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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1190**

State of Minnesota,
Respondent,

vs.

Tory Larae Moore,
Appellant.

**Filed July 8, 2019
Affirmed
Bratvold, Judge**

Douglas County District Court
File No. 21-CR-17-1926

Keith Ellison, Attorney General, St. Paul, Minnesota, and

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Considered and decided by Ross, Presiding Judge; Larkin, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

In this direct appeal from final judgment of conviction of misdemeanor domestic assault, appellant argues that his conviction must be reversed because it is based on circumstantial evidence for which there is a rational alternative hypothesis that he intended to discipline and correct his child. Alternatively, appellant argues that the district court committed reversible error when it admitted evidence of his “strangle” neck tattoo and his discipline methods. We conclude that sufficient evidence supports appellant’s conviction of domestic assault and that the district court’s evidentiary decisions did not affect appellant’s substantial rights. Accordingly, we affirm.

FACTS

Evidence received during trial established the following facts: Appellant Tory Larae Moore lived in Alexandria with his two daughters, T.M. (age 14) and M.L. (age 12). When she was ten years old, T.M. moved to Alexandria to live with Moore; she had previously lived with her mother in Starbuck. T.M. testified that she did not have a “strong relationship” with her father. M.L. began living with Moore when she was about three, and, at the time of the trial, had lived with Moore for approximately nine years. M.L. testified that she and Moore were “close” until T.M. moved in, when Moore “expected [her] to start acting like an adult.” M.L. has a history of mental-health issues including depression, anxiety, suicidal thoughts, and self-harm including cutting.

On September 19, 2017, Moore and T.M. went shopping. While driving to the store, T.M. told Moore that, in 2016, she had confronted M.L. when M.L. took a knife from the

kitchen to the bathroom (the “knife incident”). T.M. told M.L. to stop and that she knew that M.L. was “going to go into that bathroom [to] cut.” M.L. held the knife up to T.M. and responded that if T.M. did not “move out of my way, then I’ll stab you.” T.M. eventually “wrestled the knife away from” M.L. and put it back in the kitchen.

After T.M. told Moore about the knife incident, he was “furious” and went home to speak with M.L. When they arrived home, Moore yelled at M.L. to come out of her bedroom and asked her if she had threatened T.M. with a knife. M.L. stood in her bedroom and “kept saying, no, and that [she] didn’t know what he was talking about.” T.M. testified that M.L. was “confused” and “terrified,” and that Moore was “[a]ngry, aggressive, [and] threatening.” Moore then grabbed M.L., using his right hand on the “front of her neck,” pulled her out of her bedroom, and pushed her into the dining room. M.L. testified that Moore touched the skin of her neck, with a “rough” grip, and she felt “[s]cared.” Moore told M.L. to “[g]o stand on the wall,” which is the “time out position.”

Moore then called his mother, V.M., so that one of the girls could stay with her, because he did not feel comfortable leaving them at home together while he went to work. M.L. stayed with V.M., and after a few days, she returned to Moore’s home.

On October 2, 2017, T.M. and M.L. decided to run away. M.L. feared she would get in trouble for running away, so she returned to Moore’s home; T.M. packed a bag and went to a friend’s house after school. Moore called the police and reported that T.M. had not come home from school. Responding police officers, including Officer Draz, found T.M. at her friend’s house; T.M. said that she was afraid to go home because her “sister had gotten choked by her dad.”

Draz investigated the September 19 incident and took statements from M.L. and Moore. Moore stated that after T.M. told him about the knife incident, he was angry with M.L, and “went to go yell at her.” Moore stated that he grabbed M.L. “by the sweatshirt collar to be able to yell at her face-to-face.” When asked if he “had choked her at any point,” Moore replied that he had not, but “it might have looked like it.” M.L. admitted that she had threatened T.M. with a knife “because [she] was mad, not because [she] was actually going to do it.” M.L. also said that, on September 19, Moore “put his hands around her neck briefly, and then in turn grabbed her by the sweatshirt.” M.L. added that Moore had recently “twisted her arm,” that Moore was “really strict . . . [like] a drill instructor,” and that she did not want to live with him. Draz referred the case to social services and the investigative unit. T.M. and M.L. remained in Moore’s home on October 2.

The next day, Detective Halverson and a social worker from Douglas County Social Services were assigned to investigate. Halverson and the social worker interviewed M.L. at school; M.L. described her history of “cutting herself” and the September 19 incident. M.L. demonstrated how Moore choked her by “using her hand,” and showed “squeezing with the hand and fingers in front of the neck.” The next day, Halverson and the social worker interviewed T.M. at school and she provided similar information. T.M. also stated that “things were terrible at home” and she “was afraid of her father.” T.M. described Moore’s “disciplinary measures,” which included “standing against a wall for hours,” “cleaning the house to the point of exhaustion,” and “not receiving meals on a regular basis.” T.M. and M.L. were placed on an emergency hold, removed from the home, and placed in foster care.

