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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1747

State of Minnesota,
Respondent,

vs.

Richard Allen Dalton,
Appellant.

Filed October 12, 2010
Affirmed
Connolly, Judge

Olmsted County District Court
File No. 55-CR-08-11039

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Lansing, Presiding Judge; Wright, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

On appeal from his conviction of felony domestic assault, appellant argues that he did not properly waive his right to a jury trial on the felony-enhancement element of the crime and that the district court abused its discretion in admitting evidence of violations of a domestic-abuse no-contact order (no-contact order) with the victim and a prior fifth-degree assault against his former girlfriend. Because we conclude that appellant effectively waived his right to a jury trial when he stipulated to the felony-enhancement element and that the relationship evidence was admissible under Minn. Stat. § 634.20 (2008), we affirm.

FACTS

On October 11, 2008, P.K. met her friend D.B. at a bar in Rochester. P.K. and D.B. had lunch and approximately four to five drinks each in a period of two or three hours. P.K. then left to pick up her daughter. While P.K. was gone, appellant Richard Dalton arrived with a friend of his, L.W. P.K. and appellant had dated for a short time about a year earlier and had begun seeing each other again. D.B. told appellant that P.K. had left to pick up her daughter and was on her way back.

As P.K. was coming back, she noticed that appellant had left her a voicemail on her cell phone. P.K. described the message as “really rude and derogatory” and stated it made her mad. In the message, appellant swore at her and asked her why she is “such a b---h” and told her that she “d[id]n’t need to be a b---h.”

When P.K. arrived back at the bar, she observed appellant in the parking lot with his friend and asked if he could come over to her vehicle so she could speak with him. At the time, P.K. had her new puppy in her purse. P.K. told appellant that she did not appreciate the message and that appellant did not need to speak to her that way. Appellant responded by stating that P.K. was a "b---h" and that "he could say whatever he wants." P.K. then told appellant that he was "the only b---h" present.

Appellant then struck P.K. with an open hand on the left side of her face. P.K. was knocked to the ground, landing on her elbow, and her puppy "went flying." The puppy hit her head on the ground and scurried off. After making sure her puppy was okay, P.K. slapped appellant across his face. Appellant then slapped P.K. again.

Appellant started walking back towards L.W.'s truck. "[T]hen [P.K.'s] mouth started going because [she] was furious." P.K. "thr[e]w insults" at appellant to let him know she was mad. Appellant then exited the vehicle from the passenger side, said that he was going to kill P.K., and chased her around the back of the truck. Scared, P.K. ran into the bar and yelled for someone to "call the cops."

During the altercation, D.B. was outside on the bar's "smokers' patio" and she heard P.K. yelling her name. A wooden fence surrounds the patio, and patrons cannot see into the parking lot. D.B. ran outside, where she saw P.K. on the ground "yelling at [D.B.] to grab her dog." D.B. also saw appellant. P.K. told D.B. that appellant hit her. D.B. did not see P.K. subsequently strike appellant because she was trying to get L.W. to assist her. After P.K. ran into the bar, the bartender stopped appellant at the door and told him that the police were on their way and that "you guys should leave." D.B. saw

appellant drive off with L.W. A few days later, D.B. saw P.K. and described her face as "[m]ore bruised and purple."

D.V., a bartender, was just pulling into the parking lot around 5:30 p.m. and finishing a cigarette before going in to work. Although he did not see them, D.V. heard a man and a woman arguing. D.V. heard a "smacking noise." D.V. then got out of his car and saw a woman falling to the ground and her "little dog" take off running. D.V. saw the woman get up quickly to grab the dog. The woman went inside the bar and the man got into his vehicle and left.

Law enforcement subsequently arrived on the scene. As an officer was coming into the bar, he observed P.K. coming out of the bathroom. She had been crying and was upset. P.K. was holding the side of her head and complaining about pain in her left eye. The officer could tell that P.K. had been drinking, but she did not appear to be "that intoxicated." The officer noticed slight swelling and redness around P.K.'s eye area and that her face was "flushed from being upset and crying." There was an abrasion on her right forearm. The officer observed that P.K.'s injuries appeared to be fresh. The officer also listened to appellant's voicemail, but was unable to discern much of the message except for "b---h" and "p---y." The officer could tell that the caller was a black male and described the tone of the message as "sly and demeaning."[1] P.K. was not truthful to the officer about the nature of her romantic relationship with appellant and told him that they "were friends" because she was "embarrassed over the whole situation."

