STATE OF MINNESOTA
IN COURT OF APPEALS
A09-745

State of Minnesota,
Respondent,

vs.

Gabrelle Dominique Hicks,
Appellant.

Filed April 13, 2010
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CR-08-43011

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

Desyl Peterson, Minnetonka City Attorney, Rolf A. Sponheim, Assistant City Attorney, Minnetonka, Minnesota (for respondent)

William M. Ward, Chief Public Defender, Peter W. Gorman, Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Schellhas, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges her convictions of disorderly conduct and domestic assault, arguing that the district court abused its discretion by admitting evidence of a prior incident of domestic violence and that she did not receive a fair trial as a result of procedural irregularities. Because the district court did not abuse its discretion by allowing evidence of the prior incident of domestic violence and because appellant fails to establish a procedural error that necessitates reversal, we affirm.

FACTS

On August 7, 2008, appellant Gabrelle Dominique Hicks was involved in an altercation with her 16-year-old daughter J.L.H., which resulted in Hicks being charged with two counts of domestic assault and one count of disorderly conduct. Prior to the scheduled trial date, the state filed notice of its intent to offer evidence of a prior, uncharged incident of domestic violence, which Hicks allegedly committed against J.L.H. in April 2008. The state sought to admit the evidence as *Spreigl* evidence[1] and under

[1] Evidence of past crimes or bad acts, commonly known as *Spreigl* evidence, is generally not admissible to prove the character of a person in order to show action in conformity therewith, but may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Minn. R. Evid. 404(b).

> In a criminal prosecution, such evidence shall not be admitted unless (1) the prosecutor gives notice of its intent to admit the evidence consistent with the rules of criminal procedure; (2) the prosecutor clearly indicates what the evidence will be offered to prove; (3) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and

Minn. Stat. § 634.20 (2008).[2] Hicks objected to the admission of this evidence. The district court initially ruled that the evidence was inadmissible, based on its conclusions that the state did not comply with procedural notice requirements and that the probative value of the evidence was outweighed by its prejudicial effect.

The case was tried to a jury. The state called J.L.H. and Officer Troy Denneson of the Minnetonka Police Department. The testimony indicated that on August 7, 2008, J.L.H. was working at a McDonald's restaurant. When J.L.H. returned home from work, Hicks was on the telephone. Hicks remained on the telephone while she and J.L.H. ate dinner. Hicks eventually passed the telephone to J.L.H. and told her to talk to her sister. Hicks asked J.L.H. to relay messages over the telephone and became upset because J.L.H. did not comply with her request. An argument ensued. As it escalated, Hicks picked up an aerosol air-freshener can and sprayed it in J.L.H.'s face. J.L.H. attempted to turn away, and Hicks grabbed her head. J.L.H. managed to back away, but Hicks began to hit her with the can. J.L.H. ran to a neighbor's house and called the police.

> convincing evidence; (4) the evidence is relevant to the prosecutor's case; and (5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant.

Id.

[2] The statute provides that

> [e]vidence 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, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Minn. Stat. § 634.20.

After the state announced that it had rested, the defense also rested, without presenting any evidence. The district court excused the jury for a lunch recess and met with counsel in chambers to discuss jury instructions. When the district court and counsel returned to the courtroom, they discovered that Hicks had left for lunch. During the on-the-record discussion that followed, defense counsel stated that Hicks had informed him, during a very brief consultation after the state rested, that she did not want to testify. Defense counsel admitted that he had made a mistake by not taking more time to discuss Hicks's decision not to testify with her. Defense counsel indicated that while Hicks had stated that she did not want to testify, he believed that she should testify, and he wanted to further consult with Hicks regarding her decision.

