STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0418

State of Minnesota,
Respondent,

vs.

Douglas Carl Manney,
Appellant.

Filed May 12, 2014
Affirmed
Smith, Judge

Hennepin County District Court
File No. 27-CR-11-16860

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Connolly, Judge; and Smith, Judge.

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

SMITH, Judge

We affirm appellant's conviction of second-degree felony murder because the district court did not err by (1) instructing the jury on second-degree felony murder,

(2) admitting evidence of prior domestic abuse, or (3) precluding alternative perpetrator evidence. Additionally, appellant has failed to prove ineffective assistance of trial counsel.

FACTS

Appellant Douglas Carl Manney was charged with one count of second-degree intentional murder death-by-strangulation of K.S. in violation of Minn. Stat. § 609.19, subd. 1(1) (2010). Before trial, respondent State of Minnesota moved to admit evidence of prior violent conduct by Manney against (1) K.S., his long-term, live-in girlfriend, (2) his ex-wife T.M. and her current husband, and (3) his ex-wife J.N. The state argued that this evidence was admissible both as relationship evidence under Minn. Stat. § 634.20 (2010) and as evidence of other crimes or bad acts, commonly known as *Spreigl* evidence, under Minn. R. Evid. 404(b). *See State v. Spreigl*, 272 Minn. 488, 491, 139 N.W.2d 167, 169 (1965) (noting that there are several "widely recognized exceptions to the general exclusionary rule"). After oral and written argument, the district court ruled on the evidence's admissibility under Minn. Stat. § 634.20 and Minn. R. Evid. 404(b).

As relationship evidence under Minn. Stat. § 634.20, the district court found four of the five incidents involving K.S. admissible, two of the three incidents involving T.M. admissible, the one incident involving T.M.'s husband inadmissible, one of the four incidents involving J.N. fully admissible and a second incident partially admissible, and T.M.'s and J.N.'s knowledge of Manney's alcohol and drug abuse inadmissible. The state also sought to admit evidence of Manney's abuse of K.S. through K.S.'s family and friends. Although the district court found the majority of this evidence admissible, it

imposed a limitation: because the "testimony is cumulative . . . the State must select only one of these witnesses to testify at trial on the subject matter described herein." The district court granted Manney's "request for a cautionary instruction regarding relationship evidence, both at the time the evidence is received and in the court's final instructions to the jury."

The state's requested *Spreigl* evidence was essentially the same as its requested relationship evidence. Under Minn. R. Evid. 404(b), the district court found four of the five incidents involving K.S. admissible, one of the two incidents involving T.M. admissible, the one incident involving T.M.'s husband inadmissible, one of the three incidents involving J.N. fully admissible and a second incident partially admissible, and T.M.'s and J.N.'s knowledge of Manney's alcohol and drug abuse admissible.

Before trial, Manney moved to admit into evidence portions of a recorded, unsworn statement given by next-door neighbor J.B., now deceased, to police four days after the murder. The district court granted the motion. On the first day of trial, in response to the state's ongoing concern regarding the purpose of the evidence, the defense confirmed that Manney would not pursue an alternative perpetrator defense and stated, "We have not filed that notice of defense, and I can tell the Court, as I understand the alternative perpetrator defense to be, that being, for example, that we would introduce evidence or make argument that John Doe committed this crime. We will not be presenting that type of evidence." During trial, however, the defense asked another neighbor whether "there might have been something going on in terms of affection or flirtation between" K.S. and J.B. The state objected, and the district court concluded that

"if this is going to alternative perpetrator, . . . [t]he defense withdrew it. So . . . you can't go there." Later, the defense questioned an investigating officer about J.B.'s conflicting statements regarding his whereabouts at the time of the murder. The state objected, and the defense withdrew the question.

In accordance with Manney's pretrial request, the district court instructed the jury on both the charged offense and the lesser-included offense of second-degree felony murder. The jury found Manney not guilty of the charged offense and guilty of the lesser-included offense. The district court sentenced Manney to 198 months' imprisonment.

D E C I S I O N

I.

Arguing that second-degree felony murder is not in fact a lesser-included offense of second-degree intentional murder, Manney challenges the district court's jury instructions. This presents a question of law, which we review de novo. *State v. Lory*, 559 N.W.2d 425, 427–28 (Minn. App. 1997), *review denied* (Minn. Apr. 15, 1997).

"[W]here the evidence warrants a requested lesser-included offense instruction, the district court must give it." *State v. Hannon*, 703 N.W.2d 498, 509 (Minn. 2005). "Whether an offense is a lesser-included offense is determined by examining the elements of the offense rather than the facts of a particular case. A lesser offense is necessarily included in a greater offense if it is impossible to commit the latter without also committing the former." *Lory*, 559 N.W.2d at 428 (quotation omitted). Because this court has explicitly concluded that second-degree "felony murder is an included offense

of second-degree intentional murder," the district court did not err by instructing the jury on second-degree felony murder, as Manney requested. *Id.* at 428–29.

II.

A.

Relationship evidence is admissible under Minn. Stat. § 634.20 when "(1) it demonstrates similar conduct by the accused; (2) the conduct is perpetrated against the victim of domestic abuse or against another family or household member; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *State v. Barnslater*, 786 N.W.2d 646, 651 (Minn. App. 2010) (citation omitted), *review denied* (Minn. Oct. 27, 2010). "Similar conduct" includes evidence of domestic abuse. Minn. Stat. § 634.20.

