STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1337

State of Minnesota,
Respondent,

vs.

David Alexander Schill, Jr.,
Appellant.

Filed June 26, 2017
Affirmed
Jesson, Judge

Polk County District Court
File No. 60-CR-15-989

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, Crookston, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Jesson, Judge; and Smith, John, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

JESSON, Judge

Appellant David Schill argues that (1) the evidence is insufficient to convict him of felony domestic assault because he was not a family or household member of the victim; and (2) the district court abused its discretion by admitting three prior domestic-violence-related incidents and resulting convictions as relationship evidence. Because Schill and the victim meet the definition of family or household members as required by statute, and because the district court did not commit reversible error by admitting relationship evidence of the prior underlying incidents or the resulting convictions, we affirm.

FACTS

On June 12, 2015, two police officers responded to a call regarding a domestic disturbance in a Crookston apartment building. Through an open window, they could hear a man and a woman arguing loudly inside one of the apartments. The officers heard the woman, who was later identified as E.K., scream, "Get your hands off my neck; call the cops." They then entered the apartment.

The officers observed that E.K. appeared "out of it," was crying, and had distinct red finger marks on the side of her neck, consistent with having been grabbed. Schill appeared belligerent, uncooperative, and intoxicated. He denied that they had been fighting, told the officers that the markings on E.K.'s neck were from an earlier fight, and said that they had just been searching the apartment for a phone. According to one of the officers, Schill stated that he lived at that apartment and that E.K. was "his girlfriend." Both officers recorded the encounter on pocket recorders.

The state charged Schill with felony domestic assault, *see* Minn. Stat. § 609.2242, subd. 4 (2014), and gross-misdemeanor obstructing legal process, *see* Minn. Stat. § 609.50 (2014). At his jury trial, E.K. testified that she had known Schill for quite a while, that they had "sort of, not really" been involved in a romantic relationship, and that he was not her boyfriend, but that they had had sex. E.K. testified that she lived at the apartment but denied that she resided with Schill. She testified that she and Schill had been hanging out drinking and got into an argument over Schill's lost phone that "turned worse," with Schill placing his hands on her neck. But she testified that she did not want to press charges or see him go to prison. The officers' recordings of the incident were admitted as evidence. In the recordings, Schill identified E.K. to police as his "girlfriend."

Over a defense objection, the district court admitted as relationship evidence three prior domestic-violence-related convictions and their underlying conduct. *See* Minn. Stat. § 634.20 (2014). The district court then asked Schill if he was willing to stipulate to the facts concerning the prior incidents. He agreed on the record to waive his rights to have the state prove the incidents, to call or cross-examine witnesses regarding them, or to contest their facts. The parties agreed to a stipulation, and the district court therefore instructed the jury that the parties had stipulated: (1) that in June 2007, Schill willfully caused bodily injury to a former girlfriend by striking her on the side of the head and, "[a]s a result," was convicted in North Dakota of simple assault, domestic violence; (2) that in January, 2010, Schill grabbed, struck, or hit that girlfriend and caused her to suffer pain or bodily injury, and "[a]s a result," was convicted in Minnesota of fifth-degree assault; and

(3) that in July 2012, Schill assaulted a former girlfriend and "[a]s a result," was convicted in Minnesota of fifth-degree assault.

Schill did not testify, and the defense presented no witnesses. The jury found him guilty of both offenses, and the district court sentenced him to 27 months in prison on the felony domestic assault conviction.

D E C I S I O N

I. The evidence is sufficient to convict Schill of felony domestic assault.

A person may be convicted of domestic assault if that person commits an assault against a "family or household member." Minn. Stat. § 609.2242, subd. 1. "Family or household members" includes persons who are "involved in a significant romantic or sexual relationship." Minn. Stat. § 518B.01, subd. 2(b)(7) (2014). That definition also includes persons "who are presently residing together or who have resided together in the past." *Id*., subd. 2(b)(4).

Schill argues that the evidence is insufficient to sustain his conviction of felony domestic assault because, on this record, the state failed to prove beyond a reasonable doubt that E.K. was his "family or household member," as required for a conviction of domestic assault. *See* Minn. Stat. § 609.2242, subd. 1. In a challenge to the sufficiency of the evidence, we review the record and determine whether the evidence and any legitimate inferences are sufficient to have permitted the jury to find the defendant guilty beyond a reasonable doubt. *Bernhardt v. State*, 684 N.W.2d 465, 476 (Minn. 2004). In so doing, we assume that the jury credited the state's witnesses, and we draw all reasonable inferences in favor of the conviction. *State v. Jackson*, 726 N.W.2d 454, 460 (Minn. 2007).

