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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0486**

Jose Angel Trevino, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed October 21, 2019
Affirmed
Kirk, Judge***

Pennington County District Court
File No. 57-CR-16-66

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

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

Seamus Duffy, Pennington County Attorney, Thief River Falls, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Worke, Judge; and Kirk,
Judge.

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

UNPUBLISHED OPINION

KIRK, Judge

Appellant challenges the denial of his petition for postconviction relief, arguing that the evidence was insufficient to sustain his conviction of felony domestic assault, that the district court abused its discretion by admitting relationship evidence, that the district court plainly erred by admitting hearsay evidence, and that he did not validly waive his right to testify. We affirm.

FACTS

On January 20, 2016, appellant Jose Angel Trevino and his wife, M.B., were involved in an argument that lasted the entire day. Trevino called M.B. on the telephone while she was at work approximately 15-20 times to yell at and insult her. After M.B. finished work, she and Trevino went to a bar to discuss their marriage. After Trevino said “very hurtful things,” M.B. left and called her parents to give her a ride home. Her stepfather picked her up and drove her back to the apartment that she shared with Trevino.

Trevino and M.B. arrived at their apartment at approximately the same time. Once inside, they continued to argue and yell at one another. Trevino then pushed M.B. down and slapped her once across the face near her right eye. M.B. ran to her neighbor’s apartment and called the police to report the assault. An officer from the Thief River Falls Police Department responded to the call. M.B. was “very emotional and crying,” and the officer observed a red mark under her eye where she had been slapped. The officer took photographs of the mark.

Respondent State of Minnesota charged Trevino with one count of felony domestic assault. After the charge was filed, M.B. contacted the officer multiple times and asked him to drop the charge because the incident was a misunderstanding and the assault had not occurred. She also emailed the prosecutor and stated that she wished to have the charge dropped because she had been intoxicated on the night of the incident and had made it up. The state did not drop the charge and the case proceeded to trial.

On October 26, 2016, the district court held a jury trial. At trial, M.B. acknowledged that she had contacted the officer and the prosecutor to request that the charge be dropped, but testified that the incident had in fact occurred, and that she subsequently attempted to get the charge dropped out of fear. Over Trevino's objection, the district court ruled that relationship evidence could be admitted pursuant to Minn. Stat. § 634.20 (2014). The relationship evidence included testimony from M.B. that approximately two weeks before the charged incident, Trevino had threatened her with a knife and choked her. M.B. also testified that Trevino had threatened to harm her parents and destroy their property. M.B. stated that that incident and her fear that Trevino would harm her were part of the reason that she had requested that the charge be dropped and told the officer and the prosecutor that the charged offense had not occurred. After the state rested, Trevino waived his right to testify.

The jury found Trevino guilty. The district court sentenced Trevino to 30 months in prison. Trevino did not file a direct appeal. On October 4, 2018, Trevino filed a petition for postconviction relief. He argued that his conviction should be reversed because the evidence was insufficient to sustain his conviction, or in the alternative, that he was entitled

to a new trial because the district court abused its discretion by admitting the relationship evidence, committed plain error by admitting inadmissible hearsay, and that he did not validly waive his right to testify. On January 30, 2019, the district court denied the petition. This appeal follows.

D E C I S I O N

We review the denial of a petition for postconviction relief for an abuse of discretion. *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012). An abuse of discretion occurs when a postconviction court’s decision “is based on an erroneous view of the law or is against logic and the facts in the record.” *Id.* (quotation omitted). We review legal issues de novo, but our review of factual issues is limited to whether there is sufficient evidence in the record to sustain the postconviction court’s findings. *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015).

Sufficiency of the Evidence

Trevino challenges the sufficiency of the evidence underlying his conviction for felony domestic assault. Upon review of a claim of insufficient evidence, we review the record to determine “whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach their verdict.” *State v. Olhausen*, 681 N.W.2d 21, 25 (Minn. 2004). We also

assume that the jury believed the state’s witnesses and disbelieved any evidence to the contrary. We will not disturb the verdict if the jury, while acting with proper regard for the presumption of innocence and regard for the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.

Id. at 25-26 (citations omitted).

