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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1371**

State of Minnesota,
Respondent,

vs.

Angelo Nidina Lee,
Appellant.

**Filed June 27, 2011
Affirmed
Klaphake, Judge**

Hennepin County District Court
File No. 27-CR-09-48871

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Toussaint, Presiding Judge; Klaphake, Judge; and Connolly, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Angelo Nidina Lee was convicted by jury of second-degree assault, Minn. Stat. § 609.222, subd. 2 (2008), and prohibited person in possession of a firearm,

Minn. Stat. § 624.713, subds. 1(2) & 2(b) (2008). The district court imposed an executed sentence of 60 months for the felon-in-possession conviction and a concurrent executed sentence of 84 months for the second-degree assault. The latter represents an upward durational departure from the presumptive sentence of 63 months. Appellant challenges his second-degree assault conviction, arguing that the district court abused its discretion by admitting evidence of appellant's prior assault of the same victim, and urges this court to reduce his sentence to the presumptive term because the upward durational departure was not supported by substantial evidence.

Because the district court did not abuse its discretion by admitting relationship evidence under Minn. R. Evid. 404(b), and because the sentencing jury's finding that appellant is a danger to public safety is supported by record evidence, we affirm.

D E C I S I O N

Relationship Evidence

Appellant argues that the district court abused its discretion by permitting the victim to testify about incidents during which appellant threatened him with a samurai sword and telephoned threats against his mother and daughter. The district court ruled that the evidence was admissible for the purpose of showing a strained relationship between appellant and the victim. The court further ruled that the evidence was clear and convincing, no notice was necessary, and it was unnecessary to independently find a need for the evidence.

We review the district court's evidentiary rulings for an abuse of discretion. *State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006). We will not reverse unless the defendant

can demonstrate that admission of the disputed evidence was both erroneous and prejudicial. *State v. Rhodes*, 627 N.W.2d 74, 84 (Minn. 2001).

Generally, evidence of a defendant's prior bad acts or conduct is inadmissible to prove character. Minn. R. Evid. 404(b). But such evidence may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* When offered for such purposes, the state must give notice of its intent to offer the evidence and indicate the purpose for offering the evidence. *Id.* The evidence itself must be clear and convincing and relevant, and its probative value must outweigh its prejudicial effect. *Id.*; *Ness*, 707 N.W.2d at 685. In particular, the district court "must identify the precise disputed fact to which the [404(b)] evidence would be relevant." *Id.* (quotation omitted).

While these standards generally must be followed, there is an exception for so-called relationship evidence. In *State v. Loving*, the supreme court concluded that "[r]elationship evidence is treated differently than other evidence offered under Minn. R. Evid. 404(b)." 775 N.W.2d 872, 880 (Minn. 2009) (citation omitted).

The *Loving* case parallels this matter in significant ways. Loving was charged with the murder of his former girlfriend, with whom he had a child, and her current boyfriend. *Id.* at 875. Loving had a history of domestic abuse with the female victim; he continued to be abusive after the relationship ended. *Id.* He also threatened the male victim, her new boyfriend, and falsely accused him of sexually touching Loving's daughter. *Id.* The two victims were found dead in a parked car. *Id.* To strengthen its case against Loving, the state sought to introduce evidence of the abusive and threatening

conduct, but offered it pursuant to rule 404(b), not Minn. Stat. § 634.20 (permitting evidence of prior abusive conduct against household or family member). *Id.* at 879. Loving argued that the evidence was irrelevant because he was not charged with first-degree domestic abuse murder, and that the state did not need the evidence because it could have established motive by referring to Loving's accusation of sexual misconduct by one of the victims, similar to appellant's claim that evidence that he and the victim had dated the same woman was sufficient to establish a strained relationship between the two. *Id.* The supreme court rejected Loving's argument as "unconvincing" and concluded that the evidence provided "context to the incident." *Id.* at 880.

The relationship between appellant and the victim here was relevant. Without some understanding of the antagonism between the two, appellant's actions may not have appeared to be intentional. *See id.* (concluding that relationship evidence helped establish motive, intent, identity, and premeditation in first-degree murder case). Appellant's prior threatening conduct toward the victim helped to establish that the shooting of that particular person was not an accident.

Appellant further contends that the evidence was not clear and convincing because it was based solely on the victim's testimony. "The clear and convincing standard is met when the truth of the facts sought to be admitted is highly probable." *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). A victim's testimony alone is sufficient to meet this standard; the testimony need not be corroborated. *Id.* In any event, the victim's testimony that appellant threatened him, his mother, and his daughter in telephone calls was supported by other witnesses who overheard the telephone conversations.

