STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1724

State of Minnesota,
Respondent,

vs.

Demetrius McGee,
Appellant.

Filed January 29, 2008
Affirmed
Dietzen, Judge

Hennepin County District Court
File No. 06013275

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (for respondent)

John M. Stuart, State Public Defender, Lydia Villalva Lijo, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Dietzen, Presiding Judge; Lansing, Judge; and Ross, Judge.

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

DIETZEN, Judge

Appellant challenges his convictions of one count of stalking and three counts of violating a restraining order, arguing that the district court erred in admitting evidence of his alleged prior assaults against the victim's children. Because the district court properly applied the law and did not abuse its discretion, we affirm.

FACTS

In February 2005, appellant Demetrius McGee moved in with the victim and her three children in South Minneapolis. The victim ended the relationship in July 2005 and sought a restraining order against appellant, but did not pursue it. In September 2005, the victim sought and obtained a restraining order against appellant that was valid for two years. The restraining order prohibited contact in person, by phone, or in writing.

In October 2005, the victim reported to the Minneapolis Police Department that appellant made numerous telephone calls and sent letters to her from the Hennepin County Workhouse. Subsequently, appellant was charged with one count of stalking and three counts of violating a restraining order involving three different dates in October 2005.

Before trial, the state moved to admit two incidents involving appellant's assaults of the victim's two youngest children in April and May of 2005, arguing that they were admissible under Minn. Stat. § 634.20 (2004). Appellant opposed the motion. The district court excluded the proposed testimony, but stated "[t]he ruling will be subject to revision if testimony makes that relevant."

At trial, the victim testified that she ended the relationship with appellant due to his threats and his violence against her and her children. The state introduced her telephone log that contained over 400 calls from appellant for October 2005 and appellant's letters to the victim, which included the statements, "I wish death on you," "Game over[.] Someone must die[—]me or else who? No threat[.] A promise[.]" The victim stated, "I was just scared for me and my kids, what he might do."

During cross-examination, defense counsel highlighted other portions of the letters in which appellant stated, "Oh God, I miss my [the victim]. I'm so sorry father. Thank you for the strength to endure another day father. Protect my family, comfort my mama, [the victim], [13-year-old daughter], [three-year-old son]." The state then moved to introduce testimony from the victim regarding the two incidents of assault against the minor children on the ground that appellant "opened the door" and made it relevant. The district court agreed, concluding that appellant opened the door and made it relevant by having the victim repeat his statements in the letter that he cared for the victim and her children. But the court cautioned, "You are to inquire into it only insofar as it rebuts what is said in the letter." The victim then testified:

> Q. [by the prosecutor] Can you tell us, generally, what your—what his [appellant's] relationship was with your children?
>
> A. At first they had a good relationship, but then at the end of the relationship [], my daughter, middle child, the six year old, he mentioned her in the letter, she threw a cup out of the window and he went insane. She threw a cup out of the window and he punched her in her mouth, and her teeth went through her lip. He mentioned [the three-year-old] in the letter; my son, [] had pee on hisself and when I was at work

> this day, my 13 year old daughter called me and said [the three-year-old] had a big bruise on his forehead because he had punched him in his head for peeing on hisself.

The prosecution then called the victim's 13-year-old daughter to testify as a witness who had observed both incidents—the one involving the six-year-old daughter and the other involving the three-year-old son. The court excluded the testimony on the grounds that allowing further testimony would be overly prejudicial. The prosecutor made an offer of proof that the 13-year-old daughter had witnessed both incidents and could testify as to what occurred.

Appellant testified at trial. He denied making any phone calls to the victim from the workhouse. He admitted writing parts of the letters sent to the victim but denied writing those portions of the letters that were threatening, claiming that they were written in different handwriting.

Following trial, the jury convicted appellant of all charges. At sentencing, the district court imposed a 57-month sentence for the stalking conviction and gave appellant credit for 249 days. No additional sentence was imposed for the convictions of violating the restraining order. This appeal follows.

D E C I S I O N

I.

Appellant contends the district court erred in admitting evidence of his prior assaults against the victim's children. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

Appellant has the burden of establishing that the district court abused its discretion and that appellant was prejudiced. *Id.* We also review admission of similar incidents of domestic abuse under Minn. Stat. § 634.20 (2004) for an abuse of discretion. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004).

