STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1974

State of Minnesota,
Respondent,

vs.

Pov Beng,
Appellant.

Filed September 4, 2012
Affirmed as modified
Cleary, Judge

Hennepin County District Court
File No. 27-CR-10-38214

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Cleary, Judge; and Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

CLEARY, Judge

Appellant challenges his convictions under Minn. Stat. §§ 609.222, subd. 1, .2242, subd. 4 (2010). Appellant argues that there was not sufficient evidence to support his convictions and that the district court erred by admitting evidence of appellant's relationship with one of the victims. Appellant also argues that the district court erred when it extended a previously-imposed domestic-abuse no-contact order (DANCO) against appellant as part of appellant's executed sentence. We vacate the DANCO, but otherwise affirm.

FACTS

On a Saturday afternoon, appellant Pov Beng and his girlfriend, P.G., were involved in a dispute at P.G.'s mother's house in Crystal. P.G. and her mother, S.G., had been shopping together and returned to S.G.'s house around 2:30 p.m. P.G. and S.G. had been using S.G.'s car while they were shopping and parked the car in the driveway when they returned to the house. Shortly after they returned, appellant also arrived at the house. Appellant was driving P.G.'s car, with her permission, and parked directly behind S.G.'s car in the driveway.

Appellant had missed a dentist appointment that had been scheduled for 2:00 p.m. P.G. testified that appellant was very upset that he had missed the appointment, and appellant and P.G. argued about whether appellant was supposed to have gone to the appointment by himself or whether P.G. was going to accompany him. When appellant and P.G. started arguing, S.G. first asked them not to argue inside the house and then

asked appellant to leave. P.G. also told appellant that he needed to leave, but that he could not take her car.

Appellant left the house and got into P.G.'s car. P.G. did not want appellant to drive her car and she tried to stop appellant from leaving by banging on the car window and yelling to get her keys back. P.G. testified that appellant was upset and angry and drove straight into S.G.'s car, which was parked directly ahead of P.G.'s car in the driveway, about three times. P.G. testified that, after appellant hit S.G.'s car, "he drove towards [P.G. and S.G.] on the lawn and backed out and then drove towards us again a few times."

S.G. heard the commotion and went outside; she observed appellant hit her car at least once and saw P.G. trying to stop appellant from leaving. A neighbor and his cousin, L.O. and A.O., also heard the disturbance and came over to help P.G. L.O. and A.O. tried to stop appellant from leaving in P.G.'s car. Appellant drove over S.G.'s lawn, toward L.O. and A.O., who had to jump out of the path of the car to avoid being hit. A.O. testified that appellant first drove toward L.O., then backed up and drove toward A.O. Eventually appellant drove across the lawn and away from the house.

Appellant was charged with one count of domestic assault under Minn. Stat. § 609.2242, subd. 4, and two counts of second-degree assault with a dangerous weapon under Minn. Stat. § 609.222, subd. 1.

At trial, the district court allowed P.G. to testify about three previous domestic-abuse-related incidents with appellant pursuant to Minn. Stat. § 634.20 (2010). Just

before P.G. testified about the previous domestic-abuse incidents, the court issued this instruction to the jury:

> Members of the jury, the State is about to introduce evidence of conduct by [appellant] on January 23, 2004, March 2, 2005, and March 17, 2007, in Brooklyn Park Minnesota. This evidence is being offered for the limited purpose of demonstrating the nature and extent of the relationship between [appellant] and [P.G.] and to assist you in determining whether [appellant] committed those acts with which [appellant] is charged here in the complaint before you today.
>
> [Appellant] is not being tried for and may not be convicted for any behavior other than the charged offenses. You are not to convict [appellant] on the basis of conduct on January 23, 2004, March 2, 2005, and March 17, 2007, in Brooklyn Park, Minnesota. To do so might result in unjust double punishment.

The jury found appellant guilty of all counts, and the district court sentenced appellant to a stayed sentence of one year and one day for the domestic-assault conviction, an executed sentence of 27 months for the first second-degree assault conviction, and an executed sentence of 33 months for the second second-degree assault conviction, to be served concurrently. The district court also extended a DANCO previously issued against appellant, preventing him from having contact with P.G. for five years. This appeal follows.

D E C I S I O N

I.

Appellant argues that there was not sufficient evidence to support his convictions. Specifically, appellant contends that the state failed to prove that appellant possessed the

requisite intent to cause fear of imminent bodily harm or death, as required by Minn. Stat. §§ 609.222, subd. 1, .2242, subd. 4.

In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of 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 the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

"Direct evidence as to the fact of intent is usually impossible . . . ." *State v. Bouwman*, 328 N.W.2d 703, 705 (Minn. 1982). "Intent is an inference drawn by the jury from the totality of the circumstances." *State v. Raymond*, 440 N.W.2d 425, 426 (Minn. 1989). Intent is "generally proved circumstantially by drawing inferences from the defendant's words and actions in light of the totality of the circumstances." *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997).

