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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1217**

State of Minnesota,
Respondent,

vs.

Shawn Timothy Cermak,
Appellant.

**Filed June 18, 2018
Affirmed
Connolly, Judge**

Carver County District Court
File No. 10-CR-16-481

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

Mark Metz, Carver County Attorney, Angella M. Erickson, Assistant County Attorney,
Chaska, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Smith, Tracy M., Judge; and
Bratvold, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges his convictions of gross misdemeanor malicious punishment of a child and misdemeanor domestic assault. Appellant argues that the district court committed prejudicial error by allowing relationship evidence detailing two past incidents of violence between the victim and appellant. We affirm the district court's decision because it did not abuse its discretion by admitting evidence of past acts of domestic violence under Minn. Stat. § 634.20 (2016).

FACTS

On May 10, 2016, appellant Timothy Cermak and his live-in girlfriend, A.K., got into an argument about A.K.'s 12-year-old son, D.K. A.K. left the residence to de-escalate the argument. D.K. went to sleep at around 10:00 p.m. Later that night D.K. woke up to find Cermak rummaging through his closet. Cermak asked D.K. why he had not cleaned his closet, and D.K. responded that he had cleaned his closet. Cermak then left the room. He came back a little while later with raised fists, and D.K. asked Cermak if he was "going to beat [him]?" Cermak replied "no" but told D.K. that he "had three seconds to get out." D.K. told Cermak to "stop," and Cermak stated that he was "going to kick [D.K.] out" of the apartment. D.K. then dared Cermak to kick him out. Cermak grabbed D.K. by his arm and leg and pulled him off the bed he was lying on. This action caused D.K. to fall off his bed, hit his head on the ground, and sustain a scratch on his leg and a bruise on his arm. Cermak left the room, and D.K. stayed "on the ground in pain" for a while before calling

his maternal grandfather for help. D.K.'s grandfather told him to call the police—which D.K. was reluctant to do because he was afraid of “what would happen.”

Eventually, the police were called, and they interviewed D.K. and Cermak and took pictures of D.K.'s injuries. When the police originally interviewed Cermak, he stated that “[he] didn’t do anything.” The police officer then separated the parties, and Cermak changed his storying by saying he “had physically grabbed [D.K.] in order to sit him up and that [D.K.] might have fallen” by accident.

At trial, the state asked D.K. about two past instances of physical violence that Cermak had committed against him. Directly before D.K. was asked about these instances, the district court read a cautionary instruction explaining the purpose of the relationship evidence and that the jury was not allowed to “convict the defendant on the basis of conduct occurring on previous occasions.” D.K. then described two past instances of violence—both of which occurred within six months of the incident for which Cermak was tried and convicted. D.K. explained that in one instance Cermak was arguing with J.K. and then came over to where D.K. was sitting on the couch, grabbed his shirt, and pulled him off the couch. This assault left a mark on D.K.'s neck. The police came to the home directly after this assault. In the second instance, A.K. was standing between Cermak and D.K. when Cermak charged at D.K. and pushed him on to his bed. The district court gave a cautionary instruction regarding the permissible use of this relationship evidence before the jury deliberated.

The jury found Cermak guilty of both gross misdemeanor malicious punishment of a child and misdemeanor domestic assault. The district court entered a conviction on the

malicious-punishment-of-a-child and domestic-assault charges, stayed imposition of the sentence on the malicious-punishment-of-a-child conviction, and placed Cermak on two years of probation. This appeal follows.

D E C I S I O N

We review evidentiary rulings under an abuse-of-discretion standard. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). On appeal, it is the appellant's burden to establish that the district court not only abused its discretion by admitting improper evidence but also that the evidentiary ruling prejudiced the appellant. *State v. Swinger*, 800 N.W.2d 833, 837 (Minn. App. 2011), *review denied* (Minn. Sept. 28, 2011).

Minnesota's relationship-evidence statute allows for "[e]vidence of domestic conduct by the accused against the victim of domestic conduct, or against other family or household members[.]" Minn. Stat. § 634.20. Evidence under Minn. Stat. § 634.20 "is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* Our supreme court has interpreted Minn. Stat. § 634.20 as authorizing the admission of prior acts of domestic abuse for the purpose of "illuminat[ing] the history of relationship" between the defendant and the victim, and putting the alleged act of violence in "the context of the relationship between the two." *State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004).