[1] The record reflects that appellant is a black male.

Another officer also responded and saw a vehicle matching the description of the one that appellant left in. She stopped the vehicle and identified L.W. as the driver and appellant as the passenger. Appellant was cooperative and told the officer that he and P.K. were in a relationship. Appellant also said that P.K. had a boyfriend and that she would probably deny that they were in a relationship.

Appellant was subsequently charged by amended complaint with two counts of felony domestic assault in violation of Minn. Stat § 609.2242, subd. 4 (2008) (intentional or attempted infliction of bodily harm upon another or intent to cause fear in another of immediate bodily harm or death with two or more previous qualified domestic-violence-related convictions). A no-contact order was also issued, directing appellant not to have contact with P.K.

Prior to trial, appellant called P.K. twice from jail. The first call was a conversation between appellant and P.K.[2] The next day, appellant called a second time and left a voicemail on P.K.'s cell phone. In the voicemail, appellant told P.K. that he loved her. Appellant also told P.K.:

> I start trial on the 8th, so all you have to do is not show up. You don't have to come to court and they gonna drop it, you know, and it's all on you, what you want, you know. You can not come to court and not let the people find you, you know.

Appellant also apologized. Appellant said that both he and P.K. made mistakes "that day"; appellant stated he took responsibility for his mistake and asked P.K. to take

[2] It does not appear from the record that this conversation was played for the jury.

responsibility for her mistake. P.K. understood appellant's voicemail as apologizing for his conduct on October 11. P.K. reported the voicemail to law enforcement.

Prior to trial, appellant stipulated that he had two prior convictions that would qualify him for the felony enhancement. These convictions were for misdemeanor fifth-degree assault, in which appellant pleaded guilty to assaulting his prior girlfriend, and felony second-degree assault, in which appellant pleaded guilty to threatening another person with a dangerous weapon. *See State v. Moen*, 752 N.W.2d 532, 534-35 (Minn. App. 2008) (holding an offense is not required to have a "domestic-violence nexus" to be a qualified domestic-violence-related offense for purposes of Minn. Stat. § 609.224, subd. 4). The following exchange took place between appellant and the district court:

> PROSECUTOR JACKSON: And I'm wondering if the Court—I don't mean to get ahead of the Court, but if you would inquire of the Defendant himself personally?
> DISTRICT COURT: I was just going to do that.
> . . .
> DISTRICT COURT: Mr. Dalton—
> DEFENDANT: Yes, ma'am.
> DISTRICT COURT: —you are currently charged with a felony-level Domestic Assault. As part of the elements of the felony-level Domestic Assault, you are required to have the prerequisite convictions to enhance it from a misdemeanor to a gross misdemeanor to a felony. You understand that, right?
> DEFENDANT: I understand that.
> DISTRICT COURT: Okay. And you've talked to Mr. Kaschins [defense counsel] regarding that matter, right?
> DEFENDANT: Yes, ma'am.
> DISTRICT COURT: And by stipulating to the requisite prior convictions, you keep those prior convictions for purposes of the enhancement from the jury. Do you understand that?
> DEFENDANT: Yes, ma'am.
> DISTRICT COURT: And you want to do that, right?
> DEFENDANT: Yes, ma'am.

> DISTRICT COURT: And you've got two prior convictions that qualify for that enhancement, namely a Second Degree Assault in file K4-01-4508. Right?
> DEFENDANT: Yes, ma'am.
> DISTRICT COURT: And a second Fifth Degree Domestic Assault, KX-05-1279. Right?
> DEFENDANT: Yes, ma'am.
> DISTRICT COURT: *And you want me to accept your stipulation on that to prevent that information from going to the jury for purposes of enhancement to a felony. Right?*
> DEFENDANT: *Yes, ma'am.*
> DISTRICT COURT: Do you have any questions about that, Mr. Dalton?
> DEFENDANT: No, ma'am.
> DISTRICT COURT: Thank you. I do find a valid, knowing, intelligent stipulation as to the enhancement for the felony-level domestic. And that will not be presented to the jury.
> PROSECUTOR ARTHURS: Your Honor, I just had one question for Mr. Dalton on that. Could I inquire?
> DISTRICT COURT: Sure.
> PROSECUTOR ARTHURS: Mr. Dalton, do you also recognize, based on the information that you reviewed, that both of these prior convictions are within a 10-year time frame of the current offense that we're here for trial today?
> DEFENDANT: Yes, I do.
> PROSECUTOR ARTHURS: I don't have anything further.

