STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0229

State of Minnesota,
Respondent,

vs.

Shawn Douglas Hager,
Appellant.

Filed February 22, 2022
Affirmed in part, reversed in part, and remanded
Kirk, Judge[*]

Washington County District Court
File No. 82-CR-19-794

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

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Kirk, Judge.

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

NONPRECEDENTIAL OPINION

KIRK, Judge

In this direct appeal from the judgment of conviction for first-degree criminal sexual conduct, appellant Shawn Hager argues that the district court erred (1) by permitting the state to introduce relationship evidence, and (2) by imposing lifetime conditional release where the guilty verdicts were accepted simultaneously. We affirm in part, reverse in part, and remand.

FACTS

Hager began dating A.S. in 2015 and they married in 2017. They lived together in Hugo, Minnesota with A.S.'s daughters A.A. (child 1) and G.A. (child 2), Hager's daughter K.H. (child 3), and his son G.H. (child 4).

In 2017, when she was 9 years old, child 1 disclosed to A.S. that Hager had removed her clothes and touched her vagina with his hands and tongue. A.S. confronted Hager, but he denied the allegations. Child 1 did not talk to her mother about the abuse again because, child 1 explained, her mother "didn't believe [her] the first time." However, according to child 1, the abuse continued until February 2019.

On the evening of February 20, 2019, child 2, who was 7 years old at the time, began crying and told her mother that Hager was showing her "sex videos." She said that Hager used his computer and phone, as well as her tablet, to show her pornography on multiple occasions. She also told her mother that Hager had touched her sexually.

A.S. then asked child 1 about her previous disclosure, and A.S. called 911 to report the allegations that Hager had shown child 1 and child 2 pornography and that he had

touched them sexually. Deputies from the Washington County Sheriff's Department went to their home to investigate the allegations.

The next day, a social worker for the county conducted forensic interviews with the children. Child 1 and child 2 disclosed to the social worker that Hager had sexually assaulted them. Child 1 disclosed the sexual assault that she had previously disclosed to her mother. She also disclosed that since then, Hager had forced her to watch pornography and he would leave pornography displayed on her iPad. She also disclosed that on multiple occasions Hager "touched and lick[ed] her vagina" and that "[h]e would stick his fingers into her vagina." Child 2 disclosed to the social worker that Hager watched pornography with her, that she had seen Hager watching pornography with child 4, and that "porn would just be on all the time." She also disclosed that Hager pulled off her clothes and "touched her vagina."

On February 22, after reading him the *Miranda* warning, deputies interrogated Hager. During the interrogation, Hager "admitted to having inappropriate contact" with child 1. He admitted to the deputies that "approximately every three weeks" there was some type of sexual contact with child 1. During this disclosure he said he "touch[ed]" and "lick[ed]" child 1. Hager also disclosed that he showed the children pornography, "specifically kind of daddy-daughter style porn." He told the deputies that "the whole point was to make [the children] think it was okay." Deputies obtained a search warrant and confiscated Hager's cell phone. Using computer forensics, police found "[a] very extensive pornography search with some phrases that were very disturbing" on Hager's

cellphone. The list of websites and searches discovered on his phone was entered as exhibit 2 at trial without any objection.

Deputies arrested Hager and charged him with one count of first-degree criminal sexual conduct pursuant to Minn. Stat. § 609.341, subd. 1(a) (2016), and one count of first-degree criminal sexual conduct pursuant to Minn. Stat. § 609.342, subd. 1(h)(iii) (2016). After his arrest, Hager made a phone call from jail to J.G., who is the mother of child 4. During this recorded phone call Hager said he sexually assaulted child 1 "a few times."

A few months after his arrest, child 3, Hager's biological daughter, disclosed to the counselor at her high school that Hager had sexually assaulted her. The state amended the complaint to include a second count of first-degree criminal sexual conduct pursuant to Minn. Stat. § 609.342 subd. 1(h)(iii) (2012) for allegations against Hager from child 3.

Before trial, the state moved to introduce relationship evidence pursuant to Minn. Stat. § 634.20 (2020). At a pretrial hearing, the judge granted the state's motion to introduce relationship evidence. The judge notified the parties that he would give the following limiting instruction each time a witness was to testify to relationship evidence:

> A portion of the evidence you are going to hear today will be regarding the relationship of [witness] and Mr. Hager. It is not used to prove the character of Mr. Hager or that he acted in conformity with such character. The evidence is to be considered only for the limited purpose of putting into context the relationship of [witness] and Mr. Hager leading up to our charges in this case. The defendant is not being tried for and may not be convicted of any offense other than the charged offenses which were outlined in the formal complaint.