The state charged Moore with two counts stemming from the September 19 incident: (1) misdemeanor domestic assault (fear) under Minn. Stat. § 609.2242, subd. 1(1) (2016), and (2) misdemeanor domestic assault (harm) under Minn. Stat. § 609.2242, subd. 1(2) (2016).

The state filed motions in limine, arguing that the district court should allow the admission of “domestic conduct evidence” under Minn. Stat. § 634.20 (2018). Moore objected. After hearing the parties’ arguments, the district court granted the state’s motions to admit: (1) testimony that in December 1995, Moore assaulted J.T., his ex-girlfriend (the 1995 incident), (2) testimony that in January 1996, Moore attempted to strangle J.T. (the 1996 incident), and (3) testimony that Moore had recently twisted M.L.’s arm, causing her pain (the arm incident). The district court also granted the state’s request, over Moore’s objection, to receive evidence of his neck tattoo, which said “strangle.” Finally, the district court denied the state’s request to admit “other alleged incidents” of domestic abuse that “become known to the [s]tate” before trial.

During the jury trial, T.M., M.L., Halverson, and Draz testified to the facts described above. After the state rested, Moore moved for judgment of acquittal, arguing that the state had failed to meet its burden of proof beyond a reasonable doubt. The district court denied Moore’s motion, citing M.L.’s testimony “that she was fearful of her father” and that Moore had inflicted “bodily harm” on M.L., and therefore, there was a “sufficient record for the jury to make a decision” on the charges.

In his defense, Moore called V.M. to testify that when she picked up M.L. from Moore’s home on September 19, Moore was “upset, but he was really holding it together

well.” V.M. testified that M.L. never told her that Moore harmed her in any way on September 19. Moore also testified and denied that he grabbed M.L. “by the throat.” Moore testified that, when he tried to talk to M.L. about the knife incident, M.L. would not leave her bedroom, so he “tried to grab her by her shirt with two fingers, and lead her out into the dining room.” Moore testified that his voice was raised when he spoke with M.L. Moore admitted that he would make his ex-girlfriend J.T. “stand in the corner” when they fought, similar to the timeout position he used with T.M. and M.L. Moore also testified that he understood that J.T. felt afraid when he made her stand in the corner.

The jury found Moore guilty of count I, domestic assault (fear), and not guilty of count II, domestic assault (harm). At sentencing, the district court placed Moore on one year of supervised probation, and imposed a 90-day jail sentence, “suspending seventy-five days on the conditions” provided. Moore appeals.

D E C I S I O N

I. Sufficient evidence supports Moore’s conviction of domestic assault (fear).

Moore argues that the district court erred when it denied his motion for judgment of acquittal made at the close of the state’s case-in-chief. Specifically, Moore contends that “a reasonable alternative hypothesis exists that Moore intended to discipline and correct his child, and therefore the circumstantial evidence on the intent element was insufficient to convict.”

This court’s review of a sufficiency-of-the-evidence challenge is limited to “a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient

to allow the jury to reach its verdict.” *Lapenotiere v. State*, 916 N.W.2d 351, 360-61 (Minn. 2018) (quotation omitted). The appellate court must assume that the trier of fact “believed the state’s witnesses and disbelieved any contradictory evidence.” *State v. Webster*, 894 N.W.2d 782, 785 (Minn. 2017).

Moore argues that the state failed to prove that he had the intent necessary to convict him of domestic assault (fear), which is that the defendant acted “*with intent to cause fear in another of immediate bodily harm.*” Minn. Stat. § 609.2242, subd. 1(1) (emphasis added). “With intent to . . . means that the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result.” Minn. Stat. § 609.02, subd. 9(4) (2016) (quotations omitted); *see also* 10 *Minnesota Practice*, CRIMJIG 13.44-.46 (2015). The state must prove intent beyond a reasonable doubt. *See State v. Merrill*, 428 N.W.2d 361, 366 (Minn. 1998) (due process clauses of the United States and Minnesota Constitutions require the state to prove “each element of the crime charged beyond a reasonable doubt”).

