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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0565**

State of Minnesota,
Respondent,

vs.

Denni Allen Apfelbacher,
Appellant.

**Filed April 11, 2022
Affirmed
Segal, Chief Judge**

Chippewa County District Court
File No. 12-CR-21-67

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

Janice Nelson, Milan City Attorney, Matthew Haugen, Assistant City Attorney,
Montevideo, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Gina D. Schulz, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Segal, Chief Judge; and Ross,
Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Appellant challenges his conviction for fifth-degree domestic assault, arguing that
the district court abused its discretion by admitting verbal relationship evidence and

evidence of two prior instances of domestic abuse under Minn. Stat. § 634.20 (2020). We affirm.

FACTS

Appellant Denni Allen Apfelbacher was charged with one count of fifth-degree domestic assault and one count of disorderly conduct. The domestic assault charge was based on the allegation that Apfelbacher assaulted his long-time girlfriend, J.B., by strangulation. Before trial, respondent State of Minnesota moved to admit evidence of domestic conduct under Minn. Stat. § 634.20. The proposed evidence included two prior instances of domestic abuse against J.B. from 2002 and 2005, as well as evidence of a pattern of derogatory comments made by Apfelbacher to J.B. “to show the strained relationship” between them (the verbal evidence). The district court granted the state’s motion, but also noted that the court would provide a cautionary instruction to the jury regarding the proper use of the evidence.

J.B. and Apfelbacher had been in a romantic relationship for more than 20 years and had lived together for most of that time. As J.B. was driving home from work in the early afternoon of February 5, 2021, Apfelbacher and J.B. spoke by phone, and Apfelbacher asked J.B. to stop at a liquor store and pick up a bottle of alcohol for him on her way home. J.B. testified at trial, “The minute he asked for that bottle . . . my stomach starts hurting, I wonder how the day’s gonna go, how the night’s gonna go. I put up my defenses right away.” She explained that she becomes scared whenever Apfelbacher drinks because he “changes as a person” and calls her derogatory names. J.B. testified that Apfelbacher would insult her by saying things like, “I’m a c-nt. I’m a dumb b-tch. I’m stupid. My kids

are worthless. I'm worthless. I'm in debt. That I cheat. I'm a liar. And I'm just worthless."

J.B. did not buy any alcohol on her way home from work, but testified that she later went out and purchased a bottle of rum for Apfelbacher and gave it to him. Apfelbacher began consuming the alcohol at home around 7:30 p.m. As he became intoxicated, he criticized J.B.'s finances and children and accused her of being unfaithful. J.B. told him to leave her alone if he was going to drink. She explained, "I do that every day. Every day he drinks I tell him, I ask him, are you going to leave me alone?" J.B. could tell that Apfelbacher was becoming intoxicated because he "start[ed] rambling on about stuff," said that she and her children were worthless, and used abusive language, such as calling her a "b-tch."

J.B. described how she typically responds to Apfelbacher's behavior when he is drinking:

Sometimes I just don't respond at all. Sometimes I tell him no I'm not. I try to keep things just level. I don't try to make it go up or make it go down. I just want to stay level 'cause in my mind then I'm safe. But it just escalates on, he just keeps on. And after a while, you just can't listen to it anymore.

She further explained that she "used to just sit there and go into la-la-land and you can hear him. I could hear everything he's saying, but I went into a place by myself." More recently, however, J.B. would leave the house whenever she could not listen any longer to Apfelbacher's verbal abuse.

On the night at issue, J.B. left home around 9:30 p.m. to get away from Apfelbacher. She first went to her daughter's house and later went to her work. While she was gone, Apfelbacher sent her "endless" text messages calling her and her children derogatory names. At 3:30 a.m., Apfelbacher texted J.B. saying that he was going to bed. J.B. returned home shortly afterward, believing that it was safe to do so.

When J.B. arrived home, she tried to be quiet so that she would not wake Apfelbacher. But, after she sat down in a recliner in the living room, Apfelbacher ran upstairs from the basement and began to insult J.B. again. He started playing music loudly for about two hours. Eventually, after the music stopped, Apfelbacher approached J.B., grabbed her by her shirt, and "twisted" the shirt against her skin. He then put his hands around her neck and applied pressure. J.B. was holding a bottle of water at the time, and she splashed Apfelbacher with water so that he would release her.

J.B. was initially scared to report the assault to the police because Apfelbacher often told her she would not have a car or a place to live if she ever left. She nevertheless reported the assault to the police late in the afternoon the same day as the incident. The police took photographs of red marks from the assault that were still visible on her neck and arms.

At trial, after describing the alleged assault, J.B. provided testimony about the 2002 and 2005 domestic-abuse instances. During the 2002 instance, Apfelbacher "tore up the house" after he had been drinking and physically assaulted J.B. In 2005, after the police brought Apfelbacher home from the liquor store, he became angry at J.B. and her daughter and pushed over a coffee table. J.B. testified that Apfelbacher had engaged in verbal abuse

when drinking on other occasions after 2005, but she noted that the alleged assault in this case was the first time that he had become physical in years.