To establish that Trevino committed felony domestic assault, the state was required to prove that Trevino intentionally inflicted bodily harm upon M.B. and that he had two or more previous qualified domestic violence-related offense convictions. Minn. Stat. § 609.2242, subd. 4 (2014). Trevino argues that the evidence was insufficient to establish that M.B. suffered bodily harm. “Bodily harm” is defined as “physical pain or injury, illness, or any impairment of physical condition.” Minn. Stat. § 609.02, subd. 7 (2014). The threshold for what constitutes bodily harm under Minn. Stat. § 609.02, subd. 7 is “minimal,” but “nonetheless requires proof of pain or discomfort.” *State v. Struzyk*, 869 N.W.2d 280, 289 (Minn. 2015). Evidence of a bruise or pain from being struck is sufficient to establish that an individual suffered bodily harm. *State v. Mattson*, 376 N.W.2d 413, 414-15 (Minn. 1985); *State v. Johnson*, 152 N.W.2d 768, 773 (Minn. 1967).

Here, M.B. testified that Trevino pushed her down and slapped her across the face near her right eye. She then ran to her neighbor’s apartment and called 911 to report that Trevino had assaulted her. When the officer arrived, M.B. was “very emotional and crying,” and he observed a red mark where she had been slapped. Photographs of the red mark were shown to the jury and admitted as evidence. On this record, the jury could reasonably conclude that M.B. suffered bodily harm. M.B. was struck across the face, suffered a visible mark as a result, and the mark was still present after M.B. was interviewed by the officer and transported to the law enforcement center to be photographed. M.B. was extremely emotional and described the physical altercation as an assault. Given the “minimal” threshold required to establish bodily harm—pain or

discomfort—we determine that the evidence was sufficient for the jury to reasonably conclude that M.B. suffered bodily harm.

Relationship Evidence

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 is offered to illuminate the relationship between an accused and an alleged victim and provide context for the charged incident. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004). We review a district court’s admission of relationship evidence for an abuse of discretion. *State v. Lindsey*, 755 N.W.2d 752, 755 (Minn. App. 2008), *review denied* (Minn. Oct. 29, 2008). An appellant must show that the district court abused its discretion and that he was prejudiced as a result to be entitled to relief. *Id.*

Trevino argues that the district court abused its discretion by admitting relationship evidence. The district court permitted M.B. to testify about a prior instance in which Trevino threatened her with a knife, choked her, and threatened to kill her. The district court admitted the evidence after determining that it would assist the jury and provide context for the relationship between Trevino and M.B. Trevino argues that the evidence should not have been admitted because the earlier incident was more serious than the charged incident and did not assist the jury in determining whether he committed the charged offense. He contends that the “only relevant incident was the charged incident which involved appellant and his wife drinking alcohol followed by appellant pushing his

wife down and slapping her with an open-hand.” We disagree. Evidence of domestic conduct by a defendant against the same victim is inherently relevant, and using it to contextualize the relationship between the defendant and victim is a permissible use of such evidence. *State v. Williams*, 593 N.W.2d 227, 236 (Minn. 1999).

Moreover, the relationship evidence had probative value because it was relevant as to why M.B. attempted to have the charge dropped prior to trial. During closing argument, defense counsel focused on the fact that M.B. repeatedly requested to have the charge dropped. Trevino’s theory of defense was that M.B. had in fact been lying about the incident, and that her going back and forth between saying the incident had occurred and had not occurred suggested that it had not. But at trial, M.B. explained that she attempted to have the charge dropped because she was afraid that Trevino would harm her based on the previous incident and prior threats. Accordingly, the relationship evidence had significant probative value as to whether Trevino committed the charged offense because it explains why M.B. attempted to recant her initial allegation, a fact that Trevino focused heavily on during trial.

Finally, we note that the district court provided the jury with a cautionary instruction both at the time the relationship evidence was admitted and during final jury instructions. These cautionary instructions “lessened the probability of undue weight being given by the jury to the evidence.” *Lindsey*, 755 N.W.2d at 757 (quotation omitted). On this record, the district court did not abuse its discretion by admitting the relationship evidence.

Hearsay

Trevino argues that the district court erred by admitting inadmissible hearsay. Specifically, he challenges the following question by the prosecutor and answer by M.B.:

Q: Who else did Mr. Trevino threaten?

A: He threatened to hurt my family. He threatened to go over to my parents' house and bash out my mom's truck windows and their apartment windows.

Because Trevino did not object to the statement at trial, the plain error standard of review controls.

