

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1681**

State of Minnesota,
Respondent,

vs.

Malcolm Jamal Allen,
Appellant.

**Filed September 11, 2023
Affirmed
Frisch, Judge**

Hennepin County District Court
File No. 27-CR-21-15468

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

Mary F. Moriarty, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Slieter, Judge; and Hooten, Judge.*

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

NONPRECEDENTIAL OPINION

FRISCH, Judge

Following his conviction for illegal possession of a firearm, appellant argues that the district court's abuse of discretion in admitting relationship evidence and multiple graphic photographs warrants a new trial. Although we agree that the district court abused its discretion in its evidentiary rulings, we affirm appellant's conviction because there is no reasonable possibility that, but for these errors, the verdict would have been different.

FACTS

Respondent State of Minnesota charged appellant Malcom Jamal Allen with one count of felony possession of ammunition or a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subd. 1(2) (2020). The state alleged that Allen was in illegal possession of ammunition and a firearm when he accidentally shot his girlfriend, S.H., in the head. Allen stipulated that he was prohibited from possessing a firearm, and the case proceeded to trial.

Prior to trial, Allen objected to certain evidence: details of his relationship with S.H. and graphic photographs depicting the gunshot wound to S.H.'s head and her bloody face. The state argued that the relationship evidence was admissible under Minn. Stat. § 634.20 (2022), and that it could be used to explain S.H.'s reactions to the incident. It also argued that the photographs were highly relevant because the weapon was not recovered, and the photos depicting S.H.'s gunshot wound were circumstantial evidence that Allen had possessed a gun during the shooting. The district court allowed the relationship evidence

to be admitted under Minn. Stat. § 634.20 and allowed the photographs to be admitted, finding that they were relevant and their probative value outweighed any unfair prejudice.

At trial, the following facts were elicited. S.H. met Allen in 2018, and they were in a relationship until August 12, 2021, the day of the shooting. Allen would stay at S.H.'s home a few times a week, but he was not named on the lease and did not regularly reside at S.H.'s home. The relationship "wasn't always good"—"it could be physical." Around five days before the shooting, Allen punched S.H. in the face and broke her nose. S.H. did not report this incident to police because she was protecting Allen, and she did not seek medical attention for her injury because Allen told her not to. S.H. knew that Allen would sometimes bring handguns and ammunition into her home.

On August 12, 2021, S.H. completed errands with her son while Allen remained at her home. When she returned home, Allen was upstairs in the bedroom. As S.H. was walking up the stairs to speak with Allen, she saw a red laser light pointing at the wall that she believed could be attached to a weapon such as a gun. S.H. continued to walk up the stairs and asked Allen to put the gun away. When she approached her bedroom, she saw Allen laying on the bed holding a revolver. S.H. knew it was a real revolver and not a B.B. or pellet gun. Allen then put his finger on the trigger, and S.H. heard a "boom." S.H. realized that she had been shot in the head and felt blood coming from the wound. Allen dialed 911 on S.H.'s phone but asked her to wait to place the call until he had left the residence.

When S.H. eventually placed the 911 call, she told the dispatcher she did not know who shot her because she wanted to protect Allen. Officers responded to the shooting, and

S.H. initially maintained that she did not know the identity of the shooter. She later identified the shooter as Allen. The officers did not find a gun in the residence, but they located a hole in the ceiling that they believed was caused by a bullet fired from a real gun as opposed to a B.B. or pellet gun. They also found an empty box of ammunition. The officers obtained surveillance footage that captured a man running away from the area of S.H.'s residence at around the time of the shooting. S.H. identified that person as Allen. When an investigator interviewed S.H. at the hospital, she again identified Allen as the shooter. She reported that the weapon he used was a revolver with a handle-grip-activated laser. In July 2021, a Prior Lake police officer had searched S.H.'s home and recovered packaging for a revolver grip with a "built-in laser sight attachment," specifically with a red laser.

A nurse interviewed and examined S.H. The nurse observed that S.H. had a black eye, which S.H. said she received in an argument with Allen. S.H. also told the nurse that Allen had shot her in the head and that he had been physically violent with her in the past. S.H. reported that Allen had previously used a weapon against her, had been violent and jealous during their relationship, and that she believed Allen was capable of killing her.

The jury found Allen guilty of possessing a firearm while ineligible, and the district court sentenced him to 60 months' imprisonment. Allen appeals.

DECISION

Allen challenges two of the district court's evidentiary rulings: the admission of evidence of his relationship with S.H. and multiple graphic photographs depicting the bullet wound to S.H.'s head. We review the district court's evidentiary decisions for "a

clear abuse of discretion.” *State v. Bustos*, 861 N.W.2d 655, 666 (Minn. 2015). The district court abuses its discretion when its “ruling is based on an erroneous view of the law or is against logic and the facts in the record.” *Id.* (quotation omitted). Allen bears the burden of showing that the district court abused its discretion and that the admission of the evidence prejudiced his defense. *See State v. Peltier*, 874 N.W.2d 792, 802 (Minn. 2016). “A defendant is prejudiced by an evidentiary ruling when there is a reasonable possibility that without the error the verdict might have been more favorable to the defendant.” *State v. Miller*, 754 N.W.2d 686, 700 (Minn. 2008) (quotation omitted); *see also Peltier*, 874 N.W.2d at 802 (“[A]n appellant who alleges an error in the admission of evidence that does not implicate a constitutional right must prove that there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” (quotation omitted)).

Generally, “[a]ll relevant evidence is admissible” unless otherwise provided by law. Minn. R. Evid. 402. Evidence is relevant if it tends to “make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401. But relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Minn. R. Evid. 403. We afford the district court “discretion in balancing the probative value of evidence against its prejudicial effect.” *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993). We agree with Allen that the district court abused its discretion by admitting the challenged evidence but conclude that Allen was not prejudiced by these errors.

