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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0582

State of Minnesota,
Respondent,

vs.

Dewayne Braswell,
Appellant.

Filed March 16, 2020
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CR-18-14448

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

Michael O. Freeman, Hennepin County Attorney, Sarah J. Vokes, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Reilly, Judge; and Kirk, Judge.[*]

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

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges his convictions for drive-by shooting and for unlawful possession of a firearm, arguing that the evidence was insufficient to prove either crime and that the district court abused its discretion in admitting prejudicial relationship evidence of appellant's subsequent bad acts against the victim. Because there was sufficient evidence to prove that appellant committed the drive-by shooting, and by extension, possessed a firearm, and because there was no abuse of discretion in the admission of evidence of appellant's subsequent bad acts against the victim, we affirm.

FACTS

In May 2018, appellant Dewayne Braswell began dating S.S., who shared custody of her five-year-old daughter with her former husband. On Friday, June 1, 2018, S.S.'s parents came to town for a family event and stayed in a hotel. S.S. spent some time with them that evening, then spent time with appellant. On Saturday, June 2, S.S. dropped appellant off in the afternoon and met her parents. She and her daughter spent the evening with them at the hotel, and S.S. fell asleep in their hotel room. Appellant called and texted her several times, became angry when she did not respond, and accused her of being with someone else. S.S. thought appellant was insecure and did not answer his calls. He continued to call, text, and FaceTime her. On Sunday, June 3, appellant continued to call; S.S. texted him that he was scaring her and that she could not "do this with [him]."

Early in the morning on Monday, June 4, appellant repeatedly called and texted S.S., threatening her, while she was alone in her apartment. When she talked with him on

FaceTime, she could see that he was in a car. During one phone call, appellant accused S.S. of having another man in her apartment.

Later that morning, S.S.'s daughter arrived at the apartment so S.S. could style her hair for a modeling audition. While S.S. was talking to her cousin on one phone and having a FaceTime video call with appellant on another phone, she heard shots in the apartment. She took her daughter behind the couch and called 911. S.S. continued to receive texts from appellant; these included "Watch," "Show you how to play," and "See if you all make the [au]dition."

When the police arrived, S.S. told them she thought the shots had been fired by appellant. According to phone records the police obtained, appellant's cell phone was then in the area of S.S.'s apartment. At 9:03 a.m., he texted S.S. that he was on his way. At 9:12 a.m., he texted that there were a lot of police around, and an hour later he texted that the "police can't save you." S.S. was frightened and left the apartment to stay with her family.

Forensic evidence was consistent with five shots from one gun having been fired from the south end of the apartment's parking lot. Two shots entered appellant's apartment through a window and a wall, and two shots entered a nearby apartment. Surveillance video showed a dark gray SUV enter the parking lot; a male point a gun through an open window; the gun recoil five times, presumably from having been fired; and the SUV drive away.

Other evidence showed appellant's phone going to the apartment before the shooting, leaving immediately afterwards, being in north Minneapolis, and returning to the apartment about a half hour later, then again leaving and returning.

Later that afternoon, appellant was seen driving an SUV that matched the description of the SUV on the surveillance video. The following day, the SUV's owner was contacted. She said she had lent appellant the SUV on the previous day, i.e., the day of the shooting, and he had since returned it.

Appellant was not apprehended, and he continued to contact S.S. Twelve days later, on June 16, she agreed to see him. When they were together driving in S.S.'s car, her phone rang, and she did not answer it. Appellant demanded to see her phone and became aggressive. When she gave him the phone, he read her text messages and became very angry, threatened S.S., punched her repeatedly in the face, and threatened to kill her. She asked to call her daughter, who was staying with S.S.'s former husband, and did so. Then appellant started to strangle S.S. with his hands around her neck, but desisted when she began to black out. The police arrived and followed the car until it stopped; appellant then fled on foot. Again, he was not apprehended. He continued to call S.S. and told her not to go to the police.

