General, 900 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101; and

Tom Kelly, Wright County Attorney, 10 Northwest Second Street, Buffalo, Minnesota 55313 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Stoneburner, Judge; and Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

HUDSON, Judge

On appeal from his conviction of third-degree criminal sexual conduct, appellant argues that the district court abused its discretion when it admitted evidence under Minn. Stat. § 634.20 (2004), of his prior conviction of criminal sexual conduct involving the same victim. Because there was no abuse of discretion, we affirm.

FACTS

In the summer of 2006, appellant Richard Benike was charged with two counts of third-degree criminal sexual conduct against his adult stepdaughter, C.S. Count I of the complaint alleged that in February 2006, appellant violated Minn. Stat. § 609.344 (2004), by using force or coercion to sexually penetrate C.S. Count II of the complaint alleged that in December 2005, appellant violated Minn. Stat. § 609.344, subd. 1(d), by sexually penetrating C.S. when he had reason to know that the victim was physically helpless. Appellant pleaded not guilty and a jury trial was held on the matter.

Before trial, the state moved to admit evidence of appellant's prior conviction of criminal sexual conduct, which stemmed from allegations that appellant sexually abused C.S. when she was a child. Specifically, appellant was convicted of digitally penetrating C.S.'s vagina on or about June 13-14, 1989, when C.S. was 16 years old. The district court granted the state's motion on the basis that the current charges were similar to the previous charges and both were against a victim of domestic abuse. The court also found that the "probative value is not substantially outweighed by the danger of unfair prejudice with regard to the prior acts against [C.S.]." Appellant subsequently requested a

departure from the standard jury instruction, preferring a specific instruction that would specify the limited purpose for which the evidence was received and inform the jury that the previous conduct was committed against C.S. The court granted appellant's request.

At trial, C.S. testified that in the winter of 2005, she stayed overnight at her mother's and appellant's house. According to C.S., appellant gave her some muscle relaxants to help her sleep because she had recently been in a car accident and was in a great deal of pain. C.S. testified that after falling asleep on the living room couch, she awoke to find appellant on top of her with his penis inside her vagina. C.S. told appellant to stop, and appellant complied. C.S. testified that she could not remember anything else about that incident.

C.S. also testified about an incident that occurred a few weeks later. According to C.S., she had planned to accompany her mother while she did some errands, but decided to stay at her mother's and appellant's house instead "because of the look [she] got" from appellant. C.S. testified that after her mother left, appellant took off his clothes and forced her to give him oral sex.

After C.S. testified about the two charged incidents, the district court read the requested jury instruction pertaining to appellant's prior conviction for sexually abusing C.S. C.S. then testified that from the time she was six until the time she was sixteen, appellant regularly molested her by touching her vagina with his hand. When asked if appellant had been convicted of "that conduct," C.S. answered in the affirmative. Of the remaining five witnesses who testified on behalf of the state, four briefly mentioned the prior sexual misconduct in their testimony.

In his defense, appellant testified that he and C.S. began a consensual sexual relationship in the fall of 2005. Appellant conceded that he and C.S. engaged in sexual intercourse and oral sex on the occasions alleged by C.S., but appellant claimed that the sexual contact was consensual.

The jury found appellant guilty of Count II, criminal sexual conduct while the victim is physically helpless. But the jury found appellant not guilty of Count I, criminal sexual conduct by force or coercion. The district court subsequently sentenced appellant to 69 months in prison. This appeal follows.

D E C I S I O N

Appellant argues that the district court abused its discretion when it admitted evidence under Minn. Stat. § 634.20 (2004), of his prior conviction for criminal sexual conduct involving C.S. Evidentiary rulings ordinarily rest within the sound discretion of the district court. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). When challenging a district court's evidentiary ruling, an appellant must establish both that the district court abused its discretion and that, as a consequence, the appellant was prejudiced. *Id.*

Minnesota law provides:

> Evidence of similar conduct by the accused against the victim of domestic abuse, 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. "Similar conduct" includes . . . evidence of domestic abuse . . . . "Domestic abuse" . . . [has] the meaning[] given under section 518B.01, subdivision 2.

Minn. Stat. § 634.20 (2004). Minn. Stat. § 518B.01, subd. 2(a) (2004), defines "domestic abuse" as "criminal sexual conduct" that has been "committed against a family or household member by a family or household member." "Family or household members" are defined in part as "persons who are presently residing together or who have resided together in the past." *Id.*, subd. 2(b)(4) (2004).

Minn. Stat. § 634.20 was expressly recognized by the Minnesota Supreme Court as a rule of evidence to allow "for the admission of evidence of similar conduct by the accused against the alleged victim of domestic abuse." *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004). Although evidence of an accused's similar conduct of domestic abuse, or "relationship evidence," is not considered *Spreigl* prior-bad-acts evidence, "the purpose of each type of evidence is similar." *State v. Meldrum*, 724 N.W.2d 15, 20 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). In determining the admissibility of relationship evidence under Minn. Stat. § 634.20, a court evaluates "(1) whether the offered evidence is evidence of similar conduct; and (2) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *McCoy*, 682 N.W.2d at 158.

Here, appellant argues that (1) his prior conviction did not involve similar prior conduct within the meaning of section 634.20; and (2) even if the conviction did involve similar prior conduct, the district court erred in admitting the evidence because its probative value was substantially outweighed by the danger of unfair prejudice. Appellant also contends that he was prejudiced by the admission of his prior conviction.

