STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2052

State of Minnesota,
Respondent,

vs.

Travis Jerome Norcross,
Appellant.

Filed November 12, 2019
Affirmed
Smith, Tracy M., Judge

Becker County District Court
File No. 03-CR-18-763

Keith Ellison, Attorney General, Peter D. Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Brian W. McDonald, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Reyes, Judge; and Smith, Tracy M., Judge.

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

SMITH, TRACY M., Judge

In this direct appeal, appellant Travis Jerome Norcross argues that (1) his conviction for felony domestic assault must be reversed because the state failed to prove beyond a

reasonable doubt that he harmed the victim and (2) in the alternative, his conviction must be reversed because the district court abused its discretion by admitting statements that he made during a jail phone call that were not relevant and were unfairly prejudicial. Because the evidence was sufficient to support the conviction and the district court did not abuse its discretion by admitting the jail-call statements, we affirm.

FACTS

On April 24, 2018, a Becker County sheriff's deputy conducted a welfare check at the home of Norcross and his girlfriend, M.H. The deputy spoke with M.H.; Norcross was not home. The welfare check prompted additional investigation and led to charges against Norcross for two counts of felony domestic assault (harm and fear) under Minn. Stat. § 609.2242, subd. 4 (2016). Following a jury trial, Norcross was convicted of the harm-based domestic-assault charge.

The evidence at trial showed the following facts. Norcross and M.H. lived together and had been dating since July 2017. A friend of M.H. testified that she helped M.H. move out of Norcross's home in March 2018, but M.H. moved back in with Norcross shortly thereafter. On April 24, M.H. contacted her mother by phone and by text. Based on those communications, M.H.'s mother became concerned and called the Becker County Sheriff's Office to ask for a welfare check at Norcross and M.H.'s home. The mother testified that she did this without M.H.'s knowledge.

The deputy who conducted the welfare check testified that, when he arrived, he immediately noticed that M.H. had a black eye. He told M.H. why he was there and asked what had happened, and she "immediately became extremely emotional." She was crying,

did not want to talk to him, and was "constantly peeking around the door down the driveway." The deputy testified that M.H. had a look of "extreme fear" and that he had difficulty calming her down. He also testified about his training and experience with domestic-abuse cases and estimated that he has responded to hundreds of these types of calls. Based on his experience, he believed that the bruising under M.H.'s eye consisted of both an older and a more recent injury. He determined that the more recent injury had been inflicted "within hours." The deputy photographed the bruising, and the photo was admitted as evidence at trial.

The deputy testified that, after speaking with M.H. for 20 to 30 minutes, he phoned Norcross. Norcross answered and told him that he was at a particular residence in another town. The deputy traveled to that residence, and, when he arrived, learned that Norcross had not been there for several days. The deputy eventually found Norcross back at his and M.H.'s house. Norcross spoke with the deputy and told him that he and M.H. had an argument that day that ended with him leaving their home. He attributed the argument to M.H. being "very controlling" and becoming upset about a television at their house that belonged to Norcross's ex-girlfriend.

Norcross testified at trial and explained that he lied to the deputy about his whereabouts because he was scared based on "prior experience." He also stated that M.H. had threatened him by saying that, if he ever left her, he would go to jail. Norcross testified that M.H. did not have a bruise on her when he left the house.

M.H. was scheduled to testify at trial but failed to appear, despite a valid subpoena. As part of their efforts to locate her, investigators reviewed Norcross's recent jail calls. The

recorded jail calls included a segment of one call in which Norcross tells an unidentified listener that he has just read a statement given by M.H. Norcross then indicates to the listener that his case is "a wrap," saying "that's all [the county attorney] needed—need her to do is show up now and testify and that's—that's it." The district court admitted this segment of the call as evidence over Norcross's objection.

At the close of the state's case-in-chief, the district court granted Norcross's motion for judgment of acquittal as to the fear-based assault charge. The jury found Norcross guilty of the harm-based assault charge. He was sentenced to 33 months' imprisonment.

This appeal follows.