We agree with Moore that the two-step circumstantial-evidence test applies in this case because the state did not present direct evidence of Moore’s intent. *See State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997) (stating that intent is generally established by circumstantial evidence). Under the circumstantial-evidence test, this court first identifies the circumstances proved by deferring to the fact-finder’s “acceptance of the proof of the circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State.” *State v. Washington-Davis*, 881 N.W.2d 531, 543 (Minn. 2016) (quotations omitted). After identifying the circumstances proved, this court “independently

examine[s] the reasonableness of all inferences that might be drawn from the circumstances proved” to determine “whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.*

First, we identify the circumstances proved by the state in its case against Moore. As a preliminary matter, Moore suggests that this court should only consider the evidence offered during the state’s case in chief because the district court denied his motion for judgment of acquittal. We disagree. The supreme court has held “that where a defendant chooses to introduce evidence after his motion for judgment of acquittal has been denied, [this court] consider[s] the ‘whole record’ and not just the evidence produced by the State.” *State v. Tscheu*, 758 N.W.2d 849, 857 n.7 (Minn. 2008). In examining whether the evidence was sufficient to support Moore’s conviction, this court will consider the entire record. *See id.*

The following circumstances were proved at trial: On September 19, T.M. told Moore that, in 2016, she had confronted M.L. when M.L. took a knife from the kitchen to cut herself, and that M.L. had threatened T.M. with a knife and said that if T.M. did not “move out of my way, then I’ll stab you.” Moore was “furious” and yelled at M.L. to come out of her bedroom and explain what had happened. Moore’s demeanor toward M.L. was “[a]ngry, aggressive, [and] threatening.” M.L. stood in her bedroom, was “confused” and “terrified,” and attempted to answer Moore’s questions. Moore grabbed M.L., using his right hand on the “front of her neck,” pulled her out of her bedroom, and pushed her into the dining room. Moore touched the skin of M.L.’s neck, with a “rough” grip, and this

made M.L. feel “[s]cared.” Moore then told M.L. to “[g]o stand on the wall,” in the “time out position.”

Under the second step, we consider “whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Washington-Davis*, 881 N.W.2d at 543. Moore does not dispute that the circumstances proved are consistent with guilt. Rather, Moore argues that a rational hypothesis inconsistent with guilt exists, which is that, after “learning M.L. threatened her sister’s life with a knife, Moore grabbed M.L. with the intent of moving her to the dining room to speak with her about the knife incident, and to discipline her and correct her behavior.” Moore contends that the law allows a parent to use “physical force to discipline a child,” and cites statutes providing that a parent may use “reasonable force” with their own child when such force is used “to restrain or correct such child,” *see* Minn. Stat. § 609.06, subd. 1(6) (2016), and that a parent has “a reasonable-force defense for malicious-punishment-of-a-child charge,” *see* Minn. Stat. § 609.379, subd. 1 (2016).

The state contends that the affirmative defense of “reasonable force to restrain or correct a child is not available” for domestic assault, therefore, Moore’s “proposed rational hypothesis other than guilt” is “not available to him as a matter of law.” It is true that section 609.379, subdivision 2, provides a reasonable-force defense for certain enumerated offenses, and does not mention section 609.2242, domestic assault (fear). *See* Minn. Stat. § 609.379, subd. 2. But the state has the burden to prove Moore’s intent beyond a reasonable doubt; therefore, we consider Moore’s argument. *See* Minn. Stat. § 609.2242, subd. 1(1); *Merrill*, 428 N.W.2d at 366.

We reject Moore's alternative hypothesis for two reasons. First, no evidence establishes that Moore intended to correct M.L. Moore did not testify that he intended to discipline M.L. when he grabbed her neck. Instead, at trial, Moore denied that he grabbed M.L.'s neck, and testified that he only touched her clothing with two fingers to force her to go into the living room. No evidence establishes that Moore had to grab M.L.'s neck to "restrain or correct" her.

Second, Moore's alternative hypothesis is inconsistent with the circumstances proved. Grabbing M.L. by the neck is inconsistent with Moore's previous discipline methods, as established during trial. Moore disciplined the children by requiring that they "stand[] against a wall," "clean[] the house to the point of exhaustion," and that Moore made them miss meals. Because Moore's alternative hypothesis is without support in the record and inconsistent with the circumstances proved, we reject it.

Viewing the evidence in the light most favorable to the jury's verdict, we conclude that there is sufficient circumstantial evidence to prove Moore's intent to commit domestic assault (fear).

II. The district court erred by admitting evidence of Moore's neck tattoo, but the error was harmless.

During T.M.'s testimony, the state introduced exhibit one, a picture of Moore's face and neck, including his tattoo, and T.M. described Moore's "strangle" neck tattoo. Moore argues that evidence of his neck tattoo should have been excluded because it had no relevance to the charged offenses and "risked the jury concluding that Moore had a propensity to assault people" by strangling them. The state argues that the evidence

regarding Moore's tattoo was admissible because it was an identifying mark, and because it was probative of M.L.'s fear.