A. Similar conduct

Appellant argues that his prior conviction did not involve conduct sufficiently similar to the conduct in the charged offenses to be admissible under section 634.20. To support his claim, appellant attempts to contrast the offenses by asserting that his prior conviction occurred 16 years before the charged offenses, and involved digital penetration rather than the allegations of sexual intercourse and oral sex that were charged in the complaint.

Appellant's argument is without merit. The definition of "similar conduct" contained in section 634.20, includes "domestic abuse." As noted above, "domestic abuse" includes "criminal sexual conduct" that has been "committed against a family or household member by a family or household member." Minn. Stat. § 518B.01, subd. 2(a). Both the prior conviction and the charged offenses concern criminal sexual conduct by appellant against C.S., who is a family or household member. Accordingly, the district court did not err in concluding that appellant's prior conviction involved similar prior conduct within the meaning of section 634.20.

B. Probative value vs. danger of unfair prejudice

When balancing the probative value of evidence against its prejudicial impact, "unfair prejudice" is not merely damaging evidence, nor is it severely damaging evidence. *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006). Evidence satisfies the unfair-prejudice test when it persuades by illegitimate means and gives one party an unfair advantage. *Id.* "[W]hen considering its admissibility, the district court is not required to independently consider the state's need for such evidence as 'the need for

section 634.20 evidence is naturally considered as part of the assessment of the probative value versus prejudicial effect of the evidence.'" *State v. Meyer*, 749 N.W.2d 844, 849 (Minn. App. 2008) (quoting *Bell*, 719 N.W.2d at 639).

Here, in granting the state's motion to admit evidence of appellant's prior conviction, the district court stated:

> The probative value of the prior conviction is an example of true relationship evidence. Admission of that evidence, that is, evidence of [appellant's] prior acts against [C.S.] committed in the family home, one family member against another, defined to be domestic violence, paints a complete picture. It puts the current allegations in the context of the relationship between [C.S.] and [appellant] and thereby assists the jury to assess [C.S.'s] witness credibility. The probative value is not substantially outweighed by the danger of unfair prejudice with regard to the prior acts against [C.S.].

Appellant argues that even if this court determines that his prior conviction involved similar conduct within the meaning of section 634.20, the district court erred in admitting the evidence because its probative value was substantially outweighed by the danger of unfair prejudice. To support his claim, appellant relies on *McCoy*, in which the victim made statements to police implicating the defendant, but later sought to recant the statements. 682 N.W.2d at 156–57. The state introduced police reports and medical records from a prior assault, but the victim testified at trial that she retained no memory of that assault and denied that it occurred. *Id.* Despite her denials, the evidence was nevertheless found to be admissible. *Id.* at 159.

Appellant argues that unlike the victim in *McCoy*, C.S.'s testimony was consistent from the time she reported the incident to the time she testified at trial. Thus, appellant

argues, the entire basis for admitting the section 634.20 evidence, as articulated in *McCoy*, was completely lacking here because there was no need to buttress C.S.'s credibility by way of the domestic abuse relationship evidence.

We disagree. There is no need for the statements of the victim to be inconsistent in order for a prior conviction to be admissible under section 634.20. *See generally Bell*, 719 N.W.2d at 638–40. Minnesota has recognized "the inherent [probative] value of evidence of past acts of violence committed by the same defendant against the same victim." *Id.* at 641. The rationale for admitting evidence of prior acts of domestic abuse is to show the history of the relationship between the parties. *McCoy*, 682 N.W.2d at 159. Evidence of past abuse also places the "alleged criminal conduct of the defendant in context [and] may help the jury in assessing the defendant's intent and motivation." *State v. Henriksen*, 522 N.W.2d 928, 929 (Minn. 1994).

Here, the issue at trial was whether the sexual activity was consensual. In light of the past relationship between appellant and C.S., appellant's prior conviction was probative of this issue. The past conviction demonstrates appellant's sexual manipulation of C.S. and places the charged criminal sexual conduct in the context of the relationship between appellant and C.S. *See McCoy*, 682 N.W.2d at 159. The record reflects that the district court carefully considered the issue, and appellant cannot show that the court abused its discretion in making its decision. Moreover, any arguably unfair prejudicial effect would have been mitigated by the district court's cautionary instruction. *See State v. Waino*, 611 N.W.2d 575, 579 (Minn. App. 2000) (stating that any prejudicial effect of admitting the prior conviction was mitigated by the district court's cautionary

instruction). Accordingly, the district court did not abuse its discretion by determining that the probative value of appellant's prior conviction outweighed the danger of unfair prejudice.

We also note that even if the district court abused its discretion in admitting appellant's prior conviction, appellant was not prejudiced by the error. The jury found appellant guilty of Count II, criminal sexual conduct while the victim is physically helpless, but not guilty of Count I, criminal sexual conduct by force or coercion. This indicates that the jury was not unduly influenced by the admission of appellant's prior conviction. *See State v. DeWald*, 463 N.W.2d 741, 745 (Minn. 1990) (stating that acquittal on some charges demonstrates that the jury conscientiously considered the evidence rather than resorting to passion or prejudice). Moreover, there was more than sufficient testimony in the record for the jury to reach the decision that it did.

Affirmed.