STATE OF MINNESOTA
IN COURT OF APPEALS
A10-296

State of Minnesota,
Respondent,

vs.

Kurt Daniel Schmidt,
Appellant.

Filed January 11, 2011
Affirmed
Klaphake, Judge

Ramsey County District Court
File No. 62SU-CR-09-7043

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

Hugh A. Kantrud, Maplewood City Attorney, 1830 County Road B East, Maplewood, Minnesota (for respondent)

Andrew J. Laufers, Mark K. Thompson, Dudley and Smith, P.A., St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Klaphake, Judge; and Harten, Judge.*

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

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

KLAPHAKE, Judge

Kurt Daniel Schmidt appeals from his conviction for violating an order for protection, arguing that the evidence was insufficient to sustain the conviction and that the district court erred by admitting evidence of the parties' relationship under Minn. Stat. § 634.20 (2008).

Because there is sufficient record evidence to sustain the conviction and the district court did not abuse its discretion by admitting the relationship evidence, we affirm.

D E C I S I O N

Sufficiency of the Evidence

> In assessing the sufficiency of the evidence, [the appellate court] review[s] the evidence to determine whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted.

*State v. Al-Naseer***,** 788 N.W.2d 469, 473 (Minn. 2010) (quotation omitted). We will not reverse a jury's verdict if the jury, having given due regard to the presumption of innocence and the state's burden of proof, could reasonably have found the defendant guilty. *Id.* We defer to the jury's credibility determinations, recognizing "that the trier of fact is in the best position to determine credibility and weigh the evidence." *Id.* Evidence is viewed in the light most favorable to the verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989).

Appellant was charged with violating an order for protection (OFP), Minn. Stat. § 518B.01, subd. 14(a) (2008). To obtain a conviction, the state must prove that: (1) there was an existing OFP; (2) the defendant violated a term of the OFP; (3) the defendant knew there was an OFP; and (4) the location of the violation. *State v. Hinton*, 702 N.W.2d 278, 283 (Minn. App. 2005); Minn. Stat. § 518B.01, subd. 14(b) (2008); *see also* 10 *Minnesota Practice*, CRIMJIG 13.54 (Supp. 2010). Appellant contends that the state failed to sustain its burden of proving that appellant knew of the OFP and that he violated it.

"'Know' requires only that the actor believes that the specified fact exists." Minn. Stat. § 609.02, subd. 9(2) (2008). While the actual state of appellant's knowledge is not susceptible to direct proof, circumstantial evidence permits a jury to make certain inferences. *Webb*, 440 N.W.2d at 430. If the circumstantial evidence, viewed in the light of the evidence as a whole, excludes any other reasonable inference other than guilt beyond a reasonable doubt, the jury's verdict will be affirmed. *Id.* We recognize that the jury is in the best position to evaluate circumstantial evidence, and we will defer to the jury's decision if it is consistent with the defendant's guilt and inconsistent with any other reasonable hypothesis. *Id.*

The OFP in question was issued on May 17, 2009, and was for a term of four years. Under the terms of the OFP, appellant was prohibited from contacting his former wife, H.L., in person, by telephone, by electronic communication, or in any other way. At the time the OFP was issued, the presiding judge explained to appellant in great detail that he was to have no contact with H.L. At the same time, R.S.L., an adult child of

appellant and H.L., filed for an OFP. Appellant contested R.S.L.'s petition; R.S.L. dismissed her petition on July 24, 2009, because neither she nor her mother could afford to continue to pay for an attorney. H.L. concluded that the OFP forbidding appellant to contact the family home would be enough protection for R.S.L., who lived at home.

On July 31, 2009, while H.L. was working at her office in Ramsey County, Minnesota, she received a telephone call. She recognized appellant's voice when he said, "I don't believe there's a restraining order between us." H.L. hung up immediately, but received two more calls originating from appellant's parents' home, where appellant was living. At trial, H.L. was the only witness. She opined that appellant may have called because he received R.S.L.'s withdrawal of her petition for an OFP on July 27, 2009, but she also testified that it was clear that this pertained only to R.S.L. The stipulation for dismissal withdrawing R.S.L.'s petition was submitted into evidence; it is signed by the parties' attorneys and it references only R.S.L. Appellant's attorney in that action was also his trial counsel in the present matter. Based on this evidence, the jury could reasonably conclude that appellant knew there was an OFP in effect when he contacted H.L.

Appellant also contends that there is insufficient evidence that he violated the OFP because the only evidence offered was H.L.'s testimony identifying appellant's voice on the telephone. H.L. also testified that she received two more calls that she did not answer and that she recognized the telephone number on the caller identification information as appellant's parents' telephone, where appellant was presumably living. Appellant

contends that several other people live at that house and that this evidence is insufficient to prove that he made the calls.

H.L. testified that she answered the telephone.