(Emphasis added.)

Before resting and over defense counsel's objection, the state presented the jury with *Spreigl* evidence regarding the same fifth-degree assault that appellant stipulated to and appellant's phone calls to P.K. in violation of the no-contact order. In introducing the evidence, the state read a summary it had prepared:

> On April 1st of 2005, in Rochester, Minnesota, the Defendant, who was involved in a significant romantic or sexual relationship at that time with [A.H]. During an argument with [A.H.], grabbed her and shoved her against a car, and she was able to—that she was able to push the

> Defendant away; and that the Defendant then grabbed her again and shoved her against a wall.
>
> The phone call and voicemail to [P.K.] occurring in April 2009 and about which you have already received evidence, occurred after the Court issued a Domestic Abuse No Contact Order prohibiting contact with [P.K.] That Domestic Abuse No Contact Order was issued by the Court on January 27, 2009, and is still in effect.

Appellant did not present any evidence in his defense.

The jury subsequently convicted appellant of one count of felony domestic assault with the intent to inflict bodily harm and acquitted appellant of one count of felony domestic assault with the intent to cause fear. Appellant was sentenced to 36 months in prison. This appeal follows.

D E C I S I O N

I. Appellant effectively waived his right to a jury trial on the conviction-based element of felony domestic assault.

"A defendant's right to a jury trial includes the right to be tried on each and every element of the charged offense." *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004), *review denied* (Minn. June 29, 2004). By stipulating to an element of the offense, the defendant waives his right to a jury trial on that element. *State v. Kuhlmann*, 780 N.W.2d 401, 404 (Minn. App. 2010), *review granted* (Minn. June 15, 2010). "Because the right to a jury trial is a fundamental right, waiver of this right must be 'personal, explicit, and in accordance with rule 26.01.'" *State v. Fluker*, 781 N.W.2d 397, 400 (Minn. App. 2010) (quoting *State v. Halseth*, 653 N.W.2d 782, 786 (Minn. App. 2002)); *see also* Minn. R. Crim. P. 26.01, subds. 1(2)(a) (waiver of trial by jury), 3 (waiver for trial on stipulated facts) (2009). This court reviews de novo whether a defendant

properly waived his right to a jury trial. *State v. Tlapa*, 642 N.W.2d 72, 74 (Minn. App. 2002), *review denied* (Minn. June 18, 2002).

To be convicted of felony domestic assault, the defendant must commit misdemeanor domestic assault or fifth-degree assault and have two or more prior domestic-violence-related convictions within the previous ten years. Minn. Stat § 609.2242, subd. 4. Appellant argues that his stipulation to the requisite prior offenses "was not valid, knowing, or intelligent because he never acknowledged an understanding that he was waiving his jury-trial rights on the enhancement element." Appellant asserts that no one ever informed him that he had a right to a jury trial on the felony-enhancement element and his "acknowledgement that he wanted to keep the information from the jury is not synonymous with understanding that he had the right to require the state to prove that element beyond a reasonable doubt to the jury." Appellant also argues that the district court must strictly comply with the waiver requirements and that his conviction is subject to automatic reversal.

Although we agree with appellant that the waiver requirements were not strictly complied with in this case, we disagree that appellant's conviction is subject to automatic reversal. Appellant's argument principally relies on *State v. Antrim* for the proposition that failure to strictly comply with the waiver requirements warrants automatic reversal. 764 N.W.2d 67, 70 (Minn. App. 2009). But caselaw is clear that *Antrim*'s strict compliance is limited to stipulated-facts trials and bench trials, and is not applicable when the defendant stipulates only to an element of the offense. *Fluker*, 781 N.W.2d at 402;

Kuhlmann, 780 N.W.2d at 405-06. Here, appellant stipulated only to the felony-enhancement element of the domestic-assault charges and then proceeded to a jury trial.

