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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0450**

State of Minnesota,
Respondent,

vs.

Daniel Martinez Damian,
Appellant.

**Filed March 1, 2021
Affirmed
Ross, Judge**

Meeker County District Court
File No. 47-CR-18-11

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota, and

Brandi Schiefelbein, Meeker County Attorney, Litchfield Minnesota (for respondent)

Christian I. Duruji, Anderson Larson Saunders Klaassen Dahlager & Leitch, P.L.L.P., Willmar, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Ross, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

ROSS, Judge

A jury found Daniel Damian guilty of inflicting great bodily harm on his five-month-old son after the evidence established that the injuries occurred while Damian was home alone with his two infant children and medical evidence showed that the injuries resulted from nonaccidental, abusive physical trauma. Damian appeals from his conviction,

arguing that the district court improperly admitted irrelevant evidence of his alcohol consumption and prior domestic abuse and that the evidence is insufficient to convict him. Because the district court acted within its discretion by admitting the challenged evidence and a reasonable jury could interpret the evidence to find Damian guilty beyond a reasonable doubt, we affirm.

FACTS

Daniel Damian took his five-month-old son to the emergency room in November 2017. We will call the child “Boy” to maintain his privacy in this opinion. Doctors discovered that Boy’s brain was bleeding and performed emergency neurosurgery, temporarily removing his skull to stem his bleeding and relieve pressure on his brain. Boy had a subdural hematoma (a brain bleed), a cerebral edema (brain swelling), and a right-side retinal hemorrhage (bleeding in his right eye). The child remained hospitalized seven weeks after surgery and is significantly developmentally delayed.

Boy lived with Damian, Boy’s mother, and Boy’s two older siblings. The morning Damian took Boy to the hospital, Boy’s mother left for work with her five-year-old son while Damian stayed home with Boy and his nearly two-year-old sibling. According to Damian’s statement to police, Boy became fussy, prompting Damian to place him on the living-room floor so he could roll around. Boy started to cry and became “hysterical,” Damian said, so Damian went to the kitchen to prepare food for him. Damian said that he returned and saw Boy arch his back, roll his eyes up, clutch his fists to his chest, and stop breathing. Damian said that he thought Boy was having a seizure, so he shook him gently and performed CPR. This, he says, caused Boy to begin breathing again.

Doctors reported the incident to police. The state charged Damian with assault causing great bodily harm on Boy. *See* Minn. Stat. § 609.221, subd. 1 (2016).

Before trial, the prosecutor indicated that the state intended to offer evidence of a 2013 domestic-abuse incident in which Damian beat his former girlfriend. Damian objected, arguing that the former assault was too dissimilar from the alleged assault on Boy. The district court allowed the evidence of the incident, reasoning that it “illuminate[s] the history of the relationship between the parties in this case to establish how [Damian] treats his family members.” The district court explained that the incident “has strength to establish relevancy on who harmed the injured child in this case in this home.” But the district court prohibited the prosecutor from introducing evidence of the resulting criminal charge, arrest, or domestic-abuse conviction.

The prosecutor also intended to offer evidence of Damian’s alcohol use. Damian had told a police investigator that he manages his stress by drinking alcohol, sometimes to the point of intoxication. He said that he had consumed two or three beers between the time he left work the day before the incident and the time of the incident. Damian moved the court to prevent the prosecutor from offering any evidence about his alcohol use, including photographs showing liquor bottles in his home. The district court denied his motion, determining that the evidence had sufficient probative value.

The trial focused heavily on medical evidence, almost all of which pointed to Damian’s guilt. Dr. Kyle Halvorson, the pediatric neurosurgeon who removed Boy’s skull to relieve brain pressure, examined computed tomography (CT) and magnetic resonance imaging (MRI) scans, and opined that Boy’s injuries resulted from nonaccidental trauma.

Dr. Halvorson also told the jury that Boy's subdural hematoma could not have been caused by a birth-related cephalohematoma (a brain bleed occupying a layer above the brain separate from a subdural hematoma), a vascular malformation (tangled and bleeding-prone blood vessels), receiving CPR, or a prior fall. He did acknowledge that birth trauma could cause subdural hematomas generally. He said that Boy's retinal hemorrhaging supports the conclusions that Boy suffered abusive trauma and that he had no vascular malformation. Dr. Halvorson also testified that a toddler could not have inflicted the necessary force to cause Boy's injuries. And when asked why he did not perform a magnetic resonance angiograph scan or a magnetic resonance venography (MRA/MRV), Dr. Halvorson stated that neither were necessary to properly treat or diagnose Boy because the MRI and CT scans were "fairly conclusive."