1.

For the first time on appeal, Manney argues that the district court erred by admitting evidence of his past physical abuse of T.M. and J.N. as relationship evidence because section 634.20 encompasses only a family or household member of the *victim*, not of the *accused*. "Evidentiary rulings ordinarily rest within the sound discretion of the district court. But when, as here, an appellant challenges the admission of evidence as contrary to the plain meaning of a statutory provision governing the admissibility of evidence, we are presented with an issue of statutory construction, which we review de novo." *Barnslater*, 786 N.W.2d at 650 (citations omitted).

Generally, an appellate court will not consider matters not argued to and considered by the district court. *State v. Roby*, 547 N.W.2d 354, 357 (Minn. 1996).

Because Manney failed to raise this issue before the district court, he has waived this argument. Moreover, we have construed section 634.20 "as unambiguously authorizing the admission of similar-conduct evidence against the accused's (not the victim's) family or household members." *State v. Valentine*, 787 N.W.2d 630, 637 (Minn. App. 2010), *review denied* (Nov. 16, 2010). Consequently, the district court did not err by admitting the challenged evidence as relationship evidence.

2.

Manney also challenges the district court's decision to admit any relationship evidence regarding K.S., T.M., and J.N., arguing that this evidence is unduly prejudicial. Manney "has the burden to establish that the district court abused its discretion and that [he] was prejudiced." *State v. Lindsey*, 755 N.W.2d 752, 755 (Minn. App. 2008), *review denied* (Minn. Oct. 29, 2008).

Relationship evidence "is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice." Minn. Stat. § 634.20. "[U]nfair 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." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted).

On appeal, Manney makes general statements regarding the "inflammatory" nature of the challenged evidence. But relationship evidence admitted under section 634.20 is intended "to illuminate the relationship between the defendant and the alleged victim and to put the alleged crime in the context of that relationship." *Valentine*, 787 N.W.2d at 637. And "evidence showing how a defendant treats his family or household members,

such as his former spouses or other girlfriends, sheds light on how the defendant interacts with those close to him, which in turn suggests how the defendant may interact with the victim." *Id.* Here, the district court provided detailed findings on each incident—which included a 2008 strangling of K.S., a 1996 choking of J.N., and a 1993 kneeling on T.M.'s chest—and ruled in favor of both parties regarding discreet evidence. Manney has failed to establish that the district court abused its discretion by admitting select relationship evidence.

B.

Manney challenges the district court's decision to admit evidence of his prior domestic abuse against K.S., T.M., and J.N. as *Spreigl* evidence. In light of our conclusion that all of this evidence was properly admitted as relationship evidence under Minn. Stat. § 634.20, *see* supra section II, A, we need not address this argument.

III.

Manney argues that the district court abused its discretion by precluding the defense from eliciting testimony that suggested J.B. may have killed K.S. "Evidentiary rulings are within the sound discretion of the district court and we will not disturb those rulings on appeal absent a clear abuse of that discretion." *State v. Nissalke*, 801 N.W.2d 82, 99 (Minn. 2011) (quotation omitted). Although a defendant has the right to present a complete defense, including "the right to present evidence showing that an alternative perpetrator committed the crime with which the defendant is charged," this right is not absolute. *State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009). Before a defendant may introduce evidence tending to prove that a third party committed the charged crime, the

defendant must lay "a proper foundation for admission of such evidence by offering evidence that has an inherent tendency to connect the alternative perpetrator to the commission of the charged crime." *Id.* at 590; *see also Nissalke*, 801 N.W.2d at 99 (requiring a "threshold showing"). "If the defendant fails to lay a proper foundation, the alternative perpetrator defense will not be permitted." *Atkinson*, 774 N.W.2d at 590.

It is undisputed that the defense made no attempt to lay a foundation for the admission of evidence tending to prove that J.B. killed K.S. Rather, the record demonstrates that the defense specifically stated it would *not* present evidence of an alternative perpetrator. Because the requisite threshold showing was not made, the district court did not abuse its discretion by precluding testimony tending to suggest that J.B. killed K.S.

IV.

In a pro se supplemental brief, Manney alleges that his trial counsel was ineffective because he "ignored all [Manney's] input," evidenced by the delay in investigating J.B. and the refusal to proceed with an alternative perpetrator defense, and erroneously requested a jury instruction on a lesser-included offense. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the outcome would have been different. *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). The burden of proof on this claim rests with the defendant, who must overcome the "strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v.*

State, 732 N.W.2d 243, 248 (Minn. 2007). When the defendant fails to prove either counsel's deficient performance or resulting prejudice, the defendant's claim of ineffective assistance of counsel fails. *State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005).

Strategic decisions do not provide a basis for a claim of ineffective assistance of counsel. *See State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999) ("What evidence to present to the jury, including which defenses to raise at trial and what witnesses to call, represent an attorney's decision regarding trial tactics which lie within the proper discretion of trial counsel and will not be reviewed later for competence."); *State v. Doppler*, 590 N.W.2d 627, 635 (Minn. 1999) (stating that appellate courts do not "review for competence matters of trial strategy"). Because Manney's allegations revolve around matters of trial strategy, and because his counsel properly requested a jury instruction on a lesser-included offense, *see* supra section I, Manney's claim of ineffective assistance of counsel fails.

Affirmed.