When appellant was apprehended, he was arrested and charged with one count of drive-by shooting at S.S.'s residence and one count of possession of a firearm by an ineligible person. He continued calling S.S. from the jail to threaten her and dissuade her from coming to the trial. A jury found appellant guilty on both counts. He was sentenced to 105 months in prison for drive-by shooting and to a concurrent 60 months in prison for unlawful possession of a firearm.

He challenges his convictions, arguing that the evidence was not sufficient for the jury to reasonably conclude that he was guilty of the offenses and that the district court

abused its discretion when it admitted relationship evidence of appellant's post-incident conduct with S.S.

D E C I S I O N

1. Sufficiency of the evidence

The evidence in this case is circumstantial.

> [T]he first step of our circumstantial evidence test . . . requires an appellate court to winnow down the evidence presented at trial by resolving all questions of fact in favor of the jury's verdict, resulting in a subset of facts that constitute the circumstances proved. . . .
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> . . . In determining the circumstances proved, we disregard evidence that is inconsistent with the jury's verdict. The second step is to independently consider the reasonable inferences that can be drawn from the circumstances proved, when viewed as a whole. We give no deference to the jury's choice between reasonable inferences at this second step. To sustain the conviction, the circumstances proved, when viewed as a whole, must be consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.

State v. Harris, 895 N.W.2d 592, 600-01 (Minn. 2017) (quotation and citations omitted).

Appellant agrees that the circumstances proved in this case are consistent with a reasonable inference that he is guilty but argues that they "are also consistent with a hypothesis that someone else committed the offense of drive-by shooting." However, many of the facts appellant cites in support of this argument are negatives: (1) appellant was not observed at S.S.'s apartment before, during, or after the shooting; (2) none of the shell casings had prints or DNA linked to appellant; (3) no gun was recovered; (4) the phone associated with appellant was not located; (5) appellant was not the registered owner

of the phone involved; and (6) the SUV in which appellant was seen on the day of the shooting was not definitively proved to be the SUV from which the shots were fired. But no conclusion can be drawn from two negative premises, and only negative conclusions can be drawn from one negative premise, so these negative premises would have to be paired with positive premises to support the conclusion that appellant was not the perpetrator.[1] Those positive premises would be absurd: e.g., (1) all drive-by shooters are observed at the site of the shooting; (2) all shell casings have the prints or DNA of the shooter; (3) all guns of drive-by shooters are recoverable; (4) all drive-by shooters' phones can be located; (5) all offensive texts are sent by the owner of the phone used; and (6) all vehicles photographed by a surveillance video camera can be specifically identified.

The positive facts on which appellant relies, i.e., that the owner of the SUV in which appellant was seen on the day of the shooting loaned the SUV to others and consented to them loaning it to third parties, are not "circumstances proved" because they depend on evidence inconsistent with the verdict. Thus, appellant has failed to show that these facts are consistent with the hypothesis that someone else was the drive-by shooter. We conclude that the evidence is sufficient to support the jury's verdict.

2. Admission of relationship evidence

"Evidence of domestic conduct by the accused against the victim of domestic conduct . . . is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice . . . ." Minn. Stat. § 634.20 (2018). "Domestic conduct" includes

[1] *See* Ruggero J. Aldisert, *Logic for Lawyers* 156-57 (3d ed. 1997).

domestic abuse. *Id.* The purpose of the statute is to "demonstrate the history of the relationship between the accused and the victim." *State v. Barnslater*, 786 N.W.2d 646, 650 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010). A district court's decision to admit domestic-conduct or relationship evidence under Minn. Stat. § 634.20 in a domestic-abuse prosecution is reviewed for an abuse of discretion. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004).