"A defendant may agree to waive a jury determination of a particular element of the offense by stipulating to it." *State v. Hinton*, 702 N.W.2d 278, 281 (Minn. App. 2005), *review denied* (Minn. Oct. 26, 2005). "[A]n oral or written waiver of rights . . . is required before a defendant personally elects to stipulate at trial to one of several elements of an offense." *Wright*, 679 N.W.2d at 191. Appellant was personally examined by the district court regarding the stipulation. Appellant acknowledged that he understood that the elements of felony-level domestic assault required prior convictions for felony enhancement and that he had consulted with counsel regarding that element. Appellant also agreed that by stipulating to the prior convictions he was "keep[ing] those prior convictions for the purposes of enhancement from the jury." Appellant then agreed that (1) he had two prior qualifying convictions; (2) the convictions occurred within the last ten years of the current charges; and (3) he "want[ed] [the district court] to accept [his] stipulation . . . to prevent that information from going to the jury for purposes of enhancement to a felony." While appellant's waiver was made orally on the record, appellant was also required to "acknowledge and waive the rights to testify at trial, to have the prosecution witnesses testify in open court in the defendant's presence, to question those prosecution witnesses, and to require any favorable witnesses to testify for the defense in court." Minn. R. Crim. P. 26.01, subd. 3. Thus, we conclude it was error to accept appellant's stipulation as to the felony-enhancement element without obtaining a proper waiver of these rights.

Although appellant's stipulation to the felony-enhancement element was incomplete, we nevertheless conclude that the error was harmless in this case. *See Fluker*, 781 N.W.2d at 402-03 (applying harmless-error analysis to the defendant's wavier of the right to a jury trial on two elements of the charged offense); *Wright*, 679 N.W.2d at 190-91 (concluding it was harmless error to accept counsels' stipulation to proof of an element of an offense without the defendant's consent in writing or orally on the record). Appellant does not contest that he has the requisite number of prior convictions and the record clearly supports the fact of conviction. *See Hinton*, 702 N.W.2d at 282 (stating "although appellant did not personally waive his right to a jury determination on this element of the offense, even if the stipulation to the prior convictions is error, it is clearly harmless" where appellant did not challenge the existence of the prior convictions and the record reflected that they had occurred). We therefore agree with the state that appellant effectively waived his right to a jury trial on the felony-enhancement element. *See Kuhlmann*, 780 N.W.2d at 405-06 (recognizing the "deeply significant differences between the rights given up by foregoing a jury and agreeing to a bench trial or stipulated-facts trial and the rights given up when exercising the right to a jury trial and stipulating only to an offense element"). Moreover, appellant was still able to compel witnesses to testify on his behalf, cross-examine the state's witnesses, challenge the state's evidence, and argue his case to the jury on the remaining elements. *See id.* at 406.

Finally, although defendants usually benefit from stipulations by keeping prejudicial information from the jury,[3] the subsequent introduction of facts underlying the same fifth-degree-assault conviction appellant stipulated to for the felony-enhancement element does not automatically invalidate the waiver. *See State v. Berkelman*, 355 N.W.2d 394, 396 (Minn. 1984) (concluding 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 where the probative value outweighs the danger of unfair prejudice).

II. Evidence of appellant's similar conduct was admissible under Minn. Stat. § 634.20.

Over defense counsel's objection, the district court allowed the state to introduce, as so-called "*Spreigl* evidence," the facts surrounding appellant's conviction for fifth-degree assault against a prior girlfriend and the two phone calls appellant made to P.K. *See State v. Spreigl*, 272 Minn. 488, 491, 139 N.W.2d 167, 169 (1965) (recognizing numerous exceptions to the general rule excluding evidence of a defendant's prior criminal behavior). The state introduced the evidence by reading a summary it had prepared. In a thoughtful and well-written brief, appellant argues that the district court erred in admitting the *Spreigl* evidence because it was not in the proper form and violated appellant's right to confrontation, and its potential for prejudice was outweighed by any probative value.

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[3] We note that, after a defendant has stipulated to an element of a crime in order to keep a prior conviction from coming to the attention of the jury, it should not be the first inclination of the state to introduce the same conduct at trial absent compelling circumstances.

We begin with an analysis of the rationale for admitting the evidence. The Minnesota Supreme Court has determined that the state, as the respondent in a criminal appeal, may "raise alternative arguments on appeal in defense of the underlying decision when there are sufficient facts in the record for the appellate court to consider the alternative theories, there is legal support for the arguments, and the alternative grounds would not expand the relief previously granted." *State v. Grunig*, 660 N.W.2d 134, 137 (Minn. 2003). The state has provided such an alternative argument in this case, asserting that the evidence was otherwise admissible under Minn. Stat. § 634.20.