Dr. Sachin Patel, the pediatric neuroradiologist involved in imaging and interpreting Boy's postoperative CT and MRI scans, opined that Boy's injuries were consistent with abusive head trauma that could have been caused by an adult shaking the child, but not by a birth-induced cephalohematoma, a vascular malformation, a seizure, or a fall. Dr. Patel testified that a toddler could not have shaken Boy with enough force to cause Boy's injuries and that Boy had no vascular malformation. Dr. Patel agreed that an MRA/MRV test would have facilitated his diagnosis, but he maintained that those tests were unnecessary.

Dr. Janell Haiwick, Boy's family physician who delivered and monitored him, opined that Boy's birth-induced cephalohematoma was not concerning, "would not be a reason . . . to affect [him] neurologically," and would not have caused his subdural hematoma.

Dr. Mark Hudson, a child-abuse pediatrician, opined that abusive head trauma, like shaking or slamming, caused Boy's injuries. Dr. Hudson addressed other hypothetical causes of Boy's injuries and ruled out a birth-induced cephalohematoma, a fall, and vascular malformation. Also Dr. Hudson said that a toddler could not have shaken Boy with enough force to cause his injuries.

Dr. Mark Shuman is a forensic pathologist whose testimony countered the other medical evidence. Dr. Shuman told the jury that Boy's symptoms did not reliably indicate the cause of his head trauma and that his symptoms were more consistent with a vascular malformation. Dr. Shuman opined that the other experts could not have determined the presence of a vascular malformation without the results of an MRA/MRV test.

Damian testified also. He denied causing Boy's injuries and denied consuming any alcohol the morning of the incident. He admitted that he drank alcohol the previous night.

The jury found Damian guilty. The district court, considering the aggravating factors of Boy's vulnerable age and Damian's position of authority, among others, departed upward from the sentencing guidelines and sentenced Damian to 206 months' imprisonment.

Damian appeals.

DECISION

Damian advances two arguments challenging his conviction for first-degree assault. He argues first that we must order a new trial because the district court improperly admitted evidence about his alcohol consumption and the 2013 domestic-abuse incident. He argues

second that the state submitted insufficient evidence to support the conviction. Neither argument prevails.

I

We first address Damian's argument that the district court should not have admitted the alcohol and prior-abuse evidence. We will not reverse a conviction based on an evidentiary challenge unless the decision to admit evidence constitutes an abuse of discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45–46 (Minn. 1997). To succeed under this standard, Damian must show that the district court acted outside its discretion and that the evidence substantially influenced the jury's decision. *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009). Damian does not meet this standard as to either the alcohol or the abuse evidence.

Evidence of Alcohol Consumption

Damian bases his evidentiary argument on appeal entirely on his challenge to a factual finding that he failed to raise in the district court. When the district court denied Damian's pretrial motion *in limine* to exclude the alcohol-consumption evidence, the district court did so expressly anticipating that the police investigator would testify that Damian had informed him that he had consumed two to three beers the morning of the incident. Damian did not contest the district court's understanding, and he did not renew his objection to the evidence during trial even after the trial testimony indicated that Damian had told a police investigator that he had consumed two to three beers only in the period following his getting off work *the day* before, not *the morning* before, the incident. Damian argues on appeal that the police investigator had previously mischaracterized his

admission to drinking. But the error he has challenged on appeal is the district court's overruling of his pretrial motion *in limine*. We will not look for error on an issue not presented to or decided by the district court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). And we are in no position to review the district court's decision when the alleged error rests on evidence developed only after the decision. Having not contested the basis for the district court's decision contemporaneously or renewed his objection after the trial evidence eventually lent support for the previously overruled objection, Damian forfeited the opportunity to raise the challenge, except potentially to contend that the district court's failure to *sua sponte* revive the objection constitutes plain error. He makes no plain-error argument. We therefore address only whether the district court acted within its discretion at the time it decided the motion. We conclude that it did.

When the district court decided Damian's motion *in limine*, it was operating under the tacitly conceded fact that Damian had been drinking the morning of the incident. Based on that fact, Damian's relevancy-based challenge fails. Evidence is generally relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." Minn. R. Evid. 401. Evidence of alcohol consumption is relevant if it may have impacted a witness's ability to perceive or recall circumstances. *State v. Hawkins*, 260 N.W.2d 150, 158 (Minn. 1977). Evidence that Damian had been drinking before Boy was injured is the sort of evidence from which a jury might reasonably draw inferences about Damian's judgment, his conduct, or his credibility about the details of the incident. The district court did not abuse its discretion by overruling the motion *in limine* under the circumstances presented to the district court.