Evidence of other acts or wrongs is not admissible to prove a person's character. Minn. R. Evid. 404(b). But in prosecutions of harassment and stalking under Minn. Stat. § 609.749 (2004 & Supp. 2005), "[e]vidence 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." Minn. Stat. § 634.20. Under the statute, "'[s]imilar conduct' includes, but is not limited to, evidence of domestic abuse."[1] *Id.* Evidence under Minn. Stat. § 634.20 need not meet the heightened standard of clear and convincing evidence required for admission of character or *Spreigl* evidence, but need only be more probative than prejudicial. *McCoy*, 682 N.W.2d at 161.

Appellant argues that the two incidents involving the children "had no probative value and was not relevant to any material issue in the case." But evidence of assaultive conduct toward a victim's children "is generally admissible both to show a 'highly

[1] "Domestic abuse" includes "physical harm, bodily injury, or assault" committed against a family or household member by a family or household member. Minn. Stat. § 518B.01, subd. 2(a)(1) (2004). "Family or household members" include "persons who are presently residing together or who have resided together in the past." Minn. Stat. § 518B.01, subd. 2(b)(4) (2004). Based on these definitions, Minn. Stat. § 634.20 clearly applies to the incidents involving the victim's two children. The two children were physically injured by appellant and appellant was a household member because he resided with the victim and her children for a period of time in 2005.

strained relationship' between the defendant and the victim and to establish a motive and premeditated intent [for the defendant's conduct]." *State v. Flores*, 418 N.W.2d 150, 159 (Minn. 1988) (citation omitted). Additionally, any "[e]vidence that helps to establish the relationship between the victim and the defendant or which places the event in context bolsters its probative value." *State v. Kennedy*, 585 N.W.2d 385, 392 (Minn. 1998). Here, the victim testified that the two assaults of her children were part of the reason she decided to cease contact with appellant. Such testimony is relevant to illustrate the strained relationship, and the motive for appellant's threatening telephone calls and letters.

Appellant also contends that the testimony was unfairly prejudicial. We disagree. "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." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted).

The evidence of the two incidents was not used to "persuade[] by illegitimate means." *See id.* Rather, the evidence was used to rebut appellant's contention that he cared for the victim and her children. Further, the court gave a limiting instruction:

> The State has introduced evidence . . . [of] a couple of incidents involving the children. As I have told you, this evidence was admitted for the purpose of illuminating the nature of the relationship between [appellant] and [the victim], and to assist you in determining whether [appellant] committed the crimes with which he is charged in the complaint . . . .

A similar instruction was given at the close of trial. These cautionary instructions to the jury "lessened the probability of undue weight being given by the jury to the evidence. *Kennedy*, 585 N.W.2d at 392.

II.

Appellant argues on appeal that the victim's testimony of the two assaults was hearsay. But appellant failed to object on the grounds of hearsay at trial and, therefore, waived his right to raise that objection on appeal. *See State v. Hamilton*, 268 N.W.2d 56, 63 (Minn. 1978) ("Where an objection is not made, hearsay evidence will be admitted and has probative force."). Appellant suggests that the "repeated objections" to the admission of these incidents on the grounds of relevancy sufficed as a hearsay objection. We disagree. An objection must be specific as to the grounds for challenge. *State v. Rodriguez*, 505 N.W.2d 373, 376 (Minn. App. 1993) (concluding that defendant's objection to testimony on grounds of a "legal conclusion" could not have alerted the district court to a hearsay argument), *review denied* (Minn. Oct. 19, 1993).

We may, nonetheless, consider "errors or defects affecting substantial rights" under the plain error doctrine even if they were not raised at trial. Minn. R. Crim. P. 31.02; *see also State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002). Thus, we will correct errors that seriously affect the fairness, integrity, or public reputation of the judicial proceeding. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002).

Here, the 13-year-old daughter, who witnessed both incidents, was available to testify. And her testimony was not subject to a hearsay objection. The prosecutor offered to present her testimony but the district court disallowed it stating that any

additional emphasis on the two incidents would be overly prejudicial. Had appellant raised a hearsay objection to the victim's testimony, the 13-year-old daughter's testimony would have been admissible to describe both incidents. On this record, we see no prejudice affecting the fairness of the trial.

Affirmed.