Hager, proceeding pro se, did not object to this instruction or to the judge's decision to allow the admission of relationship evidence.[1]

At trial all three victims testified, as did A.S., J.G., the social worker, and deputies. Hager also testified on his own behalf. At no point during trial did Hager object to the admission of relationship evidence or to the limiting instructions given to the jury each time the testimony about to be given was going to include relationship evidence. The jury found Hager guilty of all three counts of first-degree criminal sexual conduct. On November 23, 2020, the district court held a sentencing hearing. The judge sentenced Hager to consecutive sentences and lifetime conditional release. Hager appeals.

DECISION

I.

Hager argues that the district court committed reversible plain error when it admitted the evidence that he searched for pornography on his cellphone, watched pornography in the home, showed the children pornography, and asked child 3 to sexually touch child 1.[2] Hager did not object to the admission of the relationship evidence at any point in the proceedings.

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[1] For reasons not clear in the record, Hager had been appointed three different public defenders. At trial he represented himself with advisory counsel who was appointed by the district court.

[2] Hager filed a pro se supplemental brief. However, he did not make any legal arguments in this brief. An assignment of error in a brief based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971).

As with other evidentiary rulings, a reviewing court generally defers to the trial court's discretion in admitting relationship evidence, *State v. Buggs*, 581 N.W.2d 329, 336 (Minn. 1998), and reviews unobjected-to evidence for plain error, *State v. Word*, 755 N.W.2d 776, 781 (Minn. App. 2008). "An unobjected-to error will be corrected only upon a finding of the following: (1) error; (2) that is plain; and (3) that affects the defendant's substantial rights." *Id.* Even if all three prongs are satisfied, an appellate court should grant relief only if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *State v. Scruggs*, 822 N.W.2d 631, 642 (Minn. 2012) (quoting *Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011)). If a reviewing court determines that any of the prongs of plain-error review are not satisfied, the court need not address the others. *Montanaro*, 802 N.W.2d at 732.

As a threshold matter, the state argues that Hager forfeited any claim regarding the relationship evidence because not only did he not object to the admission of the relationship evidence dealing with pornography, but he also used the evidence "to his advantage" in his opening and during cross-examination of the witnesses claiming that they were the ones searching pornography. *See State v. Whisonant*, 331 N.W.2d 766, 769 (Minn. 1983) (concluding that when a defendant responds to an alleged error as opposed to objecting to it, he forfeits consideration of the issue on appeal). We decline to apply a harsh forfeiture standard when the case the state relies on is not squarely on point with our case and forfeiture was not sufficiently argued by the parties. Furthermore, we need not decide whether Hager forfeited his appellate arguments because we conclude that there was no error in admitting the relationship evidence. We turn to that issue now.

Hager first argues that the evidence is not admissible as relationship evidence under Minn. Stat. § 634.20 because it does not meet the statutory definition of "domestic conduct" and is "highly prejudicial prior-bad-act evidence." Whether or not the admitted evidence falls under the definition of "domestic conduct" in Minn. Stat. § 634.20 presents an issue of statutory interpretation which we review de novo. *Sanchez v. State*, 816 N.W.2d 550, 556 (Minn. 2012).

The first step in statutory interpretation is to determine whether a statute has a plain, unambiguous meaning. *State v. Jones*, 848 N.W.2d 528, 535 (Minn. 2014). A court "must give a plain reading to any statute it construes, and when the language of the statute is clear, the court must not engage in any further construction." *State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004) (citation omitted). "A statute is ambiguous if it is reasonably susceptible to more than one interpretation." *State v. Larkin*, 620 N.W.2d 335, 338 (Minn. App. 2001).