We review a district court's evidentiary rulings for abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). An appellant has the burden of showing an abuse of discretion and that the appellant was prejudiced as a result. *Id.* A district court abuses its discretion "when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *State v. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017).

"The threshold test for the admissibility of evidence is the test of relevancy." Minn. R. Evid. 401 1977 comm. cmt. Generally, evidence is relevant if it has "any tendency to make the existence of any [material] fact . . . more probable or less probable." Minn. R. Evid. 401. In addition to arguing that his neck tattoo is not relevant, Moore also argues that the tattoo should have been excluded because "its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403.

We agree with Moore that the tattoo evidence should have been excluded. The district court reasoned that the tattoo evidence was admissible to prove the "alleged fear by the victim." Relevant caselaw provides, however, that the "intent of the actor, as contrasted with the effect upon the victim," is the "focal point for inquiry" in domestic assault. *In re Welfare of T.N.Y.*, 632 N.W.2d 765, 769 (Minn. App. 2001). "The crime is in the act done with intent to cause fear, not in whether the intended result is achieved." *Id.* Because the tattoo only tended to prove that M.L. was afraid of Moore, and her fear, independent of any action by Moore, is not relevant, the tattoo evidence is not relevant.

Even assuming that M.L.’s fear is relevant, her fear is established by her own testimony about Moore’s conduct. In fact, M.L. did not testify that she was afraid of Moore because of his tattoo. M.L. did not mention the tattoo in her testimony about the September 19 incident. In addition, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *See* Minn. R. Evid. 403. Here, the “strangle” tattoo conveyed the “nearly inescapable message” that Moore “celebrates assaulting others and has done so in the past.” *See State v. Smith*, 749 N.W.2d 88, 96 (Minn. App. 2008) (concluding that the district court abused its discretion in admitting a photo of a defendant in the presence of firearms).¹ Accordingly, the danger of unfair prejudice from the tattoo evidence outweighed its nominal probative value. Thus, we conclude that the district court abused its discretion in admitting the tattoo evidence.

Still, we must determine whether the erroneous admission of the tattoo evidence warrants reversal. An appellant has the burden of showing that he was prejudiced by the erroneous admission of evidence. *Amos*, 658 N.W.2d at 203. An error is sufficiently prejudicial to justify a new trial “when the error substantially influences the jury’s decision.” *State v. DeShay*, 669 N.W.2d 878, 888 (Minn. 2003). In this case, the tattoo evidence was only briefly mentioned during T.M.’s testimony, and was not mentioned by either party in closing arguments. In addition, the state’s case relied primarily on the

¹ In *State v. Swinger*, this court concluded that it was not an abuse of discretion to admit testimony about appellant’s swastika tattoo. 800 N.W.2d 833, 838-40 (Minn. App. 2011), *review denied* (Minn. Sept. 28, 2011). But *Swinger* determined that the testimony about the swastika tattoo was “relevant because it helped explain the initial confrontation between appellant and [the victim] and provided context for the whole event.” *Id.* at 839. Here, the strangle tattoo was not linked to the September 19 incident.

testimony of T.M. and M.L. about the September 19 incident, and not on the tattoo evidence. But Moore complains that the photographs depicting his tattoo were booking photos that may have led jurors to infer he had a prior criminal record. The photographs, however, were altered before they were presented to the jury, and the jury was “not informed of the arrest connection”; therefore, Moore was not prejudiced. *See State v. Sutherlin*, 393 N.W.2d 394, 397 (Minn. App. 1986), *review denied* (Minn. Nov. 17, 1986).

Because the tattoo evidence did not substantially influence the jury’s decision, we conclude that the alleged error does not warrant reversal.

III. The district court did not err in admitting evidence of Moore’s discipline methods.

T.M. and M.L. testified about how Moore disciplined them, stating that Moore made them “get on the wall,” which meant “[s]tand facing the wall . . . no talking, no sitting,” clean the house to “the point of exhaustion,” and that Moore made them miss meals. M.L. also testified about the arm incident, where another child told Moore that M.L. had twisted the other child’s arm. Moore then “twisted [M.L.’s] arm” and asked her if she liked it when someone did this to her. Moore denied that he had twisted M.L.’s arm, and testified that the trial was “the first time [he had] heard” of this allegation.