The United States Supreme Court has established a three-prong test for plain error, requiring that before an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights. If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.

State v. Griller, 583 N.W.2d 736, 740 (Minn. 1998) (footnote omitted).

Trevino argues that the district court committed plain error by permitting this testimony because it constitutes inadmissible hearsay. We disagree. M.B. testified regarding threats made by Trevino, and statements made by Trevino are not hearsay and are admissible as party admissions under Minn. R. Evid. 801(d)(2). Trevino argues that there is a possibility that M.B. is repeating a statement that her parents made regarding threats made by Trevino, and therefore the testimony may be hearsay. But because it is not clear from the testimony that that is what occurred, and Trevino did not object at trial or ask to clarify the source of the statement, we cannot conclude that the district court committed plain error.

Trevino next argues that M.B.’s testimony about threats he made against her family constitutes impermissible *Spreigl* evidence and the district court committed plain error by permitting the testimony. See *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965). The postconviction court rejected this argument, reasoning that the evidence was not admitted as *Spreigl* evidence, but rather as relationship evidence to help put the relationship between M.B. and Trevino in context. M.B. made the statement when being questioned about her relationship with Trevino and threats he had made in the past. As the postconviction court noted, the overall purpose of the evidence of threats Trevino made against M.B. and her family was presented to explain to the jury why M.B. initially attempted to recant her allegation and have the charge dropped. And as noted above, the district court gave a cautionary instruction about the proper use of relationship evidence both when the evidence was admitted and during final instructions. On this record, the district court did not commit plain error by permitting the testimony.

Waiver of Right to Testify

A defendant’s right to testify in his own defense is “protected by the Due Process clause of the United States Constitution and Minnesota law.” *Andersen v. State*, 830 N.W.2d 1, 11 (Minn. 2013). The right to testify is personal and may be waived only by the defendant. *State v. Rosillo*, 281 N.W.2d 877, 878 (Minn. 1979). The waiver must be made voluntarily and knowingly. *State v. Walen*, 563 N.W.2d 742, 751 (Minn. 1997). The defendant has the burden of proving that his waiver was not voluntary and knowing. *Andersen*, 830 N.W.2d at 11.

Prior to trial, the state provided notice that if Trevino chose to testify it would seek to impeach Trevino with his prior convictions. The district court heard arguments on the motion before trial but reserved its ruling until after the state rested its case in chief. After the state rested, the district court asked Trevino if he had made a decision as to whether he would testify, and he indicated that he wished to waive his right to testify. During the waiver, the district court asked Trevino if he understood that, should he choose to testify, the prosecutor “may be entitled to ask you about any prior convictions and thereby disclose them to the jury.” After further inquiring about whether Trevino understood his right to testify and whether he had been influenced or pressured into waiving that right, the district court determined that the waiver was voluntary, intelligent, and intentional.

Trevino argues that he did not validly waive his right to testify because the district court did not rule on whether he could be impeached with his prior convictions if he chose to testify. He argues that because the district court did not rule on the state’s motion to impeach Trevino with his prior convictions before Trevino waived his right to testify, the advisory was “incomplete and misleading,” and therefore the waiver was not valid. But Trevino did not request that the district court rule on the impeachment motion before informing the district court that he had decided to waive his right to testify, or indicate in any way that his decision was dependent on the district court’s ruling on the issue. Trevino was aware that the district court reserved its ruling on the issue and did not request that the district court do so before waiving his right to testify.

Finally, the record belies Trevino’s assertion that the district court’s advisory was “incomplete and misleading.” To the contrary, the district court made a thorough inquiry

to ensure that Trevino understood his right to testify and that he was waiving it free of undue pressure or influence. The district court asked Trevino whether he understood that he was presumed innocent, that he had the right, but not obligation, to testify, that only he could make the decision whether he should testify, that the prosecutor could not comment on his decision whether or not to testify, and that he may be impeached should he choose to testify. The district court then inquired if Trevino had a clear head, was making the decision free of duress, and whether he had taken any medication or substances that would affect his decision making ability. Accordingly, the district court provided a thorough and accurate advisory regarding Trevino's decision regarding the waiver of his right to testify. On this record, Trevino has not met his burden of establishing that his waiver was not knowing and voluntary. We therefore affirm the district court's denial of his petition for postconviction relief.

Affirmed.