D E C I S I O N

I. The evidence is sufficient to support appellant's conviction for domestic assault.

Norcross argues that the evidence is insufficient to prove that he committed domestic assault in violation of Minn. Stat. § 609.2242, subd. 4. He asserts that the circumstances that the state proved are consistent with two rational hypotheses other than guilt: first, the bruising on M.H.'s face occurred on April 24, 2018 between the time Norcross left the house and the time the sheriff's deputy called him, and second, the bruising occurred on a different day.

A. Legal standard and standard of review

In considering a claim of insufficient evidence, appellate courts review the record "to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach their verdict." *State v. Olhausen*, 681

N.W.2d 21, 25 (Minn. 2004). The sufficiency of circumstantial evidence is subject to a stricter standard of review than is the sufficiency of direct evidence. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). To review the sufficiency of circumstantial evidence, an appellate court uses a two-step process. *See id.* First, the court identifies the circumstances that the state proved. *Id.* To do so, it "winnows down" the evidence by "resolving all questions of fact in favor of the jury's verdict" and disregarding any evidence inconsistent with the verdict. *State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017). This is done "because the jury is in the best position to evaluate the credibility of the evidence even in cases based on circumstantial evidence." *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013). Second, the court determines "whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt." *State v. Bahtuoh*, 840 N.W.2d 804, 810 (Minn. 2013). There are two questions within this inquiry: first, "whether the inferences that point to guilt are reasonable," and, second, whether the circumstances exclude any reasonable inference other than guilt. *Silvernail*, 831 N.W.2d at 599 (quotation omitted). At this step, the court does not give deference to the fact-finder's choice between reasonable inferences. *Id.*

To find Norcross guilty of domestic assault (harm), the jury needed to find beyond a reasonable doubt that he intentionally inflicted or attempted to inflict bodily harm upon a family or household member.[1] Norcross does not contest that M.H. was his household

[1] Norcross was charged with felony-level domestic assault, which also requires proof that he committed the assault "within ten years of the first of any combination of two or more previous qualified domestic violence-related offense convictions." Minn. Stat. § 609.2242, subd. 4. Norcross stipulated that he had the requisite prior convictions.

member; he argues that the state did not prove beyond a reasonable doubt that he inflicted bodily harm upon her.

B. Circumstances proved

To identify the circumstances proved, we assume that the jury credited the testimony of the state's witnesses and interpreted the evidence in the light most favorable to the verdict. *See State v. Hawes*, 801 N.W.2d 659, 668 (Minn. 2011). Doing so here, we identify the following circumstances proved. Norcross and M.H. lived together and were in a dating relationship. M.H.'s mother became concerned about M.H. after M.H. contacted her on April 24, 2018. Unbeknownst to M.H., her mother called the sheriff's office and asked for a welfare check. When the sheriff's deputy conducted the welfare check on M.H., he observed that she was extremely emotional and fearful, and he determined that these reactions were consistent with those of a victim of domestic violence. The deputy observed and photographed bruising under M.H.'s eye and concluded that part of the bruise had been inflicted within the previous several hours. When the deputy contacted Norcross, Norcross lied about his location. Norcross later admitted that he had an argument with M.H. on April 24 that ended with him leaving their house. Later, in a phone conversation from jail shortly before his trial, Norcross told an unidentified listener that he had read M.H.'s statement to the police and that it was "a wrap" and that all the state needed was for M.H. to testify against him and "that's it."

The parties do not appear to have significant disagreement as to the circumstances proved. Rather, they disagree about the reasonable inferences from the circumstances, which is where we next turn.

C. Inferences from the circumstances proved

At step two of the circumstantial-evidence test, we evaluate whether it is reasonable to infer from the circumstances proved that Norcross is guilty of domestic assault (harm) and whether no reasonable inference may be drawn that is inconsistent with Norcross's guilt. *See Harris*, 895 N.W.2d at 600. Norcross appears to concede that the circumstances proved support a reasonable inference of guilt. Norcross and M.H. had an argument that day before he left the house, M.H. had a bruise under her eye, M.H. exhibited signs consistent with domestic abuse, and Norcross lied to the deputy about his location. Under these circumstances, we conclude that it is reasonable to infer that Norcross intentionally inflicted bodily harm on M.H.

But Norcross argues that there are two alternative hypotheses inconsistent with his guilt, which we address in turn.

1. Another cause of the harm on April 24

The first hypothesis is that the bruising on M.H.'s face occurred on April 24, between the time Norcross left the house and when the deputy arrived, and was caused by an accident, self-harm, or another person.