At this point, the state complained that because the defense had rested, the state had released its witnesses. The state was uncertain whether J.L.H. could return to court to testify should it become necessary to rebut Hicks's testimony. The district court instructed defense counsel that "until we go on the record . . . you are not to talk to [Hicks] any further. We'll have the discussion on the record that we would have had now if [Hicks] would have been here and you can tell her . . . what you think if you want . . . ." Defense counsel asked the district court to clarify that the court did not want counsel to talk to Hicks over the lunch recess. The district court responded that it would not be appropriate for counsel to communicate with Hicks since there would be some prejudice to the state if counsel advised Hicks to testify. The district court also expressed its concern that if Hicks testified regarding events that preceded the August incident, it might make the April 2008 incident more relevant. The district court stated, "we just

need to have that on the record first before [defense counsel has] any discussions with her."

When the district court reconvened after the lunch recess, defense counsel indicated that he had talked to Hicks over the recess and advised her that in his opinion, she should testify. Hicks confirmed that she had changed her mind and wanted to testify. The district court, after clarifying that defense counsel had indeed talked to Hicks over the recess, stated "[t]his is what we specifically said we were going to do on the record, you could give her your advice, but we were not going to talk about it until we got back here." But the district court granted the defense's request to reopen its case to present Hicks's testimony and cautioned the defense, "I don't want to hear any . . . irrelevant historical stuff, and if you open the door on anything I'm going to let them go into those *Spreigl* things."

The defense called Hicks, who testified that J.L.H. had spent some of her summer vacation with family in Chicago. During this visit, Hicks's brother informed Hicks that J.L.H.'s behavior had changed. J.L.H. reportedly had consumed "double shots" of rum, which was provided by her step-sister. As a consequence, Hicks had forbidden J.L.H. from having any contact with her step-sister. According to Hicks, on August 7, J.L.H. answered the telephone while she and Hicks were having dinner. Hicks suspected that J.L.H. was talking to her step-sister, despite the fact that she had been told not to have contact with her. Hicks testified that when she asked J.L.H. who was on the telephone, J.L.H. "became extremely agitated and uttered some real harsh words and said she was sick of this." J.L.H. jumped up from the dinner table and caused the tabletop to dislodge

and fall toward Hicks. Hicks claimed that she grabbed the table top so it would not fall and break. In doing so, Hicks accidentally tilted the tabletop toward J.L.H. and caused its contents to spill onto J.L.H.'s lap. Hicks testified that she asked J.L.H. to give her the telephone and that J.L.H. shoved the telephone at Hicks, scratching Hicks with her fingernail in the process, and then ran towards the door. Hicks testified that J.L.H. "slammed the door and ran out" and that it "wasn't the first time."

On cross-examination, Hicks stated that her behavior on August 7 was affected by J.L.H. "constantly running out of the house since she had been home." But Hicks denied using force against J.L.H. as a means of discipline on August 7. At this point, the prosecutor asked to approach the bench. During an off-the-record discussion, the prosecutor asked the district court to reconsider its ruling denying admission of evidence regarding the April 2008 incident in light of Hick's testimony. The district court agreed to allow the evidence, reasoning that Hicks had opened the door to the evidence by testifying that (1) Hicks's brother informed her that J.L.H.'s behavior had changed, (2) when J.L.H. ran out and slammed the door after the August 2008 incident, it was not the first time, (3) J.L.H. was constantly running out of the house, and (4) J.L.H.'s behavior had affected her. The district court concluded that "the relevance of the *Spreigl* [evidence] now outweighs any potential prejudice because it does demonstrate a lack of mistake and intent if we have another incident clearly like that earlier in the summer."

Cross-examination resumed, and the prosecutor asked Hicks if she had used force against J.L.H., struck J.L.H. with a can, or threatened J.L.H. earlier that year. Hicks replied, "[m]ost definitely not." After Hicks's testified, the state recalled J.L.H., who

testified regarding the April 2008 incident. J.L.H. testified that Hicks was angry on that occasion because she did not think J.L.H. was doing her chores quickly enough. Hicks pulled a knife from a butcher's block and told her that she was going to kill her. J.L.H. attempted to flee, but Hicks pulled her back into their house. Hicks and J.L.H. struggled, and J.L.H. was able to gain control of the knife. But Hicks picked up a can and began to hit J.L.H. in the head with it. The next day, Hicks sent J.L.H. to live with family in Chicago, despite the fact that there were over two weeks of school remaining in the academic year.

