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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0631**

State of Minnesota,
Respondent,

vs.

Apollyon Abbdon Kennedy,
Appellant.

**Filed April 28, 2009
Affirmed
Harten, Judge***

Ramsey County District Court
File No. 62-K9-07-002711

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

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Considered and decided by Toussaint, Chief Judge; Hudson, Judge; and Harten, Judge.

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

UNPUBLISHED OPINION

HARTEN, Judge

Appellant Apollyon Abbdon Kennedy challenges the jury's verdict finding him guilty of domestic assault because the victim, his wife Mary Kennedy (Kennedy), recanted her statements to police officers and medical personnel; he also argues that the district court erred in admitting evidence of appellant's prior domestic assault convictions. Because the jury could reasonably have decided as it did and we see no error in the admission of the evidence, we affirm.

FACTS

On the night of 27-28 July 2007, Kennedy went to a hospital for treatment of a head wound. She told the intake nurse and the emergency physician that the wound resulted from appellant's throwing a beer can at her and that the bruise on her back was caused by appellant punching her. Kennedy gave the same account to a police officer who interviewed her at the hospital. Appellant, who was then on probation, was arrested.

The following day, 29 July 2007, Kennedy told a police investigator that appellant had caused her injuries. She also said she was the victim in appellant's three prior domestic assault convictions: fifth-degree assault for slapping her face, causing a black eye, and bruising her on 23 June 2005; gross misdemeanor assault for hitting her hard in the face on 10 April 2006; and felony domestic assault for smothering and choking her on 29 May 2006.

Appellant was charged with one count of felony domestic assault. At the pre-trial conference, respondent State of Minnesota said it would present evidence of appellant's three prior convictions as relationship evidence. Appellant did not object.

At trial, Kennedy testified that appellant did not assault her and that she lied at the hospital. The jury nonetheless found appellant guilty. He was sentenced to serve 24 months' imprisonment. On appeal, he argues that, given Kennedy's testimony, the jury could not reasonably have concluded that he was guilty and that the district court erred in admitting evidence of his prior convictions.

DECISION

1. Sufficiency of the Evidence

This court will not disturb a verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably have concluded that defendant was guilty. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). We must assume "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 mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980).

The jury heard from three witnesses who testified as to Kennedy's explanation for her injuries: the physician who saw Kennedy at the hospital, the police officer who was summoned to the hospital, and a police investigator from the family and sexual violence unit.

The physician testified that the triage nurse had reported: “Patient [Kennedy] got into an argument with spouse [appellant], spouse started manhandling patient and then threw a can of beer at the patient, hitting her in the head.” The jury also heard from the physician that “[Kennedy] said she had been assaulted by her husband, and he had thrown a beer can at her head” and that Kennedy said “she got punched in the back.”

The police officer was asked what Kennedy said she was doing at the time of her injury. He answered, “[S]he was leaving the house, taking her beer out to leave. [Appellant] grabbed one of the cans of beer, threw it at her, striking her on the right side of the head.” The officer also testified that “[Kennedy] stated that she had been assaulted by [appellant] before” and that the officer therefore examined appellant’s record and found that he was on probation for domestic assault in another county.

The investigator was asked, “From what [Kennedy] told you . . . who had inflicted this wound upon her?” and answered, “[S]he said they were inflicted by her husband, [appellant].” When asked if he discussed with Kennedy her prior relationship with appellant, the investigator replied, “I asked if those [prior domestic abuse] cases involved her, and she said all the cases did involve her.” The jury also heard evidence from Kennedy, who testified that she had lied to the triage nurse, the physician, the police officer, and the investigator.

Appellant argues that (1) Kennedy had a motive to lie when she spoke to the hospital personnel and the police; (2) his own testimony and that of one other witness supported Kennedy’s recantation of what she said to the hospital personnel and the police; and (3) Kennedy’s injuries were not consistent with her claims.

The jury disagreed with appellant's version of the events. We must assume that the jury disbelieved Kennedy's contrary evidence and believed the state's witnesses. *See Moore*, 438 N.W.2d at 108. The testimony from the state's witnesses would have enabled the jury to reasonably conclude that appellant was guilty.

2. Admission of Relationship Evidence

"Evidence of similar conduct by the accused against the victim of domestic abuse . . . is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice 'Similar conduct' includes . . . evidence of domestic abuse." Minn. Stat. § 634.20 (2006). Admission of evidence under Minn. Stat. § 634.20 (2006) is within the discretion of the district court and will not be reversed absent an abuse of that discretion. *State v. Lindsey*, 755 N.W.2d 752, 755 (Minn. App. 2008), *review denied* (Minn. 29 Oct. 2008). When evidence is admitted without objection, this court may review it only if its admission was error, the error was plain, and the error affected substantial rights. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002).

Appellant did not object to the admission of evidence of his three prior convictions for domestic assaults on Kennedy. He now claims that the admission was plain error because it prejudiced the jury by "painting appellant as a person with a violent character." But, even if the jury was prejudiced by the evidence of appellant's three prior convictions, that prejudice did not outweigh the probative value of evidence that he had repeatedly assaulted Kennedy. *See Lindsey*, 755 N.W.2d at 756 ("Evidence that helps to establish the relationship between the victim and the defendant . . . bolsters its probative value.").

Appellant also argues that admitting the evidence of his prior convictions caused the jury to convict him “on the illegitimate basis that he had committed domestic violence multiple times in the past.” But, before the evidence was admitted, the district court instructed the jury that

[t]his evidence is being admitted for a limited purpose of assisting you in determining whether or not [appellant] committed the acts with which he is charged in the complaint in this case. [He] is not being tried for and may not be convicted for any offense other than the one charged here in this case. You are not to convict [appellant] on the basis of any of the [prior] occurrences. . . . To do so might result in an unjust [conviction] and an instance of double punishment.

“It is presumed that the jury follows the [district] court’s instructions.” *State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005). Appellant offers no persuasive basis for his assertion that the jury convicted him because he had prior convictions, and the district court did not err in admitting evidence of the convictions.

Affirmed.