Evidence of Prior Domestic Abuse

Damian rests his relevancy challenge to the domestic-abuse evidence primarily on the notion that the prior assault is dissimilar in nature to the assault alleged here. The notion is not persuasive. The admission of prior domestic-abuse evidence does not require similarity. Instead, “[e]vidence of domestic conduct by the accused against the victim of domestic conduct, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice.” Minn. Stat. § 634.20 (2018). The previous version of the statute included the word “similar,” but the legislature removed the word in 2013, broadening the admissibility of prior domestic-abuse evidence. *See* 2013 Minn. Laws ch. 47, § 7, at 5 (amending Minn. Stat. § 634.20 (2012)). “Domestic conduct includes . . . evidence of domestic abuse,” Minnesota Statutes section 634.20, and “[f]amily or household members” include “persons involved in a significant romantic or sexual relationship,” Minnesota Statutes section 518B.01, subdivision 2(b)(7) (2016). Evidence that Damian physically assaulted his ex-girlfriend is therefore admissible unless the danger of unfair prejudice substantially outweighs its probative value.

The district court concluded that the danger of unfair prejudice from the prior-abuse evidence did not substantially outweigh its probative value. The conclusion is sound. The probative value of the evidence that Damian beat his former girlfriend is apparent on its face. Damian admitted that his out-of-control violence sent his girlfriend to the hospital, saying, “I lost control, like, I didn’t know what happened, and I just lost control.” This is consistent with the state’s trial theory, which was that Damian lost control and responded violently while he was caring for Boy, who, according to Damian, had been crying

“hysterical[ly]” for the last couple of days. We suppose that the evidence prejudiced Damian, but when we balance the probative value against any potential prejudice, we will consider only *unfair* prejudice. *See State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006). This is the sort of prejudice that “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.” *Id.* (quotation omitted). And we have held that admitting evidence of prior domestic abuse against a different household member does not unfairly prejudice a defendant if the district court limits the testimony and instructs the jury on the proper use and consideration of relationship evidence. *State v. Patzold*, 917 N.W.2d 798, 806 (Minn. App. 2018), *review denied* (Minn. Nov. 27, 2018). The district court here did both. We see no abuse of discretion in the district court’s admitting the 2013 domestic-abuse evidence.

II

Damian’s insufficient-evidence argument fails. We review *de novo* whether the state presented sufficient evidence, which is evidence that would allow the jury to find the defendant guilty beyond a reasonable doubt. *See State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016). Where, as here, a conviction rests entirely on circumstantial evidence, we apply a heightened, two-step standard of review. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). We first determine the circumstances proved, construing the evidence in the light most favorable to the verdict and assuming that the fact-finder rejected conflicting evidence. *Griffin*, 887 N.W.2d at 263–64. And then, “giving no deference to the fact-finder’s choice between reasonable inferences,” we independently determine whether

these circumstances proved are consistent with guilt and inconsistent with any reasonable alternative hypothesis. *Griffin*, 887 N.W.2d at 264. We conclude that the circumstances proved here allow for the sole reasonable conclusion that Damian inflicted great bodily harm on Boy.

To convict Damian of assault causing great bodily harm, the state had to prove that he intentionally caused “a high probability of death . . . serious permanent disfigurement, or . . . a permanent or protracted loss or impairment of the function of any bodily member or organ.” Minn. Stat. §§ 609.02, subds. 8, 10(2), .221, subd. 1 (2016). Damian contends only that there is a rational hypothesis inconsistent with guilt as to the element of cause. He maintains that the circumstances proved would allow a reasonable jury to find that Boy’s injuries resulted from a vascular malformation or other undiagnosed issues instead of nonaccidental physical trauma. The argument fails.

Damian’s argument misapplies the standard of review because it would require us to ignore the actual circumstances proved at trial. The trial evidence and verdict inform us that the jury rejected the very circumstance Damian proffers, which is that trauma did not cause Boy’s injuries. “[W]hen a jury is presented with conflicting medical testimony about the nature of injuries and their possible causes, we assume the jury believed the expert testimony that is most consistent with its verdict.” *State v. Stewart*, 923 N.W.2d 668, 674 (Minn. App. 2019), *review denied* (Minn. Apr. 16, 2019); *see also State v. Rhodes*, 657 N.W.2d 823, 841 (Minn. 2003) (acknowledging contrasting medical-expert testimony and noting that the jury “apparently disregarded” medical testimony inconsistent with the verdict). The expert witnesses all opined as to causation, with only one dissenting from the

others. The jury necessarily rejected the possibility that vascular malformation or any undiagnosed medical condition caused the injuries. The other circumstances proved include in relevant part, the following. Boy was at home with his two-year-old sibling and Damian, who was the only person present capable of causing Boy's injuries. Damian shook Boy. Damian took Boy to the emergency room. Boy had a subdural hematoma, a cerebral edema, and retinal hemorrhaging, all symptoms indicating abusive trauma. Boy's injuries were not caused by accidental trauma. They did not result from a fall or from receiving CPR. Boy had no medical history of conditions capable of causing his injuries.

These circumstances proved support the reasonable inference that Damian intentionally inflicted great bodily harm upon Boy. And they do not allow for the innocent hypothesis that Damian proposes. We hold that the evidence sufficiently supports the verdict.

Affirmed.