Schill first argues that the record does not a permit a reasonable inference that he and E.K. were involved in a "significant romantic or sexual relationship." *See* Minn. Stat. § 518B.01, subd. 2(b)(7). To review that issue, we may look to several factors, including the type of relationship, the length of the relationship, and the frequency of interaction between the parties. *Id*., subd. 2(b).

Schill points out that the fact that he and E.K. had had sex does not necessarily mean that they were involved in a significant sexual or romantic relationship. *See Sperle v. Orth*, 763 N.W.2d 670, 674 (Minn. App. 2009) (stating that a "mere assertion" that the parties at one time had a romantic or sexual relationship does not by itself establish that they are family or household members for purposes of the Domestic Abuse Act). Schill references E.K.'s testimony that they were not "boyfriend girlfriend," and that they were only "sort of, not really" involved in a relationship. But in the police recordings, Schill referred to E.K. as his "girlfriend." And when the prosecutor asked E.K. whether she had known Schill "for a while," she testified, "[q]uite a bit." This is evidence of a significant sexual relationship. The two had known each other for a significant period of time, had sex, and Schill considered E.K. his girlfriend. On this record, the jury could have reasonably determined that Schill and E.K. had a "significant romantic or sexual relationship." *See* Minn. Stat. § 518B.01, subd. 2(b)(7).

Alternatively, family or household members includes persons who "are presently residing together or . . . have resided together in the past." Minn. Stat. § 518B.01, subd. 2(b)(4). Schill points out that the police recordings show that he told E.K. that he wanted her to go with him "to [his] house" to "take over some keys." On the recordings,

E.K. also stated that "[y]ou don't act like that to me in my f--king house." But one of the officers testified that Schill stated that he lived at the address of E.K.'s apartment. Although there is conflicting evidence, taken in the light most favorable to the verdict, the jury could reasonably have determined that E.K. and Schill resided together, satisfying the requirement for "family or household members." *See id*., subds. 2(a), 2(b)(4); *see also State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980) (stating that weighing witness credibility is the exclusive province of the jury). Based on this record, which includes direct evidence that Schill and E.K. were family or household members, the evidence is sufficient to sustain Schill's conviction of domestic assault. *See* Minn. Stat. § 609.2242, subd. 1.

II. The district court did not commit reversible error by admitting Schill's past domestic-abuse-related conduct and resulting convictions as relationship evidence.

Schill challenges the district court's admission of evidence of three prior incidents of domestic-related conduct: a 2007 incident, which resulted in a conviction of simple assault; a 2010 incident, which resulted in a conviction of fifth-degree assault; and a 2012 incident, which resulted in another fifth-degree assault conviction.

If certain conditions are met, a district court may admit "[e]vidence of domestic conduct by the accused against the victim of domestic conduct, or against other family or household members." Minn. Stat. § 634.20. This evidence, called relationship evidence, is a particular category of "other-acts" evidence, which is offered to demonstrate the history of the relationship between the defendant and the victim of domestic abuse. *State v. Word*, 755 N.W.2d 776, 784 (Minn. App. 2008). Evidence that shows how the defendant treats

other family or household members, including other girlfriends, "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. Valentine*, 787 N.W.2d 630, 637 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010).

Relationship evidence is generally admissible if it shows similar conduct by the accused and if its probative value is not substantially outweighed by the danger of unfair prejudice. *State v. Barnslater*, 786 N.W.2d 646, 651 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010). We review the district court's admission of relationship evidence for an abuse of discretion. *Id*.

Effect of stipulation

At the outset, the state argues that Schill stipulated to the admission of the relationship evidence and thus has waived his right to contest its admission on appeal.[1] The state is incorrect. When the state initially moved to admit the prior incidents as relationship evidence, the defense argued that their probative value was outweighed by their prejudicial effect. The district court stated,

> I'll make my ruling on the admissibility of the proposed incidents as relationship evidence. And then in light of my ruling, I'll let the attorneys try to agree on a stipulation. And if they can't agree on a stipulation, then, you know, I'll allow

[1] We note that Schill agreed, before trial, to stipulate that he had two prior domestic-violence-related convictions, as required for a conviction of felony domestic assault. *See* Minn. Stat. § 609.2242, subd. 4. This stipulation is not at issue on appeal. *Cf. State v. Berkelman*, 355 N.W.2d 394, 396 (Minn. 1984) (stating that defendants should generally be able to remove a conviction-based element from the jury through stipulation, but leaving open the possibility that such evidence may be admitted on other grounds when its probative value outweighs the danger of unfair prejudice).

> the state to go ahead and, you know, submit evidence to prove the incident.

The district court then ruled that it would admit three of the four submitted incidents. And as proposed by the district court, the parties stipulated to the form in which the incidents would be presented to the jury.