The jury convicted Hicks of misdemeanor disorderly conduct and one count of domestic assault. Hicks appeals from her convictions.

D E C I S I O N

I.

Evidentiary rulings generally rest within the sound discretion of the district court, and a reviewing court will not reverse an evidentiary ruling absent a clear abuse of that discretion. *State v. Palubicki*, 700 N.W.2d 476, 485 (Minn. 2005). Hicks argues that the district court erred by admitting evidence regarding the April 2008 incident. The state responds that the evidence was admissible under either Minn. R. Evid. 404(b) or Minn. Stat. § 634.20 and because the defense opened the door to the evidence. Hicks contends that because the state "basically waived its [section] 634.20 theory of admissibility at trial, by barely mentioning it and concentrating on its *Spreigl* theory of admissibility," the state failed to adequately preserve the section 634.20 issue for appeal.

As a general rule, an appellate court will not consider matters that were not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). The state raised the applicability of Minn. Stat. § 634.20 in the district court. The state's Notice by Prosecuting Attorney of Evidence of Additional Offenses to be Offered at Trial Pursuant to Rule 7.02 and Minn. Stat. § 634.20 specifically references the statutory provision, and the state cited section 634.20 in its oral argument to the district court. But the district court's analysis focused solely on Minn. R. Evid. 404(b). Regardless, the Minnesota Rules of Criminal Procedure allow "a party, without filing a cross-petition, to defend a decision or judgment on any ground that the law and record permit that would not expand the relief that has been granted to the party." Minn. R. Crim. P. 29.04, subd. 6.[3] Because the record is sufficient to determine whether the evidence regarding the April 2008 incident was admissible under Minn. Stat. § 634.20 and a finding that the evidence is admissible under the statute would not expand the relief granted to the state, the issue is within our scope of review.

The statute provides:

> 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, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. "Similar conduct" includes, but is not limited to, evidence of domestic abuse . . .

[3] The title of rule 29.04 indicates that it applies only to appeals from this court to the Minnesota Supreme Court. However, in *State v. Grunig* the supreme court approved its application in appeals to this court. 660 N.W.2d 134, 137 (Minn. 2003) (concluding that this court erred by failing to apply Minn. R. Crim. P. 29.04 and consider the state's alternative argument in defense of the underlying decision).

> . "Domestic abuse" . . . [has] the meaning[] given under section 518B.01, subdivision 2.

Minn. Stat. § 634.20.

Evidence of prior domestic abuse by the accused against the alleged victim "may be offered to illuminate the history of the relationship, that is, to put the crime charged in the context of the relationship between the two." *State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004). Courts have treated relationship evidence differently than other "collateral" *Spreigl* evidence because "[d]omestic abuse is unique in that it typically occurs in the privacy of the home, it frequently involves a pattern of activity that may escalate over time, and it is often underreported." *Id.* at 161. Furthermore, "[d]omestic abusers often exert control over their victims, which undermines the ability of the criminal justice system to prosecute cases effectively." *Id.*

"[T]he stringent procedural requirements of rule 404(b) do not apply to section 634.20 evidence." *State v. Meyer*, 749 N.W.2d 844, 849 (Minn. App. 2008). The state is not required to provide notice of the evidence, the state is not required to prove the evidence by clear and convincing evidence, and the district court is not required to "independently consider the state's need for such evidence as 'the need for section 634.20 evidence is naturally considered as part of the assessment of the probative value versus prejudicial effect of the evidence.'" *Id.* (quoting *State v. Bell*, 719 N.W.2d 635, 639 (Minn. 2006)). Evidence is admissible under Minn. Stat. § 634.20 so long as "(1) it is similar conduct by the accused, (2) it is perpetuated 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." *Id.* When balancing probative value against potential prejudice, unfair prejudice "is not merely damaging evidence. . . ; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *Bell*, 719 N.W.2d at 641 (quotation omitted). Appellate courts have "on numerous occasions recognized the inherent value of evidence of past acts of violence committed by the same defendant against the same victim." *Id.*