As to the suggestion of harm by a third party, the record is not clear on how much time elapsed between when Norcross left the house and the deputy arrived there for the welfare check. Norcross estimated that, after leaving, he received the call from the deputy "[t]wo or three hours later—three hours later." The deputy arrived at the house shortly after 5:00 p.m. and spoke with M.H. for 20 to 30 minutes before calling Norcross. Thus, if Norcross's testimony as to the timing is credited, two and a half hours elapsed, at most.

Norcross testified that M.H. was alone when he left, and the deputy's testimony suggests M.H. was alone when he arrived. No evidence indicates that M.H. was with anyone besides Norcross that afternoon. A "theoretical possib[ility]" that an unknown, third party could have committed the offense is insufficient to support reversal of a conviction. *State v. Tscheu*, 758 N.W.2d 849, 860-61 (Minn. 2008); *see also State v. Andersen*, 784 N.W.2d 320, 330 (Minn. 2010) ("[W]e will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture." (quotation omitted)).

As to Norcross's suggestion that the injuries could have resulted from an accident or self-harm, the record again contains no supporting evidence. Norcross merely suggested in his own testimony that M.H. had previously threatened to send him to jail. This self-serving testimony is not part of the circumstances proved and is also undercut by the evidence that M.H. was unaware that her mother had called the sheriff's office and thus had no reason to expect the deputy's arrival. Furthermore, the evidence that M.H. called her mother, the call caused her mother to contact the sheriff's office, and the sheriff's deputy observed M.H glancing fearfully at the driveway while they spoke seems inconsistent with either of these two theories. Because "mere conjecture," without more, does not suffice, these alternatives do not support a reasonable hypothesis other than guilt. *Tscheu*, 758 N.W.2d at 861.

2. Harm occurred on a different day

The second alternative hypothesis Norcross presents is that M.H.'s facial bruising occurred on a different day entirely. He argues that this is possible because the deputy's testimony that part of the bruising was caused within the last several hours was

uncorroborated by an evaluation by medical personnel. However, that the bruise was caused within hours of the deputy's arrival is part of the circumstances proved here, as we assume the jury believed the state's witnesses. *See State v. Vick*, 632 N.W.2d 676, 690 (Minn. 2001). And, significantly, this hypothesis is inconsistent with Norcross's own testimony that, when he left the house on April 24, M.H. did not have a bruise on her. This alternative hypothesis is thus without support in the record and inconsistent with the circumstances proved.

D. Conclusion

Because the inferences that point to guilt are reasonable and the circumstances proved exclude any reasonable inference other than guilt, the evidence was sufficient to support Norcross's conviction for domestic assault.

II. The district court did not abuse its discretion by admitting Norcross's statements that were made during a jail phone call.

Norcross argues that the district court erred by admitting an excerpt from his recorded jail calls because the evidence is not relevant and is unfairly prejudicial. "The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted). Evidentiary rulings regarding relevance "are within the [district] court's sound discretion and will only be reversed when that discretion has been clearly abused." *Johnson v. Washington Cty.*, 518 N.W.2d 594, 601 (Minn. 1994) (quotation omitted). "A defendant appealing the admission of evidence has the burden to show the

admission was both erroneous and prejudicial." *State v. Riddley*, 776 N.W.2d 419, 424 (Minn. 2009).

A. Relevance

Evidence is relevant if it has "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." Minn. R. Evid. 401. The district court admitted the following excerpt from the jail-call recordings over Norcross's relevance objection:

> NORCROSS: So I guess she's gonna testify against me or something. That's from what the—what the county attorney said. Ah, I just f--ken seen her statement earlier today.
> She must a gave it yesterday. That's what it was dated for.
> UNIDENTIFIED SPEAKER: So what's that mean?
> NORCROSS: Ah, f--k it's a wrap. It's pretty much a f--ken done deal. That's all they needed—need her to do is show up now and testify and that's—that's it.

Norcross argues that the recorded statements are not probative of whether he, in fact, assaulted M.H. on April 24 but merely demonstrate that Norcross believed M.H.'s testimony would certainly result in his conviction. He argues that his thoughts on the strength of the state's case against him are not relevant to any issue in the case.