Moore argues that evidence of his “parenting style” should not have been admitted because this evidence “had little probative value and the state used the evidence to impermissibly persuade the jury that Moore should be convicted because he was a bad person, a bad parent, and a person worthy of punishment.” The state asserts that the district court’s evidentiary rulings were not an abuse of its discretion.

Moore concedes that he did not object to the admission of “[m]ost of this evidence,” at trial, and therefore, acknowledges that this court will apply the plain-error standard of review. The state argues that Moore waived appellate review of these issues, because he failed to object as a matter of “defensive strategy.” But our precedent provides that, “even in the absence of objection by counsel,” appellate courts may take note of “plain errors affecting substantial rights.” *State v. Richardson*, 514 N.W.2d 573, 579 (Minn. App. 1994); Minn. R. Crim. P. 31.02 (providing that plain error “can be considered” for the first time on appeal if the error affects the appellant’s substantial rights). Thus, we consider this issue under the plain-error standard of review.

“Under this test, the challenging party must show: 1) error, 2) that is plain, and 3) that affects substantial rights.” *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). A district court error is plain “when it contravenes a rule, case law, or a standard of conduct, or when it disregards well-established and longstanding legal principles.” *State v. Brown*, 792 N.W.2d 815, 823 (Minn. 2011) (quotations omitted). A defendant’s substantial rights are affected when “there is a reasonable likelihood that the error substantially affected the verdict.” *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002). If the first three prongs are met, this court “may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (quotation omitted).

A district court may admit evidence of “domestic conduct” by a defendant unless the probative value of the evidence is “substantially outweighed by the danger of unfair prejudice” to the defendant, “or by considerations of undue delay, waste of time, or

needless presentation of cumulative evidence.” Minn. Stat. § 634.20. Such evidence may be offered to “illuminate” the history of the relationship between a defendant and an alleged victim and provide context for the alleged incident. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004). Relationship evidence may assist the jury “by providing a context with which it [can] better judge the credibility of the principals in the relationship.” *Id.*

We conclude that the district court did not plainly err in admitting the challenged evidence. The evidence of Moore’s discipline methods had probative value because it demonstrated the history of the relationship between Moore and his children. *See id.* In particular, the discipline evidence is directly related to Moore’s conduct with M.L., and whether he intended to cause fear in M.L. on September 19. In fact, Moore’s brief to this court acknowledges when arguing his sufficiency-of-the-evidence claim that his discipline techniques are relevant to “his actions on September 19.” Additionally, when Moore was asked about J.T.’s testimony and whether he did anything “to make her afraid,” he stated, “Oh, I think I may—used to make her stand in a corner or something.” Thus, the challenged discipline evidence was relevant to whether Moore intended to cause M.L.’s fear, and the district court did not plainly err by admitting this evidence.

In addition, we disagree with Moore that the discipline evidence was “cumulative” of the other relationship evidence admitted during trial. Specifically, J.T., Moore’s ex-girlfriend, testified about the 1995 and 1996 incidents. J.T. testified that, in 1995, Moore grabbed her by her neck to stop her from leaving the house. J.T. also testified that after the 1995 incident she ended the relationship. And J.T. testified that, in 1996, Moore came to her home in the middle of the night, but she refused to talk to him. Later that night,

J.T. woke up “feeling something on [her] neck” and Moore was sitting on the edge of the couch where she slept. Moore denied the 1995 and 1996 incidents. Notably, Moore does not argue on appeal that admission of these three prior incidents was reversible error.

We are not persuaded that the discipline evidence is cumulative of the other relationship evidence. Of the three prior incidents proven at trial, only one involved Moore and M.L., where M.L. testified that Moore twisted her arm. We also reject Moore’s argument that the “sea” of relationship evidence “distracted the jury from its fact-finding mission.” The jury acquitted Moore of domestic assault (harm), which supports the state’s argument that the jury properly considered the relationship evidence to evaluate witness credibility and to give context to the relationship between Moore and M.L.²

In sum, the district court did not plainly err in admitting the relationship evidence, and we affirm.

Affirmed.

² Moore briefly states that the district court did not sua sponte caution the jury as to the proper use of such relationship evidence. Moore did not object to the admission of this evidence at trial, therefore, the absence of a cautionary instruction is not reversible error. *See State v. Zinski*, 927 N.W.2d 272, 278 (Minn. 2019) (“[W]hen a district court admits relationship evidence under Minn. Stat. § 634.20, *over a defendant’s objection that the evidence does not satisfy section 634.20*, the court must sua sponte instruct the jurors on the proper use of such evidence, unless the defendant objects to the instruction by the court.”) (emphasis added). Because Moore did not object to the relationship evidence, the district court was not required to give the cautionary instruction.