Section 634.20 provides that "[e]vidence of *similar conduct* by the accused against the victim of domestic abuse, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice." Minn. Stat. § 634.20 (emphasis added). "The rationale for the admissibility of such evidence is to show the 'strained relationship' of the parties and is relevant to establishing motive and intent." *State v. Bell*, 703 N.W.2d 858, 861 (Minn. App. 2005), *affirmed as modified*, 719 N.W.2d 635 (Minn. 2006).

Evidence of similar conduct in domestic-abuse cases is admissible "without requiring the heightened standard that the evidence be clear and convincing." *State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004). Additionally, there is no notice requirement because the "defendant is aware that his prior relationship with the victim, 'particularly in so far as it involve[s] ill will or quarrels,' may be presented against him." *Id.* at 159-60 (quoting *State v. Boyce*, 284 Minn. 242, 260, 170 N.W.2d 104, 115 (1969) (modification in original)). Conduct admissible under section 634.20 is not limited to conduct

occurring prior to the incident giving rise to the charged offense, but also includes subsequent similar conduct. *State v. Lindsey*, 755 N.W.2d 752, 758 (Minn. App. 2008), *review denied* (Minn. Oct. 29, 2008). While evidentiary rulings are reviewed for an abuse of discretion, the "[c]onstruction of a statute or rule of evidence is a question of law subject to de novo review." *State v. McCurry*, 770 N.W.2d 553, 559 (Minn. App. 2009), *review denied* (Minn. Oct. 28, 2009).

During trial, the state sought to introduce the phone calls under section 634.20, which the district court denied as they were not "of such similar conduct." The state withdrew its request to introduce the fifth-degree assault under section 634.20.

A. Phone Calls in Violation of the No-Contact Order

Section 634.20 states that "'[s]imilar conduct' includes, *but is not limited to*, evidence of domestic abuse, violation of an order for protection under section 518B.01; violation of a harassment restraining order under section 609.748; or violation of section 609.749 or 609.79, subdivision 1." Minn. Stat. § 634.20 (emphasis added). The state contends that appellant's phone calls to P.K. in violation of the no-contact order constitute "similar conduct."

Domestic abuse occurs when a family or household member commits any of the following against a family or household member: (1) physical harm, bodily injury, or assault; (2) the infliction of fear of imminent physical harm, bodily injury, or assault; (3) terroristic threats; (4) criminal sexual conduct; or (5) interference with an emergency call. Minn. Stat. § 518B.01, subd. 2(a) (2008). Family or household members include

"persons involved in a significant romantic or sexual relationship." *Id.*, subd. 2(b)(7) (2008).

P.K. qualifies as a family or household member and is a victim of domestic abuse because appellant is charged under Minn. Stat § 609.2242, subd. 4 (defining felony domestic assault). The only question, therefore, is whether appellant's violations of the no-contact order constitute "similar conduct" under section 634.20. Appellant is correct that violations of a no-contact order do not per se constitute domestic abuse. *See id.*, subd. 2(a) (defining domestic abuse).

But "similar conduct" is not limited to an enumerated list of offenses that are defined as domestic abuse. Minn. Stat. § 634.20 (stating that "similar conduct" is not limited to the types of conduct listed). Rather, the statute lists examples of the kinds of conduct that may be admitted as relationship evidence under the statute. In *State v. Barnslater*, we observed that "[t]he applicable definition of 'domestic abuse' focuses on the defendant's conduct rather than on a list of offenses that represent 'domestic abuse,'" and that domestic abuse "includes both types of assaultive conduct . . . and types of offenses." 786 N.W.2d 646, 651 (Minn. App. 2010). Therefore, our determination of whether the no-contact-order violations constitute "similar conduct" is informed by the types of conduct named in section 634.20.

"Similar conduct" includes violations of an order for protection. Minn. Stat. § 634.20. Both orders for protection and no-contact orders are intended to protect the victims of domestic abuse. The victim of domestic abuse may obtain an order for protection by alleging the existence of domestic abuse along with an accompanying

affidavit "stating the specific facts and circumstances from which relief is sought." Minn. Stat. § 518B.01, subd. 4(b) (2008). After notice and a hearing, the district court may "order the abusing party to have no contact with the petitioner whether in person, by telephone, mail, or electronic mail or messaging, through a third party, or by any other means." *Id.*, subd. 6(10) (2008). A no-contact order is issued by the district court against a defendant facing domestic-abuse charges. *Id.*, subd. 22(a)(1) (2008), *repealed by* 2010 Minn. Laws ch. 299, § 15, at 600 (current version to be codified at Minn. Stat. § 629.75).