Minn. Stat. § 609.02, subd. 10 (2010), defines assault as "(1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional

infliction of or attempt to inflict bodily harm upon another"; *see also* Minn. Stat. § 609.222, subd. 1 (assault with a dangerous weapon); Minn. Stat. § 609.2242, subd. 4 (domestic assault). An assault under Minn. Stat. § 609.02, subd. 10(1), is a specific-intent crime. *State v. Fleck*, 810 N.W.2d 303, 308–09 (Minn. 2012) (holding that a defendant committing a specific-intent crime must intend to cause a particular result, unlike a defendant committing a general-intent crime, who intentionally engages in prohibited conduct).

Appellant here was charged with second-degree assault with a dangerous weapon for his actions against A.O. and L.O. and charged with domestic assault for his actions against P.G. At trial, A.O., L.O., and P.G. all testified that appellant repeatedly backed up and drove the car toward the victims. They also testified that they had to jump out of the way of the car, or they would have been hit. P.G. testified that appellant was upset and angry.

This court has recognized that repeated attacks upon a victim can suggest intent. *See State v. Alladin*, 408 N.W.2d 642, 648 (Minn. App. 1987) (holding that the defendant's intent was "evidenced by his repeated attack upon [the victim]"), *review denied* (Minn. Aug. 12, 1987). This court has also recognized that pointing a weapon at a victim can prove intent. *See In re Welfare of T.N.Y.*, 632 N.W.2d 765, 770 (Minn. App. 2001) ("Pointing a weapon at . . . another person has been held to supply the requisite intent to cause fear.")

The evidence of appellant's behavior here supports his convictions. Appellant backed up and drove toward the victims multiple times. Appellant also pointed a

weapon, his vehicle, directly at the victims. This court assumes that the jury believed the victims and disbelieved any evidence to the contrary. Appellant's testimony that he could not back up because there were children in the street and that he was just trying to leave appears to have been rejected by the jury. The evidence presented at trial was sufficient to permit the jury to conclude that appellant intended to cause the victims fear of immediate bodily harm or death.

II.

Next, appellant argues that the district court erred when it admitted evidence regarding three prior domestic-abuse incidents between appellant and P.G. Appellant concedes that the relationship evidence was admissible as it related to the domestic-assault charge involving P.G.

Minn. Stat. § 634.20 provides:

> Evidence of similar conduct by the accused against the victim of domestic abuse, 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.

A review of the record shows that the relationship evidence here was properly admitted under Minn. Stat. § 634.20 as it related to the domestic-assault charge. In a hearing prior to the trial, the district court made findings that the incidents the state wanted to present as evidence constituted similar conduct, were perpetrated against the same victim of domestic abuse, and involved acts of domestic abuse. The court also

found that the probative value of the incidents was not substantially outweighed by the danger of unfair prejudice.[1]

Appellant argues that the relationship evidence was inadmissible as it related to the second-degree assault charges involving A.O. and L.O. because it constituted bad-acts evidence. Even if we accept appellant's contention that the evidence was inadmissible bad-acts evidence related to the second-degree assault charges, "when evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." Minn. R. Evid. 105. Appellant did not request to sever the second-degree assault charges from the domestic-abuse charge. Therefore, we focus on the district court's instruction accompanying the relationship evidence. Appellant did not object to the instruction given at trial, and acknowledges that "the court instructed the jury that [appellant] was not to be convicted for the prior offenses against [P.G.]" Despite not objecting to the given instruction and not requesting a different instruction, appellant now argues that the district court "failed to inform the jury that the evidence should not be used for the purposes of inferring that [appellant's] character made him more likely to have assaulted [L.O.] and [A.O.]"

Because appellant did not object to the cautionary instruction issued at trial, we analyze it under a plain-error standard of review. *See* Minn. R. Crim. P. 31.02; *State v.*

[1] The state wanted to present evidence of four prior incidents, but the district court found that the probative value of one incident in 2006 was outweighed by the danger of unfair prejudice and amounted to needless presentation of cumulative evidence. The court did not allow the state to present evidence of the 2006 incident.

Baird, 654 N.W.2d 105, 113 (Minn. 2002). "In the absence of an objection, the appellate court may review jury instructions if the instructions contain plain error affecting substantial rights or an error of fundamental law." *Id.* "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). "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).