Minnesota Statutes section 634.20 provides that "[e]vidence of domestic conduct by the accused against the victim of domestic conduct, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice." Evidence admissible pursuant to Minn. Stat. § 634.20 is commonly referred to as "relationship evidence." *See State v. Bell*, 719 N.W.2d 635, 638 n.4 (Minn. 2006) (noting that "evidence admitted under section 634.20 is a subtype of general relationship evidence"). The purpose of admitting relationship evidence "is to illuminate the relationship between the defendant and the alleged victim and to put the alleged crime in the context of that relationship." *State v. Valentine*, 787 N.W.2d 630, 637 (Minn. App. 2010), *rev. denied* (Minn. Nov. 16, 2010). The admission of relationship

evidence also helps jurors to better judge the credibility of those in the relationship. *McCoy*, 682 N.W.2d at 161. Therefore, relationship evidence "is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice." Minn. Stat. § 634.20.

Prior relationship evidence is admissible against an accused when the victim alleges that he or she was subjected to defendant's act of "domestic conduct." Minn. Stat. § 634.20. "Domestic conduct" includes, but is not limited to, evidence of domestic abuse against "family or household members." *Id.* Domestic abuse is defined pursuant to Minn. Stat. § 518B.01, subd. 2 (2020). *Id*. Domestic abuse includes the infliction of "physical harm, bodily injury, or assault," as well as criminal sexual conduct. Minn. Stat. § 518B.01, subd. 2(a)(1), (3). Under Minn. Stat. § 634.20, the state may introduce evidence of a defendant's act of domestic abuse committed against another family member. *Id.*

Hager argues that because showing children pornography does not fall under the list of domestic abuse crimes in Minn. Stat. § 634.20, it should not have been admitted as relationship evidence. The state argues that under the statute, domestic conduct "includes, but is not limited to," the enumerated crimes. Therefore, domestic conduct must encompass more than the enumerated crimes defined as domestic abuse.

Under the statute, "domestic conduct" includes more than just domestic abuse or violation of a protective order. *See State v. McCurry*, 770 N.W.2d 553, 560 (Minn. App. 2009) (stating that "the 'not limited to' language is more likely meant to encompass general testimony about the relationship"), *rev. denied* (Minn. Oct. 28, 2009). It has also been allowed when admitting evidence pursuant to Minn. Stat. § 634.20 relating to a defendant's

attempt to "manipulate, control, and restrain" the victim. *State v. Andersen*, 900 N.W.2d 438, 441 (Minn. App. 2017).

We are also mindful of the reasons why evidence of prior domestic abuse is admissible as relationship evidence. "Domestic abuse is unique in that it typically occurs in the privacy of the home, it frequently involves a pattern of activity that may escalate over time, and it is often underreported." *McCoy*, 682 N.W.2d at 161 (discussing the rationale for Minn. Stat. § 634.20's lax standard of prior-relationship-evidence admission). "Evidence of prior domestic abuse . . . may be offered to illuminate the history of the relationship, that is, to put the crime charged in the context of the relationship." *Id.* at 159. "[E]vidence 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." *Valentine*, 787 N.W.2d at 637. This rationale applies with the same force to the evidence at issue in this case.

The state introduced evidence that Hager showed the children pornography to put their relationship in context, and to establish that he was grooming the children. "'Grooming' is a process that sexual predators use to shape a child's perspective and lower the child's inhibitions with respect to later criminal sexual acts." *State v. Muccio*, 890 N.W.2d 914, 924 (Minn. 2017). Grooming often involves the offender "desensitiz[ing] the child to sexual conduct by exposing the child to sexual content." *Id.* The grooming process "increases the likelihood that the child will cooperate with the adult and reduces the likelihood that the child will disclose the adult's wrongful acts." *Id.* Hager admitted during interrogation that "the whole point" of showing the children pornography "was to make

[the children] think it was okay." Multiple victims and witnesses also testified that Hager had shown them pornography as minors, or that they had seen Hager watching pornography with children. This evidence was offered by the state to show a "pattern of activity" that occurred between Hager and the children in his home. *McCoy*, 682 N.W.2d at 161. We hold that this evidence of sexually manipulative, grooming activity toward the minor children is the type of "domestic conduct" that is relationship evidence contemplated by Minn. Stat. § 634.20 and that, therefore, the district court properly admitted the evidence.

Hager next argues that even if the evidence was properly admitted as relationship evidence, it still should have been excluded because it had no probative value and it was highly prejudicial.