The most important conduct that a district court can prohibit in order to protect an alleged victim of domestic abuse is to prevent the defendant from having any contact with the victim pending a trial on the alleged abuse. Violations of a no-contact order in a domestic-abuse case and an order for protection both involve a defendant's refusal to obey a court order designed to protect victims of domestic abuse. Given the similar purpose that underlies the issuance of no-contact orders and orders for protection, the similar conduct involved in the violation of no-contact orders and orders for protection, and the fact that the plain language of section 634.20 does not specifically prohibit the admission of evidence of violations of a no-contact order, we conclude that the district court erred in determining that appellant's calls to P.K. in violation of the no-contact order were not "similar conduct" under section 634.20.

B. Prior Fifth-Degree Assault

As noted above, the state withdrew its request to introduce the fifth-degree assault under section 634.20 at trial. Generally, we will not decide issues that were not raised to the district court. *Grunig*, 660 N.W.2d at 136. But here we will consider the state's

alternative argument because the record contains sufficient factual information, the argument has legal support, and the application of section 634.20 would not expand the relief previously granted to the state, given that the facts surrounding the fifth-degree assault were indeed admitted at trial. *See id.* at 137.

The facts in the record reveal that appellant grabbed, pushed, and shoved A.H., thereby assaulting her, and that, at the time, A.H. was involved in a significant romantic or sexual relationship with appellant. These facts are the very definition of domestic abuse. *See* Minn. Stat. §§ 518B.01, subd. 2(a)(1), (b)(7), 609.224, subd. 1 (2008) (defining misdemeanor fifth-degree assault).

> [I]n stating that the past conduct of the accused must have been committed "against the victim of domestic abuse, or against *other* family or household members," the legislature [has] create[d] a parallel between the victim as one "family or household member" and the other subjects of the accused's conduct as other "family or household members."

State v. Valentine, 787 N.W.2d 630, ____ (Minn. App. 2010) (quoting Minn. Stat. § 634.20). Furthermore, by including relationship evidence of "similar conduct" against "other family or household members," section 634.20 specifically contemplates the introduction of conduct that occurred beyond the conduct against the current victim or the household in which the defendant and the victim reside. *See id.* at ____ (stating Minn. Stat. § 634.20 specifically incorporates a broad definition of "family or household members"). "[E]vidence showing how a defendant treats his family or household members, such as his former spouses or 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." *Id.* at ____. We agree with the state that appellant's fifth-degree assault against a prior girlfriend is otherwise admissible under section 634.20.

C. Probative Value vs. Prejudicial Effect

While the violations of the no-contact order and prior fifth-degree assault qualify as similar conduct under section 634.20, this evidence will not be admissible if its probative value is substantially outweighed by the danger of unfair prejudice. *See* Minn. Stat. § 634.20. "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).

We agree with appellant that the evidence regarding his violations of the no-contact order and prior fifth-degree assault was prejudicial to him, but it was not unfairly prejudicial. Appellant knew his relationship with P.K. would be at issue at trial. *See McCoy*, 682 N.W.2d at 159-60. And, as we stated in *Valentine*, how appellant treated his former girlfriend is probative of how appellant treated P.K. *See* 787 N.W.2d at ____. In both relationships, appellant became violent during the course of an argument. We conclude that the probative value was not outweighed by the danger of unfair prejudice and that appellant's violations of the no-contact order and his prior fifth-degree assault were admissible under section 634.20.

D. Form of the Section 634.20 Evidence

Although we agree with the state that section 634.20 allows it to introduce evidence of the no-contact order violations and appellant's prior fifth-degree assault, we

also agree with appellant that this evidence was wrongly presented. The state concedes that the district court "erred in permitting the prosecutor to summarize to the jury the facts underlying appellant's prior domestic abuse conviction and the no-contact order" and that the state "is unaware of any authority permitting the prosecutor to describe facts to the jury in the absence of a stipulation by the parties." But, despite the procedural error, because we conclude that the evidence was otherwise admissible under section 634.20, we need not "engage in a harmless error analysis to determine whether the otherwise admissible evidence had a significant effect on the verdict," because an appellate court's "holding that, despite the procedural error, the evidence would have been admissible is implicitly a holding that the procedural error was harmless." *Bell*, 719 N.W.2d at 642.

Affirmed.