The jury found Apfelbacher guilty of both fifth-degree domestic assault and disorderly conduct. The district court entered judgment of conviction for fifth-degree domestic assault and sentenced Apfelbacher to 90 days in jail. Apfelbacher appeals.

DECISION

Apfelbacher contends that the district court abused its discretion by granting the state's motion under Minn. Stat. § 634.20 for the admission of a type of relationship evidence, including the verbal evidence and the two prior instances of domestic abuse from 2002 and 2005.¹ The statute provides:

Evidence 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, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Minn. Stat. § 634.20. While statutory in origin, the Minnesota Supreme Court has adopted the provision as a rule of evidence. *State v. Fraga*, 864 N.W.2d 615, 627 (Minn. 2015). “[T]he rationale for admitting relationship evidence under section 634.20 is to illuminate the relationship between the defendant and the alleged victim and to put the alleged crime

¹ Relationship evidence admitted under Minn. Stat. § 634.20 is one type of the broader category of relationship evidence that is admissible under caselaw. *State v. Bell*, 719 N.W.2d 635, 638 n.4 (Minn. 2006).

in the context of that relationship.” *State v. Valentine*, 787 N.W.2d 630, 637 (Minn. App. 2010), *rev. denied* (Minn. Nov. 16, 2010).

We review the district court’s decision to admit evidence under Minn. Stat. § 634.20 for an abuse of discretion. *State v. Lindsey*, 755 N.W.2d 752, 755 (Minn. App. 2008), *rev. denied* (Minn. Oct. 29, 2008). The appellant has the burden to establish that the district court abused its discretion and that he was prejudiced as a result. *Id.*

I.

We address first Apfelbacher’s challenge to the admission of the verbal evidence. Apfelbacher contends that speech-only evidence does not come within the scope of evidence admissible under Minn. Stat. § 634.20 and that the district court therefore erred by admitting that evidence.² He argues that, under the plain meaning of the phrase “domestic conduct” in Minn. Stat. § 634.20, the evidence must include an act or action and not just speech alone.

Challenges to the admission of evidence as contrary to the plain meaning of a statute governing the admissibility of evidence involve a question of statutory interpretation, which we review de novo. *State v. Barnslater*, 786 N.W.2d 646, 650 (Minn. App. 2010), *rev. denied* (Minn. Oct. 27, 2010). The objective of statutory interpretation is to “effectuate the intent of the legislature.” *State v. Riggs*, 865 N.W.2d 679, 682 (Minn. 2015) (quotation omitted).

² To clarify, Apfelbacher is not challenging the admission of evidence concerning the comments he made to J.B. the evening before and morning of the alleged strangulation; he is only challenging the admission of evidence that he used abusive language toward her in the past.

Minn. Stat. § 634.20 provides a list of the types of evidence included as domestic-conduct evidence:

“Domestic conduct” includes, but is not limited to, evidence of domestic abuse, violation of an order for protection under section 518B.01; violation of a harassment restraining order under section 609.748; violation of a domestic abuse no contact order under section 629.75; or violation of section 609.749 [harassment and stalking] or 609.79, subdivision 1 [obscene or harassing telephone calls].

The statute identifies a variety of violations of criminal laws, but also specifies that it “includes, but is not limited to” such violations. Thus, even though the verbal evidence in this case did not involve a violation of a criminal law, it may nevertheless be admissible as evidence of domestic conduct. *See State v. McCurry*, 770 N.W.2d 553, 560 (Minn. App. 2009) (stating that “the ‘not limited to’ language is more likely meant to encompass general testimony about the relationship, including conduct that does not rise to the level of the crimes listed in the definition of ‘similar conduct’”), *rev. denied* (Minn. Oct. 28, 2009); *see also State v. Andersen*, 900 N.W.2d 438, 441-42 (Minn. App. 2017) (affirming the admission of not only past physical abuse, but also verbal abuse, because it “tend[ed] to illuminate the volatility of the relationship and put the [relevant] incident in the context of the couple’s interaction with each other”).

It is also significant that among the listed examples of domestic conduct in the statute are several types of violations of provisions that may involve only speech, including the statutes that provide for harassment restraining orders (Minn. Stat. § 609.748 (2020)) and prohibit obscene and harassing calls or texts (Minn. Stat. §§ 609.79, .749, subd. 2(c)(4), (5) (2020)). Apfelbacher argues that, to the extent the listed examples in the statute relate

to speech-only offenses, they involve transactional speech—speech that “crosses the line into conduct, such as when used to violate a protective order, threaten violence, or make an obscene phone call.” This argument, however, is relevant only insofar as needed for proof of a violation of the applicable criminal statute. As stated above, Minn. Stat. § 634.20 is a rule of evidence, not a criminal statute, and the “includes, but is not limited to” language has been interpreted as allowing evidence of domestic conduct that does not constitute a crime in and of itself. We therefore are not persuaded that, to be admissible as domestic-conduct evidence, the speech must be such that it would on its own violate a criminal statute.