Relationship evidence must be excluded when the danger of its unfair prejudice substantially outweighs its probative value. Minn. Stat. § 634.20. "Evidence that helps to establish the relationship between the victim and the defendant or which places the event in context bolsters its probative value." *State v. Lindsey*, 755 N.W.2d 752, 756 (Minn. App. 2008) (quotation omitted), *rev. denied* (Minn. Oct. 29, 2008). "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." *Bell*, 719 N.W.2d at 641 (quotation omitted).

Here, the judge gave the jury a limiting instruction each time a witness was about to testify regarding relationship evidence. This limited the jury's use of the relationship evidence to "putting into context the relationship of [the witnesses] and Mr. Hager leading

up to our charges in this case." The instructions also reiterated that Hager "is not being tried for and may not be convicted of any offense other than the charged offenses which were outlined in the formal complaint." These cautionary instructions "lessened the probability of undue weight being given by the jury to the evidence." *State v. Kennedy*, 585 N.W.2d 385, 392 (Minn. 1998).

Additionally, each victim testified in detail to the sexual abuse conducted by Hager. Child 1 testified that Hager abused her multiple times over the course of more than one year. And she testified that he would touch and lick her vagina and described specific incidents of abuse by Hager. Child 2 testified that Hager "would pull off [her] pants." She testified that he would then put his fingers in her vagina. Child 3 testified that Hager had sexual contact with her multiple times, mostly before she was eleven. She testified that when she was thirteen, Hager forced her to "[give] him a blow job." It is likely that the description of the abuse was far more influential on the jury than the descriptions that Hager showed them pornography.

Hager finally argues that the district court erred when it admitted exhibit 2, the list of searches and the pornography websites visited on his phone as relationship evidence. We note that this evidence is not relationship evidence but rather relevant evidence admissible under Minn. R. Evid. 402. This exhibit corroborated what Hager said in his confession, that he showed the children "daddy-daughter porn" because it listed several videos of this type. When the exhibit was admitted, the judge asked Hager if he needed to speak to his advisory counsel, and Hager chose not to. Hager did not object to the

admission of this exhibit, and the district court did not err, and certainly did not plainly err in admitting exhibit 2.[3]

II.

Hager next argues that the district court erred when it imposed lifetime conditional release because the district court accepted all three guilty verdicts at the same time. The state agrees with Hager, and it recommends that this court remand for imposition of a ten-year conditional release period for count 3.

"[W]hen a district court convicts an offender simultaneously of multiple sex offenses in the same hearing, the offender does not have a prior sex-offense conviction and is not subject to a lifetime conditional-release term under Minn. Stat. § 609.3455, subd. 7(b), absent another qualifying conviction." *State v. Brown*, 937 N.W.2d 146, 157 (Minn. App. 2019), *rev. denied* (Feb. 18, 2020). However, if the convictions are entered consecutively, the first conviction serves as a "prior sex offense conviction" for the purpose of section 609.3455. *State v. Nodes*, 863 N.W.2d 77, 82 (Minn. 2015). These convictions may occur during the same hearing, and no set time must pass between them for the first offense to become "prior." *Id.*

[3] Although the parties approached the pornography shown to the victims by Hager as relationship evidence under Minn. Stat. § 634.20, it may have been admissible as immediate-episode evidence. *See State v. Riddley*, 776 N.W.2d 419, 425 (Minn. 2009) (describing immediate-episode evidence as a narrow exception to the general character evidence rule, allowing the admission of a prior bad act when "there is a close causal and temporal connection between the prior bad act and the charged crime"). The pornography was used by Hager to groom the children to facilitate his sexual abuse of them and to discourage them from disclosing the sexual abuse to others.

Because Hager did not have a previous conviction for sexual assault, the district court must have convicted him of the charges consecutively in order to have imposed lifetime conditional release. "A conviction occurs when the district court accepts and records a verdict of guilty by a jury." *Brown*, 937 N.W.2d at 156 (quotation omitted). Here, at sentencing, the district court judge stated: "So I accept the jury's findings of guilt as to all three of the counts." The judge then proceeded to sentence Hager on each count individually. Therefore, Hager was convicted of the three counts of criminal sexual conduct concurrently. And, because Hager did not have a prior conviction for criminal sexual conduct, he cannot be subjected to lifetime conditional release. *Brown*, 937 N.W.2d at 157. Therefore, we reverse Hager's sentence of lifetime conditional release and remand for resentencing consistent with this opinion.

Affirmed in part, reversed in part, and remanded.