The state argues that Schill expressly waived his right on the record to have the state prove the incidents, to cross-examine witnesses about the incidents, and to contest the facts giving rise to them. But this waiver occurred only after the district court ruled that it would admit the evidence over a defense objection. "It is inconsistent with our precedent and with our notion of fairness to conclude that once a defendant chooses to stipulate to evidence he was unsuccessful in getting excluded he has waived the opportunity to argue on appeal that the court erred in admitting the evidence." *State v. Swanson*, 707 N.W.2d 645, 654 (Minn. 2006) (quotation omitted). Thus, Schill's waiver does not preclude him on appeal from challenging the district court's admission of the evidence, to which he initially objected at trial.

Probative value vs. prejudicial effect

Schill argues that the district court abused its discretion by admitting the three prior incidents as relationship evidence because their probative value was outweighed by their prejudicial effect. In this context, unfairly prejudicial evidence means more than damaging, or even severely damaging, evidence; rather, it refers to 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).

Schill maintains that the state did not have a need for the evidence because E.K. did not recant her allegations and was not a reluctant witness. The state's need for the evidence is considered "as part of the assessment of [its] probative value versus [its] prejudicial effect." *State v. Meyer*, 749 N.W.2d 844, 849 (Minn. App. 2008) (quotation omitted). Here, the relationship evidence had probative value to assist the state's case. The charged conduct occurred when E.K. and Schill were engaged in a dispute that led to a physical altercation, when no other parties were present. And E.K. testified that she did not want to press charges or see Schill go to prison. Further, the defense contended at closing argument that, based on evidence of a mutual altercation, the state had not proved beyond a reasonable doubt that Schill assaulted E.K.

Schill argues that, because the conduct in each prior incident was similar, the cumulative effect of the evidence was unfairly prejudicial. But any prejudice was lessened because the prior incidents were not more serious than the current offense. *See State v. Jones*, 392 N.W.2d 224, 234 (Minn. 1986) (noting that the probative value of evidence was not outweighed by its prejudicial effect when the prior crimes would not likely inflame the jury, as they were not more serious crimes than the current offense).

In addition, the district court instructed the jury on the proper use of the relationship evidence. *See State v. Lindsey*, 755 N.W.2d 752, 757 (Minn. App. 2008) (stating that cautionary instructions lessened the probability that the jury would give undue weight to the relationship evidence), *review denied* (Minn. Oct. 29, 2008). When the stipulation was introduced, the district court informed the jury of its limited purpose and that the jury was not to convict Schill of this offense based on his past conduct. The district court repeated

this admonition in its final jury instructions. We may presume that the jury follows the district court's instructions. *Zornes v. State*, 880 N.W.2d 363, 373 (Minn. 2016). The district court did not abuse its discretion by determining that the probative value of the evidence was not outweighed by its prejudicial effect.

Evidence of convictions

Schill finally argues that the district court abused its discretion by admitting evidence of his prior convictions, not just the conduct underlying those convictions. Schill did not object to the admission of the relationship evidence on this ground before the district court. Indeed, once the evidence was admitted, Schill approved the language of the stipulation, which specifically included references to his prior convictions.[2] Therefore, we address his argument on this issue under the plain-error standard for unobjected-to error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under that standard, a defendant must prove that an error occurred, that the error was plain, and that the error affected his substantial rights. *Id*.

An error is plain if it is clear or obvious, such as when it contravenes caselaw, a rule, or a standard of conduct. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Here, Schill has identified no caselaw or statute that precludes admission of his prior convictions, as opposed to the underlying conduct. He argues that the convictions were unfairly

[2] Because Schill stipulated to the wording of the evidence to be placed before the jury, the doctrine of invited error may be instructive. "As a general rule a party cannot assert on appeal an error that he invited or that could have been prevented at the district court." *State v. Benton*, 858 N.W.2d 535, 540 (Minn. 2015) (quotation omitted). Invited error is reviewed under a plain-error standard. *Id*.

prejudicial because they show his criminal history, and they are irrelevant because they establish his relationship with the court system, not his relationships with the victims of domestic abuse. Evidence of the convictions was submitted to the jury as "result[ing]" from incidents of domestic violence that Schill committed against former girlfriends. *See, e.g.*, Minn. Stat. § 609.224, subd. 1(1)-(2) (2014) (requiring that to be convicted of fifth-degree assault, the actor must either commit an action with intent to cause fear of immediate bodily harm, or intentionally inflict, or attempt to inflict, bodily harm on another person). In this context, the convictions tended to show Schill's treatment of those girlfriends, which in turn cast light on how he would treat E.K. in this case. *See Valentine*, 787 N.W.2d at 637. We note that the admission of the prior convictions may have helped to defeat the purpose of stipulating to those convictions in order to keep that information from the jury. But the alleged error was not plain because it is not precluded by caselaw or statute. We discern no reversible error in the admission of Schill's prior domestic-violence-related convictions as relationship evidence.

Affirmed.