Appellant argues that the probative value of the evidence of his post-incident relationship evidence with S.S. was substantially outweighed by the danger of unfair prejudice. Evidence has probative value if it assists the jury in judging the credibility of the principals when the complainant cannot recall events, *id.*, or if it provides context as to the parties' relationship. *State v. Hormann*, 805 N.W.2d 883, 890 (Minn. App. 2011), *review denied* (Minn. Jan. 17, 2012). S.S. had no difficulty recalling the events of which she complained, and appellant argues that, because the relationship evidence occurred after the crime charged, it did not provide "an accurate history of the couple's relationship." But a victim's testimony about an assault after the offense has been found to be probative relationship evidence. *See, e.g.*, *State v. Anderson*, 900 N.W.2d 438, 440-41 (Minn. App. 2017) (upholding admission of victim's testimony about strangulation assault the day following the offense as relationship evidence); *State v. Lindsay*, 755 N.W.2d 752, 756 (Minn. App. 2008) (upholding admission of evidence of a defendant's conduct more than a month after the charged offense because "[i]n the context of [the defendant's] relationship with [the victim], evidence of [the defendant's] later conduct had significant probative value . . . ."), *review denied* (Minn. Oct. 29, 2008). Here, S.S. testified about events that

occurred on June 16, 12 days after the offense charged. Her testimony, like the testimony in *Anderson*, "informed the jury of the nature of [her] relationship [with appellant], the times that she felt afraid of [him], and the times that [he] attempted to manipulate, control, and restrain her. This testimony has obvious probative value." 900 N.W.2d at 441.

Moreover, the district court gave a cautionary instruction on the evidence of the June 16 incident, telling the jury that "[t]he evidence was offered for the limited purpose of demonstrating the nature and extent of the relationship between the defendant and [S.S.] in order to assist you in determining whether the defendant committed those acts with which the defendant is charged in the complaint." A limiting instruction "lessen[s] any probability that the jury would rely improperly on relationship evidence." *Id.* at 441-42.

Appellant argues that the district court erred by instructing the jury on relationship evidence only in its final instructions, not prior to S.S.'s testimony, and that its instruction therefore "failed to lessen the probability of the undue weight being given by the jury to the evidence." But appellant provides no support for the view that the instruction must be given before the testimony, not at the end of the trial.

Appellant relies on *State v. Zinski*, 927 N.W.2d 272 (Minn. 2019). He concedes that *Zinski* had not been released at the time of trial here and is therefore not dispositive, but he ignores a significant distinction: in *Zinski* no limiting instruction was given, while the district court here did give a limiting instruction. *Zinski* set out a rule that "when a district court admits relationship evidence under Minn. Stat. § 634.20, over a defendant's objection that the evidence does not satisfy section 634.20, the court must sua sponte instruct the jurors on the proper use of such evidence, unless the defendant objects to the instruction

by the court." 927 N.W.2d at 278. *Zinski* refers to, *but does not adopt*, language in *State v. Bauer*, 598 N.W.2d 352, 365 (Minn. 1999), that the instruction be given "prior to the admission of . . . evidence and again at the end of trial." *Zinski* held that, prior to its rule, there was no obligation for courts to give any relationship-evidence instruction sua sponte. *Id.* Thus, *Zinski* does not support appellant's view that the district court erred by giving the instruction only at the end of trial. A jury is presumed to follow the district court's instructions. *State v. James*, 520 N.W.2d 399, 405 (Minn. 1994). Particularly in light of the limiting instruction, the probative value of the relationship evidence was not "substantially outweighed by the danger of unfair prejudice." Minn. Stat. § 634.20.

Finally, appellant argues that he is entitled to a new trial because "[g]iven the detail of S.S.'s testimony [as to the June 16 incident], including the admission of photographs showing [her] injuries, there is a great probability that the wrongfully admitted evidence had a significant impact on the jury's verdict." But even when evidence is unfairly prejudicial and lacks probative value and the district court abuses its discretion in admitting it, a defendant is not entitled to a new trial if there is ample other evidence to convict. *State v. O'Meara*, 755 N.W.2d 29, 35 (Minn. App. 2008). Here, the evidence was more than

sufficient to convict appellant of a drive-by shooting and possession of a gun. There is no basis for reversing and remanding for a new trial.

Affirmed.