The state counters that the statements are relevant as an "implicit admission of guilt." It argues that, because Norcross did not deny the assault in this conversation, he impliedly admitted to the assault with his "silence." We are not persuaded that the call constitutes an implicit admission; in the implicit-admission cases that the state cites, either a third party directly confronted the defendant with an allegation and the defendant remained silent or the defendant made a statement that quite clearly implied guilt. *See State*

v. Johnson, 811 N.W.2d 136, 141, 148 (Minn. App. 2012) (holding that defendant's silence following the victim's direct question, "Why did you beat me? Why did you take my things?" was relevant), *review denied* (Minn. Mar. 28, 2012); *see also State v. Schulz*, 691 N.W.2d 474, 477-78 (Minn. 2005) (holding that a voicemail, left by a defendant charged with several counts of murder, that said, "Man, it's Kill [the defendant]. Remember that robbery that I was talkin' about? . . . Yeah, Kill lived up to his name . . . " was an implied admission of guilt).

At trial, the state argued that the call excerpt was relevant to show "[Norcross's] acknowledgment, that the State has a strong case with [M.H.'s] testimony." This appears to be a proper framing of the call's relevance. The inferences that arguably follow, tenuous as they may be, are that (1) if M.H. had complied with the subpoena and testified, she would have said that Norcross assaulted her, and (2) if M.H. says that Norcross assaulted her, that makes it more likely that he did assault her. To be relevant, the evidence need only "warrant[] a jury in drawing a logical inference assisting, even though remotely, the determination of the issue in question." *Schulz*, 691 N.W.2d at 478. Given this low threshold, we cannot conclude that the evidence lacks relevance.

B. Rule 403

Relevant evidence may nevertheless be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403. Norcross argues that the call was unfairly prejudicial because it led the jurors to believe that he had in some way caused M.H.'s failure to appear as a witness. The state counters that Norcross's "implicit admission of guilt" was the "most forceful evidence of [his] guilt . . .

short of an outright confession" and that any inference that Norcross had something to do with M.H.'s failure to appear would be "far less persuasive."

In admitting the evidence, the district court noted that it thought "there [was] some 403 issue concerning more prejudicial than probative." It determined, though, that redacting the majority of the call and admitting only "lines 24 through 30," the excerpt at issue here, would limit the opportunity for improper speculation. The admitted excerpt contains no indication that Norcross is asking the listener to prevent M.H. from appearing. The district court had an opportunity to listen to the call before ruling and, from our independent review of the evidence, could have reasonably determined that nothing about Norcross's tone would have led the jury to assume that he caused M.H.'s absence. The district court balanced the competing inferences, and it allowed extensive argument on the admissibility of the call before ruling. On this record, the district court did not abuse its discretion by admitting the call.

C. Even if the evidence was erroneously admitted, appellant has not shown prejudice.

Even if the district court had abused its discretion by admitting Norcross's jail-call statements, this court would not grant a new trial unless Norcross demonstrated that the error was prejudicial. *See Kroning*, 567 N.W.2d at 46. An error is prejudicial if it substantially influenced the jury's decision. *State v. Loving*, 775 N.W.2d 872, 879 (Minn. 2009).

Without the call, the evidence remains that Norcross and M.H. were in a relationship, they had an argument on April 24, Norcross left M.H. alone in the house, and

sometime later that day—several hours later at most—a sheriff's deputy arrived in response to a call for a welfare check and observed that M.H. had a black eye. Part of the bruising had been caused within the past several hours, M.H. was exhibiting behaviors that were consistent with those of a victim of domestic violence, and Norcross lied about his whereabouts when the deputy called him. Thus, the evidence without the call is "generally strong." *See State v. Ferguson*, 729 N.W.2d 604, 615 (Minn. App. 2007) (holding that erroneously admitted testimony did not substantially affect the jury's verdict because the evidence against the defendant was "generally strong," there was other evidence of the fact at issue in the testimony, and the testimony was not compelling), *review denied* (Minn. June 19, 2007). Further, although the state emphasized the call in closing arguments, the statements in the call are not particularly compelling evidence of guilt. *See id.* In light of the record as a whole, even if the call was erroneously admitted, the error was not prejudicial.

Affirmed.