Finally, appellant argues that the bad acts testimony was not relevant and was more prejudicial than probative. The supreme court noted that when “relevant to show a strained relationship . . . evidence of past abuse of or threats against the victim or her family by the defendant has generally been deemed admissible against 404(b) challenges.” *Loving*, 775 N.W.2d at 880 (quoting *State v. Bauer*, 598 N.W.2d 352, 365 (Minn. 1999)). “In addition, such evidence has further probative value when it serves to place the incident for which appellant was charged into proper context.” *Id.*

Under these circumstances, appellant has not demonstrated that the district court abused its discretion by admitting the prior bad act testimony.

Sentencing Departure

Appellant argues that the district court abused its discretion by imposing a sentence for his second-degree assault conviction that represents an upward durational departure. The presumptive sentence based on appellant’s criminal history score was 63 months. The district court sentenced appellant to the statutory maximum, 84 months. *See* Minn. Stat. § 609.222, subd. 1 (2008) (setting forth maximum sentence for second-degree assault as seven years).

We review the district court’s decision to depart from the presumptive sentence for an abuse of discretion. *State v. Vance*, 765 N.W.2d 390, 395 (Minn. 2009). We will reverse only if the reasons for departure are improper or inadequate or if there is insufficient evidence on which to base a departure. *Id.*

Appellant was sentenced under the dangerous offender statute, Minn. Stat. § 609.1095, subd. 2 (2008) (increased sentences for dangerous offender who commits

third violent crime). Appellant stipulated that he was a dangerous offender for purposes of this section; this means appellant stipulated that he had two prior convictions for violent felonies and he was at least 18 years old. A dangerous offender can be sentenced up to the statutory maximum for an offense if “the fact finder determines that the offender is a danger to public safety.” *Id.* A person is a danger to public safety if his criminal behavior has occurred at a high rate of frequency, or if he has a long involvement with criminal activity, or if the conduct underlying the present offense involved an aggravating factor under the sentencing guidelines. *Id.*

The sentencing jury found in its special verdict that “[appellant’s] use of a firearm . . . cause[d] a risk of serious physical injury to others in the area at that time”; the jury also found that one bystander in particular, N.J., was endangered by appellant’s actions. The district court considered these findings to constitute an aggravating factor under the guidelines, concluding that appellant created “a greater than normal danger to the public” because “when the shots were fired it caused great confusion, mass exiting and attempts to get away from the site of the shooting” at a time when “hundreds of people were out on the street.”

To justify a departure under the dangerous offender statute, the aggravating factor need not be “severe.” *Neal v. State*, 658 N.W.2d 536, 545 (Minn. 2003). The sentencing guidelines set forth a non-exclusive list of aggravating factors. Minn. Sent. Guidelines II.D.2(b). Creating a greater than normal danger to the public is not one of the enumerated factors, but it has been recognized by case law as a basis for departure. *See State v. Morris*, 609 N.W.2d 242, 246 (Minn. App. 2000) (noting that creating greater

than normal danger to safety of other people is a recognized aggravating factor), *review denied* (Minn. May 23, 2000).

Each case permitting departure under the dangerous offender statute must rely heavily on factual circumstances. For example, in *Neal*, the supreme court considered the numerous serious injuries suffered by one victim and the gratuitous excessive force in affirming a double durational departure for aggravated robbery. *Id.* at 548. But it reversed the double durational departure for the other victim of the same incident, who was briefly kidnapped; the supreme court concluded that the limited confinement did not justify a quadruple departure from the presumptive sentence because it was not commensurate with the crime. *Id.*

Here, appellant fired three shots in a crowded street, causing many people to flee in “great confusion.” N.J., who had no quarrel with appellant, was standing directly behind appellant’s intended victim, and had to dive for safety into the car. Appellant’s actions showed an indifference to the safety of all of these innocent bystanders. This is sufficient to sustain a finding that the offense presented an aggravating circumstance, and therefore appellant was a danger to public safety. *See State v. Anderson*, 463 N.W.2d 551, 553 (Minn. App. 1990) (affirming upward departure for assault convictions when defendant shot a gun 13 times in mixed residential and commercial area in presence of at least six people).

Under these circumstances, the district court’s decision to sentence appellant to the statutory maximum was not an abuse of discretion.

Affirmed.