The district court first abused its discretion by allowing the state to present evidence of Allen’s relationship with S.H., including evidence that Allen had physically assaulted and threatened S.H. over the course of their relationship, because the state did not charge Allen with a domestic-conduct-related offense. Evidence of prior bad acts committed by the person who is on trial is generally inadmissible to show that the person (defendant) committed the charged offense. Minn. R. Evid. 404(b)(1); *State v. Spreigl*, 139 N.W.2d 167, 169 (Minn. 1965). An exception exists for “[e]vidence of domestic conduct by the accused against the victim of domestic conduct, or against other family or household members . . . , unless the probative value is substantially outweighed by the danger of unfair prejudice.”¹ Minn. Stat. § 634.20; *see also State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004) (adopting Minn. Stat. § 634.20 as a rule of evidence). But, for relationship evidence to be admissible under Minn. Stat. § 634.20, the defendant must be charged with a domestic-conduct-related offense. *State v. McCurry*, 770 N.W.2d 553, 561 (Minn. App. 2009) (“When the state cannot charge a crime constituting domestic abuse, it may not use § 634.20 to circumvent rules of admissibility for prior bad acts.”), *rev. denied* (Minn. Oct. 28, 2009). The district court therefore abused its discretion by admitting evidence of Allen’s relationship with S.H. under section 634.20 because the state did not charge Allen with a domestic-conduct-related offense.

¹ “‘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 or 609.79, subdivision 1.” Minn. Stat. § 634.20.

On appeal, the state now agrees that the evidence was not admissible under section 634.20, but the state nevertheless encourages us to find this error harmless because it now argues that the evidence was otherwise admissible under Minn. R. Evid. 616. *See State v. Copeland*, 656 N.W.2d 599, 60 (Minn. App. 2003) (concluding that district court erred by allowing relationship evidence to be admitted under Minn. Stat. § 634.20 when the defendant was not charged with a domestic-conduct-related offense but declaring the error harmless because the evidence was admissible under Rule 616), *rev. denied* (Minn. Apr. 29, 2003). Rule 616 provides that, “For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.” But the state did not seek to admit the evidence under Rule 616 before the district court, Allen had no opportunity to object to admission of the evidence on this basis, and the district court did not admit the evidence under this rule. Given these circumstances, and on this record, we decline to rule on the admissibility of such evidence on this basis for the first time on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (declaring that party’s “failure to raise the issue before the district court at trial precludes its litigation on appeal”); *cf. State v. Vasquez*, 912 N.W.2d 642, 649 (Minn. 2018) (stating that “[a] defendant’s objection to the admission of evidence preserves review only for the stated basis for the objection or a basis apparent from the context of the objection”).

The district court next abused its discretion by allowing the state to present multiple graphic photographs depicting S.H.’s bloody face and wound. The district court has discretion to admit relevant photographs. *State v. Lee*, 645 N.W.2d 459, 467 (Minn. 2002). And photographs depicting graphic or gruesome injuries, although they may arouse the

passions of the jury, are admissible so long as they relate to some relevant issue at trial. *State v. Hahn*, 799 N.W.2d 25, 34 (Minn. App. 2011), *rev. denied* (Minn. Aug. 24, 2011); *State v. Hummel*, 483 N.W.2d 68, 74 (Minn. 1992). But here, the district court admitted *three* graphic photographs, all showing the same bullet wound, with two of the photographs depicting S.H.'s face covered with dried blood. While we acknowledge that one photograph may hold some marginal probative value for the purpose of corroborating S.H.'s description of events, the admission of three graphic photographs admitted for the same purpose was unnecessarily cumulative and unfairly prejudicial to Allen. *See Hummel*, 483 N.W.2d at 74 (cautioning prosecutors and district courts to avoid admitting multiple graphic photographs or videotapes if they are only “subtly different from other photographic or video evidence”).

Notwithstanding these evidentiary errors by the district court, we conclude that, based on this record, there is no reasonable probability that the erroneous admission of the challenged evidence affected the outcome of the proceedings. The state presented strong evidence that Allen illegally possessed a firearm. S.H. provided unchallenged testimony that Allen shot her in the head with a revolver, and her description of the shooting was consistent with the information she told responding officers, an investigator, and a nurse following the shooting. Police found what they believed to be a bullet hole in the second-floor ceiling and packaging for ammunition and a revolver accessory in S.H.'s home where Allen sometimes stayed. And surveillance footage captured a man, identified by S.H. to be Allen, fleeing from the area near her home in the moments after the shooting occurred.

See State v. Bias, 419 N.W.2d 480, 485 (Minn. 1988) (stating that “evidence of flight suggests consciousness of guilt”).

The cumulative strength of this largely unchallenged evidence is enough to overcome any prejudice caused by the improperly admitted evidence. We also observe that the state did not explicitly reference or show the photographs in its closing argument, further diluting any prejudicial effect. *Cf. State v. Lewis*, 547 N.W.2d 360, 364 (Minn. 1996) (concluding that improper references in closing argument did not require reversal when such references made up “only a small portion of the closing argument and [did] not characterize the entire argument”). We note that in a weaker case, these evidentiary errors could result in a new trial. *See State v. Valtierra*, 718 N.W.2d 425, 435 (Minn. 2006). But on this record, we cannot conclude that there is any reasonable probability that the district court’s evidentiary errors, either independently or cumulatively, “significantly affected the verdict.” *See Peltier*, 874 N.W.2d at 802.

Affirmed.