We also reject Apfelbacher’s arguments related to the dictionary definition of the word “conduct.” First, the dictionary definitions of “conduct” do not necessarily limit conduct to acts or action. One dictionary defines conduct as “[p]ersonal behavior, whether by action or inaction, *verbal or nonverbal*.” *Black’s Law Dictionary* 369 (11th ed. 2019) (emphasis added). Second, the word “conduct” does not appear in isolation in Minn. Stat. § 634.20. Rather, the statute refers to the phrase “domestic conduct.” And, as noted above, the statute’s definition of domestic conduct includes evidence of behavior that may consist of speech alone.

Consequently, we discern no abuse of discretion by the district court in admitting the verbal evidence in this case.

II.

We turn next to Apfelbacher's argument that the district court erred by admitting evidence concerning the 2002 and 2005 instances of domestic abuse because they were unfairly prejudicial. Under Minn. Stat. § 634.20, evidence of domestic conduct is not admissible when the probative value of the evidence "is substantially outweighed by the danger of unfair prejudice." "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." *Bell*, 719 N.W.2d at 641 (quotation omitted).

Generally, previous instances of domestic abuse are probative to demonstrate the nature of the couple's relationship. "Domestic abuse is unique in that it typically occurs in the privacy of the home, it frequently involves a pattern of activity that may escalate over time, and it is often underreported." *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004). Additionally, "[d]omestic abusers often exert control over their victims, which undermines the ability of the criminal justice system to prosecute cases effectively." *Id.*

At trial, J.B. provided the following description of Apfelbacher's conduct during the 2002 and 2005 instances of domestic abuse. In 2002, Apfelbacher "tore up the house" after he had been drinking. He threw seedlings for the garden all over the house, threw TVs out the window, destroyed the office, and threw a plate against the wall. He also "had [J.B.] on the floor several times," and as a result, J.B. had "bruises everywhere," including on her face. During the 2005 instance, the police brought Apfelbacher home from a liquor store. Once the police left, Apfelbacher "started pointin[g] and getting in [J.B.'s] face."

J.B.’s daughter, who was present at the home, told him to stop. Apfelbacher then pushed the coffee table, and J.B.’s daughter called the police.

These prior instances of domestic abuse provided some context for the relationship between Apfelbacher and J.B. but had low probative value because they occurred so long ago. The two instances took place 16 and 19 years before the alleged domestic assault in this case, near the beginning of a 20-year relationship. Unlike J.B.’s testimony regarding the verbal evidence—which helped explain why she reacted in the manner that she did on the night of the alleged assault—the testimony regarding the 2002 and 2005 instances provided little additional context.

Nevertheless, we conclude that the evidence did not result in unfair prejudice to Apfelbacher. With regard to the 2005 instance, J.B.’s testimony was brief, and the conduct she described was not particularly serious, such that the risk of unfair prejudice was low.

The conduct for the 2002 instance was more serious and more likely to create the impression that Apfelbacher was a violent person. Other factors, however, reduced the risk of unfair prejudice. First, immediately after J.B. testified about the two instances, the district court read a cautionary instruction that the evidence was “being offered for the limited purpose of demonstrating the nature and extent of the relationship” between Apfelbacher and J.B. And the district court reread that instruction during the final jury instructions. The cautionary instruction reduced the likelihood that the jury would use the evidence of the past instances of domestic abuse for an improper purpose. *See State v. Benton*, 858 N.W.2d 535, 542 (Minn. 2015) (stating that the district court’s use of

cautionary instructions regarding the proper use of relationship evidence under Minn. Stat. § 634.20 lessened the probability that the jury would give undue weight to that evidence).

Second, J.B. testified that the alleged assault in this case was the first time in years in which Apfelbacher had physically assaulted her. That testimony decreased the possibility that the jury would infer that Apfelbacher had a propensity for violence based on his previous conduct. In sum, the district court did not abuse its discretion by determining that the risk of unfair prejudice did not substantially outweigh the probative value of the evidence.

Moreover, even if the district court abused its discretion by admitting evidence of Apfelbacher's domestic abuse from 2002 and 2005, Apfelbacher must also show that he was prejudiced by that evidence. *See Lindsey*, 755 N.W.2d at 755. Erroneously admitted evidence is prejudicial if "the error substantially influenced the jury's decision." *State v. Loving*, 775 N.W.2d 872, 879 (Minn. 2009). One consideration in identifying the existence of prejudice is whether the prosecutor dwelled on the evidence during closing argument. *Benton*, 858 N.W.2d at 541. Here, the prosecutor did not mention the domestic abuse from 2002 or 2005 during the closing argument. In addition, J.B. did not testify extensively about the 2002 and 2005 instances. She described the instances only once during the middle of her testimony, and her descriptions were relatively brief. And as mentioned above, the district court twice read a cautionary instruction regarding the proper use of that evidence, once immediately after the testimony and then again during the final jury instructions.

We therefore conclude that the admission of evidence of the 2002 and 2005 instances did not substantially influence the jury's decision and we reject Apfelbacher's argument that he is entitled to a reversal of his conviction on that basis.

Affirmed.