We must first determine whether the district court erred in issuing the cautionary instruction to the jury and whether that error was plain. In a similar case, this court compared the use of cautionary instructions in cases involving relationship evidence and *Spreigl* evidence. *See State v. Meldrum*, 724 N.W.2d 15, 20–22 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). In *Meldrum*, the defendant was convicted of domestic assault, terroristic threats, and obstructing legal process or arrest after an altercation with his wife. *Id.* at 18. At trial, the state introduced evidence, under Minn. Stat. § 634.20 (2004), of the defendant's four prior convictions for domestic abuse against his wife. *Id.* at 19. At the end of trial, the court told both parties that it would not give a *Spreigl* instruction unless either party could provide a reason to do so, which neither party did. *Id.* On appeal, the defendant argued that the district court erred by not giving a cautionary instruction regarding the relationship evidence. *Id.* at 20.

This court noted that the purposes of both relationship evidence and *Spreigl* evidence are the same: to put the defendant's conduct into context. *Id.* at 20. The court stated:

> The purpose of a cautionary instruction is to ensure that the jury uses the other-crimes evidence solely for the permissible purpose and not to convict the defendant due to the prior bad acts. The failure of the trial court to give those instructions in the absence of a request is not reversible error.

Id. at 21 (citations omitted). The court also emphasized the necessity of a cautionary instruction in *Spreigl* cases, and noted that "[r]elationship evidence and *Spreigl* evidence are analogous. The danger both present is so significant that the precaution of providing a limiting instruction, as in *Spreigl*, should be applied to relationship evidence." *Id.*

In analyzing whether the lack of a cautionary instruction led the jury to improperly consider the relationship evidence, the court noted that it "must look at the entire record to determine if there is a significant likelihood that the jury misused the evidence, resulting in the evidence improperly affecting the verdict." *Id.* at 21–22. This court ultimately determined that, although a cautionary instruction is "strongly preferred," it was not automatically plain error for the court not to include the instruction because there was other evidence offered that negated the danger of the jury using the evidence improperly. *Id.* at 22.

As this court noted in *Meldrum*, there is a danger, when presenting relationship evidence, that the jury will use the evidence improperly. That danger is especially notable in a situation like the present case because the relationship evidence only applies to one of the victims, P.G. When looking at the entire record however, we note that

P.G.'s testimony regarding her relationship with appellant consisted of only 6 pages of testimony in a trial that had over 170 pages of testimony. The testimony from all three victims was fairly consistent regarding appellant's actions on the day in question. They all testified that appellant backed up and drove toward them in P.G.'s car. P.G.'s mother also testified that she saw appellant drive toward all three victims in the front yard. The prosecutor, in her closing argument, only briefly touched on the relationship evidence, not drawing significant attention to it. As in *Meldrum*, the other testimony offered here greatly diminishes the possibility that the jury improperly relied on the relationship evidence. The court did not plainly err in giving the instruction that it did. Because we hold that the court did not plainly err, we need not address the third prong of the plain-error test.

III.

Appellant challenges the DANCO that was extended as part of the sentence for his convictions. Although appellant did not object to the DANCO at the time of sentencing, a court may "correct a sentence not authorized by law" at any time. Minn. R. Crim. P. 27.03, subd. 9. An appellate court reviews a criminal sentence "to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court." Minn. Stat. § 244.11, subd. 2(b) (2010). "[A] district court may not impose a no-contact order as part of an executed sentence unless the order is expressly authorized by statute." *State v. Pugh*, 753 N.W.2d 308, 311 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008). Here appellant received an executed sentence.

Minn. Stat. § 609.222, subd. 1, allows courts to sentence a defendant convicted of second-degree assault with a dangerous weapon "to imprisonment for not more than seven years or to payment of a fine of not more than $14,000, or both." Minn. Stat. § 609.2242, subd. 4, allows courts to sentence a defendant convicted of domestic assault as a felony "to imprisonment for not more than five years or payment of a fine of not more than $10,000, or both."

In *Pugh*, the defendant challenged the district court's imposition of a DANCO as part of his executed prison sentence, arguing that the court was not expressly authorized by statute to do so. 753 N.W.2d at 310–11. The defendant had been convicted of first-degree criminal sexual conduct, a felony offense. *Id.* at 311. Neither the statute defining the punishment for felony offenses, nor the statute specifically addressing the penalty for first-degree criminal sexual conduct, authorized the imposition of a DANCO.[2] Although the state in *Pugh* cited many situations when a district is authorized to impose a DANCO, "none of the provisions cited by the state authorize[d] a district court to issue a no-contact order as part of an executed sentence for first-degree criminal sexual conduct." *Id.*

Similarly here, none of the statutes which appellant violated authorize the imposition of a DANCO as part of the executed sentence.[3] Because the imposition of the DANCO was not authorized, we vacate the portion of appellant's sentence that imposed the DANCO.

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[2] The DANCO statute here authorizes issuance of only a pretrial or probationary DANCO. Minn. Stat. § 629.75, subd. 1(b) (2010).

[3] The state appears to concede this issue because it does not address the extension of the DANCO in its brief.

Affirmed as modified.