The April 2008 incident involved similar conduct by Hicks against J.L.H. Both incidents involve the same aggressor, the same victim, and similar abuse. And the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Once Hicks testified that J.L.H. was the initial aggressor in the charged incident and that J.L.H.'s behavior on August 7 was consistent with prior bad behavior, the history of their relationship became highly relevant. Testimony regarding the April incident put the allegations regarding the August incident in context. And this context provided the jury with a means of assessing the credibility of Hicks and J.L.H., who provided conflicting accounts of their altercation on August 7. The evidence was admissible under Minn. Stat. § 634.20, and the district court did not abuse its discretion by admitting it.

Because we determine that the evidence regarding the April 2008 incident was admissible under Minn. Stat. § 634.20, we do not address Hicks's argument that the district court erred by admitting the evidence under the *Spreigl* doctrine and Minn. R. Evid. 404(b).

We next consider whether the district court erred by allowing the state to reopen its case to present evidence of the April 2008 incident. Whether a party is allowed to reopen his or her case after resting to present additional evidence is generally left to the discretion of the district court. *State v. Jouppis*, 147 Minn. 87, 89, 179 N.W. 678, 679 (1920). The determination of what constitutes proper rebuttal evidence rests almost wholly in the discretion of the district court. *State v. Yang*, 627 N.W.2d 666, 677 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). Rebuttal evidence generally "consists of that which explains, contradicts, or refutes the defendant's evidence." *State v. Swanson*, 498 N.W.2d 435, 440 (Minn. 1993).

Hicks's testimony suggested that J.L.H. had behaved inappropriately in the past, that her behavior on August 7 was consistent with her past inappropriate behavior, and that J.L.H. was the aggressor in the charged incident. Moreover, when asked on cross-examination, Hicks denied that she had struck J.L.H. with a can or threatened to harm her earlier that year. Evidence regarding the April incident was not only admissible under Minn. Stat. § 634.20, it was also proper rebuttal evidence. *See id*. (stating rebuttal evidence generally "consists of that which explains, contradicts, or refutes the defendant's evidence"). The district court did not abuse its discretion by allowing the state to rebut the suggestion that J.L.H was the aggressor in the charged incident and Hicks's claim that she had not previously struck or threatened J.L.H.

II.

Hicks argues that the principal point of this appeal is not the admissibility "per se" of the evidence regarding the April 2008 incident, but rather the unusual procedures at

trial. She claims that she was denied a fair trial because the district court directed defense counsel not to speak with Hicks about testifying, imposed limitations on her testimony, and allowed the state to reopen its case and present rebuttal testimony regarding the April incident.

We are troubled by the district court's attempt to prohibit communication between Hicks and her attorney regarding her decision whether to testify. The attempted restriction could have resulted in a violation of Hicks's right to assistance of counsel under the Sixth Amendment. The Supreme Court has held that a trial court order preventing a defendant from consulting with his attorney during a 17-hour overnight trial recess between defendant's direct and cross-examination deprived defendant of the right to assistance of counsel guaranteed by the Sixth Amendment. *Geders v. United States*, 425 U.S. 80, 91, 96 S. Ct. 1330, 1337 (1976). But the Supreme Court later held that a trial court's order directing a defendant not to consult with his attorney during a 15-minute recess, which occurred during defendant's testimony, did not violate the defendant's Sixth Amendment right to assistance of counsel. *Perry v. Leeke*, 488 U.S. 272, 280-84, 109 S. Ct. 594, 600-02 (1989). In both cases, the prohibition on consultation occurred during the defendant's testimony. The Supreme Court stated that "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying," but the defendant "has an absolute right to [attorney] consultation *before* he begins to testify." *Id.* at 281, 109 S. Ct. at 600 (emphasis added).

