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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1490**

State of Minnesota,
Respondent,

vs.

Joseph Michael Passon,
Appellant.

**Filed August 13, 2018
Affirmed
Stauber, Judge***

Sherburne County District Court
File No. 71-CR-17-256

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

Kathleen A. Heaney, Sherburne County Attorney, George R. Kennedy, Assistant County Attorney, Elk River, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Stauber, Judge.

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

UNPUBLISHED OPINION

STAUBER, Judge

On appeal from final judgment of his conviction and sentence for third-degree assault against his then-girlfriend, appellant argues that the district court committed reversible error by admitting overly prejudicial evidence of prior bad acts as relationship evidence and failing to provide the jury with a limiting instruction on the proper use of relationship evidence prior to the testimony. We affirm.

FACTS

At approximately 1:00 a.m. on February 26, 2017, appellant Joseph Michael Passon felt sick after a night of drinking. His on-again and off-again girlfriend, A.P., offered to help him, and to get him water and medication. After he declined, she asked him again if there was anything that she could do to help. Appellant got angry, punched A.P. in the face, and broke her jaw. Appellant asked A.P., “Why didn’t you just leave me alone?” She apologized and said she was just trying to help him because he was sick. Appellant punched A.P. again, this time on the other side of her face, and put her into a headlock by putting his arm around her neck. A.P. escaped and telephoned for help, but no one answered. She walked to her friend’s house, which took over 90 minutes. She went to a hospital where a doctor confirmed that she had a broken jaw and wired her jaw shut. After she filed a police report, the state charged appellant with third-degree assault with substantial bodily harm, in violation of Minn. Stat. § 609.223, subd. 1 (2016), and felony domestic assault, in violation of Minn. Stat. § 609.2242, subd. 4 (2016).

The state submitted a pretrial motion seeking to permit two of appellant’s former

girlfriends to each testify that appellant had assaulted them during their relationships, pursuant to Minn. Stat. § 634.20 (2016). The district court granted the state's motion and the case proceeded to a jury trial. The state presented testimony from A.P., her oral maxillofacial surgeon, the arresting officer, and two of appellant's former girlfriends, D.A. and K.V. Appellant testified in his own defense. After the jury found appellant guilty of both charges, the district court sentenced him to 24 months' imprisonment. This appeal follows.

D E C I S I O N

Appellant argues that the district court committed reversible error in two ways: (1) in admitting overly prejudicial relationship evidence; and (2) by failing to instruct the jury about the limited, permissible uses of relationship evidence. We disagree.

I. The district court properly admitted statutory relationship evidence.

The first issue is whether the district court erred in admitting evidence that appellant assaulted his former girlfriends. We review the district court's decision to admit relationship evidence under Minn. Stat. § 634.20 for an abuse of discretion. *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 unfairly prejudiced by the admission of the evidence. *State v. Peltier*, 874 N.W.2d 792, 802 (Minn. 2016).

Minn. Stat. § 634.20 permits the state to introduce evidence of domestic conduct by the accused against the victim of such conduct. As with all evidence, statutory relationship evidence must be relevant to be admissible. *See* Minn. R. Evid. 402. Such evidence is

admissible unless the probative value is substantially outweighed by the danger of unfair prejudice. Minn. Stat. § 634.20.

Appellant argues that the statutory relationship evidence was not relevant because it was not specific to his relationship with A.P. and was relevant only to show his propensity to assault the women he dates. “Evidence of domestic conduct by the accused against family or household members other than the victim may be admitted pursuant to Minn. Stat. § 634.20.” *State v. Fraga*, 864 N.W.2d, 615, 627 (Minn. 2015). This includes testimony provided by a defendant’s former girlfriend concerning his physical abuse of her. *State v. Valentine*, 787 N.W.2d 630, 638 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010). Such testimony is relevant to show how the defendant treats his family or household members, such as former girlfriends, and sheds light on how he interacts with those close to him, which in turn suggests how he may interact with the victim. *Id.* at 637. Because the testimony of appellant’s former girlfriends provides context and assists in making credibility determinations, the testimony of both women was relevant and probative.

Appellant also asserts that the relationship evidence testimony was unfairly prejudicial. “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.” *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted). But, as with relevance, the testimony of appellant’s former girlfriends was probative of appellant’s relationship with A.P. because it sheds light on his interactions with those close to him and

suggests how he may have interacted with A.P. that night. *See id.* Because the testimony of appellant's former girlfriends is relevant and its probative value is not substantially outweighed by its prejudice, the district court did not abuse its discretion in permitting the state to present statutory relationship evidence by appellant's former girlfriends.

II. The district court's limiting instructions were not prejudicially erroneous.

Appellant next argues that the district court prejudicially erred when it failed to sua sponte provide the jury with a limiting instruction prior to the testimony of his former girlfriends. Because appellant did not object during trial, our review is for plain error, which requires: (1) error; (2) that was plain; and (3) affected appellant's substantial rights. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). A plain error affects substantial rights when it is "prejudicial and affected the outcome of the case." *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002).

Here, as appellant argues, the district court did not provide a limiting instruction prior to the testimony of appellant's former girlfriends. However, immediately after a short recess that followed the testimony of both women, the district court cautioned the jury that the testimony was for the limited purpose of demonstrating the nature and extent of the relationship between the appellant and each former girlfriend. The district court reiterated this in its final jury instructions, and told the jury they were prohibited from convicting appellant for the conduct described in the testimony of each former girlfriend. The district court's instructions alleviated any prejudice resulting from the testimony. *See State v. Matthews*, 779 N.W.2d 543, 550 (Minn. 2010) (presumption that juries follow instructions given by the court). In addition, during its closing argument, the state provided the jury

with a lengthy cautionary instruction and did not place undue emphasis on the relationship evidence. Thus, the district court's failure to instruct the jury sua sponte prior to the testimony of appellant's former girlfriends did not affect appellant's substantial rights.

To conclude, the district court did not abuse its discretion in permitting the state to introduce statutory relationship evidence provided during the testimony of appellant's former girlfriends because the evidence is relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. In addition, the district court's failure to instruct the jury sua sponte prior to the testimony of appellant's former girlfriends did not prejudicially impact the jury's verdict or deny appellant a fair trial so as to warrant reversal.¹

Affirmed.

¹ Because appellant fails to carry his burden of showing that this prejudicially impacted his substantial rights, we decline to discuss whether this constituted an error that was plain. *Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011) (appellate courts need not address remaining prongs of plain error standard of review if any one requirement is not satisfied).