Cermak complains that the two prior acts of domestic violence involving him and D.K. were inadmissible because evidence of the acts was not "relevant and was unfairly prejudicial." His argument fails for the following reasons.

Relevance

To be admissible, evidence must be relevant. Minn. R. Evid. 402. Evidence that is relevant is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401.

Cermak argues that the previous acts of violence are not relevant to the current charges because the previous acts do nothing to “illuminate the history” of the relationship or put the crime into the context of the relationship. We disagree. Evidence that Cermak was physically abusive in a manner that is substantially similar to the current act of violence has a tremendous amount of probative value. Cermak’s entire defense relied on Cermak’s version of the events, which is that he had no intent to punish or harm D.K. when D.K. flailed his own body to the ground after Cermak “lightly” pulled him up on the bed. This testimony was meant to refute D.K.’s version of the assault, which is Cermak’s right as a criminal defendant. But Cermak is incorrect to suggest that two very similar acts of violence by the defendant and against the victim—both of which were committed within half a year of the current assault—do not provide context to the relationship or aid the jury in assessing the relative credibility between Cermak’s and D.K.’s materially differing accounts. *See State v. Williams*, 593 N.W.2d 227, 236 (Minn. 1999) (Stating our supreme court has “on numerous occasions recognized the inherent value of evidence of past acts of violence committed by the same defendant against the same victim.”). Because context and aid in assessing credibility are precisely what the testimony of these two past events provide, the testimony is clearly both relevant and probative.

Substantially more prejudicial than probative

Cermak next asserts that even if the testimony of the prior assaults is relevant, the evidentiary ruling was an abuse of the district court's discretion because "the evidence is clearly more prejudicial than probative." But, the test is not whether the evidence is more prejudicial than probative; rather, the evidence's probative value must be "*substantially* outweighed by the danger of unfair prejudice." Minn. Stat. § 634.20 (emphasis added).

When we consider the balance between the probative value of evidence against its potential for prejudice, we note that 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." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). Although the evidence of the past two assaults may have been damaging to Cermak's defense—most probative evidence is—there is nothing in the record to suggest that it inflamed the jury, was illegitimate, or gave one party an unfair advantage.

Additionally, Cermak cites *State v. Reardon* for the proposition that there is a "naïve assumption that prejudicial effects can be overcome by instructions to the jury, [which] all practicing lawyers know to be unmitigated fiction." 245 Minn. 509, 513, 73 N.W.2d 192, 195 (Minn. 1955) (quoting *Krulewitch v. United States*, 336 U.S. 440, 453 (1949)). We disagree. First, *Reardon* involved prosecutorial misconduct, which manifested itself in the form of a county attorney telling a jury during closing arguments that the defendant had already accepted a guilty plea before he withdrew that guilty plea. *Id.* As the United States Supreme Court has identified as recently as last year, "Some toxins can be deadly in small doses." *Buck v. Davis*, 137 S. Ct. 759, 777 (2017). That is undoubtedly the case when the

prosecution essentially argues to the jury that the defendant *is* guilty because he *already* has admitted his guilt via a withdrawn guilty plea. *Reardon*, 73 N.W.2d at 195. But unlike *Reardon*, here there was nothing improper with the admitted relationship evidence as it was both relevant and not substantially more prejudicial than probative.

Second, Cermak's limited quoting of *Reardon* neglects to mention the sentence that appears just two sentences before his citation: "It is well recognized that mistakes occur in most trials and, where they do not substantially affect the rights of the parties, it may be expected that the trial court by proper instruction *can rely upon the intelligence and restraint of a jury to disregard them.*" *Id.* (emphasis added). Here, there is nothing in the record to suggest that the jury did not rely on its intelligence and restraint in only using the evidence for the purpose in which the trial court explicitly instructed them on. Indeed, we presume jurors follow instructions. *State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005).

Because the evidence was both relevant and not substantially more prejudicial than probative, we affirm the district court's decision to admit it.

Affirmed.