The Supreme Court drew a distinction between the interruptions at issue in *Perry* and *Geders* explaining:

> The interruption in *Geders* was of a different character because the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant's own testimony—matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain. It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess.

Id. at 284, 109 S. Ct. at 602.

We conclude that it was improper for the district court to attempt to prohibit defense counsel from communicating with Hicks regarding her decision to testify. Hicks had not become a witness at that point, and she had an "absolute right" to consult with her attorney before testifying. *See id.* at 281, 109 S. Ct. at 600 (stating that the defendant "has an absolute right to [attorney] consultation before he begins to testify."). But the district court's attempt to prohibit attorney-client communication did not deprive Hicks of the right to assistance of counsel. Unlike the facts in *Geders*, where defense counsel objected to the trial court's order but complied with it, here, counsel spoke to Hicks and advised her to testify, despite the district court's directive. *See Geders*, 425 U.S. at 82-83, 96 S. Ct. at 1333 ("Counsel persisted in his objection, although he appropriately indicated that he would as in fact he did comply with the court's order.") And the district court allowed the defense to reopen its case so Hicks could testify. Because the district

court did not effectively prohibit communication between Hicks and her attorney, Hick's right to assistance of counsel was not violated.[4]

And we are not persuaded by Hicks's argument that the district court improperly imposed limitations on her testimony. Hicks cites *State v. Thompson*, 617 N.W.2d 609 (Minn App. 2000) in support of her assertion that the district court conditioned her right to testify in her own defense. In *Thompson*, we held that the district court erred by granting the state's motion in limine to suppress, in an assault trial, the defendant's statement to the police and her trial testimony regarding why she struck the alleged victim. 617 N.W.2d at 611-13. We based our decision on a criminal defendant's due-process right to explain his or her conduct to the jury, even though the explanation does not amount to a valid defense. *Id.* at 612. Unlike the facts in *Thompson*, the district court did not suppress Hicks's explanation for her conduct. And the district court did not prohibit Hicks from testifying regarding any topic.

Rather, the district court made statements indicating that it preferred that Hicks not testify regarding certain topics because such testimony might open the door to evidence regarding the April incident. The district court's statements that if Hicks "goes into more stuff about Chicago, that would allow more explanation of why [J.L.H.] was in Chicago" and "I don't want to hear any . . . irrelevant historical stuff, and if you open the door on anything I'm going to let them go into those *Spreigl* things" appear to have been an

[4] Hicks argues that a showing of prejudice is not an essential component of a violation of the *Geders* rule. *See Perry*, 488 U.S. at 278-80, 109 S. Ct. at 599-600 ("There is merit in petitioner's argument that a showing of prejudice is not an essential component of a violation of the rule announced in *Geders*."). But because Hicks *did* consult with her attorney, there was no violation of the *Geders* rule.

attempt to limit the evidence—both from the state and the defense—to the charged incident. The district court's statements are most appropriately categorized as a fair warning. The district court had previously ruled that evidence regarding the April incident was more prejudicial than probative. The district court recognized that the probative-verses-prejudicial balance might tip in the state's favor if Hicks testified regarding the recent contentious nature of her relationship with J.L.H. The district court therefore advised the parties that its prior ruling excluding the evidence might change if Hicks's testimony increased the probative value of the evidence. But the district court did not restrict Hicks's testimony.

We also reject Hicks's argument that nothing occurred during the trial to justify the district court's decision to revisit its initial ruling regarding evidence of the April incident. Once Hicks testified regarding J.L.H.'s behavioral problems and claimed that J.L.H. was the aggressor in the charged incident, evidence of Hicks's prior act of violence against J.L.H. became more relevant, thereby tipping the scale in favor of admissibility. The district court properly exercised its discretion to reverse its earlier ruling and allow the state to reopen its case to present rebuttal evidence regarding the April incident.

Affirmed.

Dated:

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Judge Michelle A. Larkin