> I heard [appellant's] voice on the phone saying to me, I don't believe there's a restraining order between us and – and you know, my stomach kind of lunged and I thought oh, no, and I hung up and then immediately the phone rang again and I looked to see, you know, what number was calling and it was [appellant's parents' telephone number], which is supposedly where he's living.

A jury could reasonably conclude that H.L., who was married to appellant for 17 years, recognized appellant's voice on the telephone making a statement that logically confirmed the identity of the speaker. The following phone call, originating from appellant's parents' home, corroborates this conclusion. Viewed in the light most favorable to the verdict, there was sufficient evidence to sustain the jury's verdict.

Relationship Evidence

Appellant contends that the district court abused its discretion by admitting evidence of the parties' relationship pursuant to Minn. Stat. § 634.20. Appellant argues that the prejudicial effect of the relationship evidence outweighed its probative value and that the court erred by not cautioning the jury at the time the evidence was admitted.

We review the district court's admission of relationship evidence for an abuse of discretion. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004); *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Appellant has the burden of establishing that the district court abused its discretion and that appellant was thereby prejudiced. *Amos*, 658 N.W.2d at 203; *State v. Meyer*, 749 N.W.2d 844, 848 (Minn. App. 2008).

Minn. Stat. § 634.20 provides that "[e]vidence of similar conduct by the accused against the victim of domestic abuse . . . is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice[.] 'Similar conduct' includes, but is not limited to, evidence of . . . violation of an order for protection."

The exchange to which appellant objects is the following:

> Q. [prosecutor]: In 2007, did [appellant] have reason to not be in the home?
> A. [H.L.]: Um, yah, at the end of the year, there was an incident.
>
> [Defense counsel]: Objection, relevance.
> [The court]: Overruled.
> [Defense counsel]: Prejudicial.
> [The court]: Overruled.
> [H.L.]: And the –
>
> Q. – I don't want to get into the details too much, [H.L.], but suffice it to say, [appellant] was ordered to stay away from the home?
>
> A. Yes.
>
> Q. And that happened at the end of 2007, beginning of 2008?
>
> A. Beginning of December 2007, it started. The incident one took place.

Nothing further about the incident was placed in the record. Although the court gave no cautionary instruction at the time, it did instruct the jury before deliberations that it was to use evidence of the history of the relationship solely to assess the relationship between the parties. The prosecutor did not refer to the relationship evidence in closing argument, except to note that H.L. recognized the number on caller ID as "the number of

her ex-husband's parents' home, where we testified he has been staying ever since he was removed from the home in 2007 in Wisconsin."

Relationship evidence, which in some ways is similar to *Spreigl*[1] evidence, has been treated in a different manner than *Spreigl* evidence because it serves to "illuminate[] the history of the relationship between an accused and a victim." *McCoy*, 682 N.W.2d at 161. The Minnesota Supreme Court stated, "We believe this different treatment is appropriate in the context of the accused and the alleged victim of domestic abuse. 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." *Id.*

"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 unfair advantage." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted). Some evidence of the parties' relationship here is necessary to explain H.L.'s reaction to a single telephone call; there is probative value in placing the call in the context of the parties' relationship. As a practical matter, the prejudicial effect of referring to an "incident" that occurred in 2007 that resulted in appellant being barred from the home is not great; a detailed description of the event would have a greater prejudicial effect.

[1] *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965) (permitting evidence of other crimes, wrongs, or acts under limited circumstances; now codified as Minn. R. Evid. 404(b)).

Under these circumstances, the district court did not abuse its discretion by admitting this limited relationship testimony.

The district court did not give a simultaneous cautionary instruction when the relationship testimony was admitted, which appellant cites as error.

> It is preferred practice for a district court to instruct the jury regarding the use of section 634.20 evidence both when the evidence is received and in the final jury charge. But we have held that the failure to supply limiting instructions to the jury "does not *automatically* constitute plain error," particularly when other evidence shows that the probative value of the other-bad-acts evidence is not outweighed by its potential for unfair prejudice.

Meyer, 749 N.W.2d at 850 (citing and quoting *State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007)).

As in *Meyer* and *Meldrum*, defense counsel here did not request a simultaneous cautionary instruction, although he did object to admission of the testimony. Because of this, we reviewed the lack of a cautionary instruction for plain error in both *Meyer*, 749 N.W.2d at 850, and *Meldrum*, 724 N.W.2d at 19-20. In *Meyer*, we concluded that the relationship evidence was not prejudicial because other evidence supported defendant's conviction. 749 N.W.2d at 850. In *Meldrum*, we concluded that the relationship evidence was outweighed by other evidence and that the state did not improperly use or emphasize the relationship evidence. 724 N.W.2d at 22.

Here, the relationship testimony was limited; the state did not emphasize it in closing; and the district court gave a cautionary instruction to the jury before

deliberations. Under these circumstances, the district court did not plainly err by failing to give a simultaneous cautionary instruction.

Affirmed.