STATE OF MINNESOTA
IN COURT OF APPEALS
A10-322

State of Minnesota,
Respondent,

vs.

Reginald Neal Birts,
Appellant.

Filed April 12, 2011
Affirmed in part and vacated in part; motion granted
Schellhas, Judge

Scott County District Court
File No. 70-CR-08-28951

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

Patrick J. Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jodi L. Carlson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellant challenges his convictions and sentences for malicious punishment of a child, domestic assault, and disorderly conduct. Appellant argues that (1) the district

court erred by admitting relationship evidence under Minn. Stat. § 634.20 (2008), (2) the district court erred by excluding other evidence, (3) the cumulative effect of evidentiary errors deprived him of a fair trial, (4) the evidence is insufficient to sustain his convictions, and (5) the district court erred by imposing sentences on each offense because the offenses arose out of the same behavioral incident. The state moved to strike portions of appellant's supplemental pro se brief. We affirm in part, vacate in part, and grant the state's motion to strike.

FACTS

Appellant Reginald Birts, a non-custodial parent, helped his 13-year-old daughter, T.B., with her homework once or twice a week after school. Birts either picked up T.B. at her school or at her mother's home. On December 16, 2008, Birts picked up T.B. at her mother's home. The parties agree that a heated argument ensued in the car about the purpose of Birts's visit, whether T.B. had any homework, and the location of T.B.'s backpack, which contained her school books. The parties also agree that T.B. attempted to get out of the moving car during the argument. Beyond that, the parties disagree.

T.B. testified that after Birts yelled at her and called her a liar, she asked to be taken home because she did not have any homework. Birts told her no and punched her in the thigh three times. T.B. attempted to get out of the moving car because she was scared and wanted to go home. T.B. testified that when she attempted to get out of the car, Birts held onto her arm and jacket. Birts stopped the car and pulled T.B. back inside the car. Birts resumed driving and continued to yell. T.B. again attempted to get out of the moving car, so Birts pulled into a bank parking lot and stopped the car. T.B. tried to

get out of the car, but Birts held onto her jacket and pulled her hair. T.B. testified that she called out for help.

Birts testified that he held onto T.B.'s arm and jacket to prevent her from leaving the moving car, stopped the car, struggled physically with T.B., pulled T.B. back inside the car, and began driving again. Birts testified that he probably inadvertently pulled T.B.'s hair when he grabbed her arm so that she could not get out of the car. When T.B. again attempted to get out of the moving car, Birts pulled into a bank parking lot and stopped the car. Birts testified that after he pulled into the bank parking lot, T.B. continued to yell and scream, told him that he was hurting her, and asked to be let go. Birts told her to settle down and held her arm firmly to her knee or thigh.

Someone in the bank parking lot heard T.B.'s screams for help, ran into the bank, and asked a teller to call 911. Before the police arrived, Birts drove away. He continued to drive until T.B. calmed down and then he dropped her off at her home.

Savage Police Officer Todd Weinzierl responded to a call from T.B.'s mother and spoke with T.B. and her mother. T.B. reported two assaults by Birts, one at the school and the other at the bank. The state charged Birts with malicious punishment of a child, domestic assault causing fear, domestic assault causing bodily harm, and disorderly conduct.

At trial, T.B. testified that Birts caused her physical pain and that she had a swollen leg, a mark under her eye, and a sprained hand. T.B.'s mother testified that she observed a mark under T.B.'s eye and her swollen leg on December 16. Weinzierl testified that he observed some slight swelling and bruising under T.B.'s eye. Birts

testified that T.B. yelled and swore at him in the car, and that he remained calm, responding to T.B.'s yelling by turning up the radio and refusing to talk to T.B. until she calmed down. Birts denied hitting T.B. in the face or on the thigh. He testified that he was not disciplining T.B.; he was merely trying to prevent her from jumping out of the car.

Over Birts's objection, the district court also allowed the state to introduce relationship evidence, consisting of four prior incidents involving Birts and his children.

In May 2002, when Birts's son, O.B., was 12, Birts attempted to discipline him by hitting his behind with a belt, but inadvertently hit him on the arm leaving a mark.

In 2006, Birts and O.B. argued when O.B. put syrup in the microwave. Birts threw O.B. on the couch and slapped him across the face. When T.B. attempted to intervene, Birts backhanded her. O.B. testified that he microwaved a syrup bottle against Birts's wishes, and Birts "popped [him] upside the head several times."

O.B. also testified that in 2007, he and Birts were exchanging words while O.B. was driving when Birts grabbed the steering wheel. Once they had parked at O.B.'s school, Birts chased him around the school parking lot.

On January 1, 2008, Birts was upset and started yelling because T.B's half-brother was in the kitchen at 1:00 a.m. T.B. intervened and Birts twisted her arm, slapped her face, hit her leg, and pinned her to the floor.

The jury found Birts guilty of malicious punishment of a child in violation of Minn. Stat. § 609.377, subd. 1 (2008), domestic assault causing fear in violation of Minn. Stat. § 609.2242, subd. 1(1) (2008), and disorderly conduct in violation of Minn. Stat.

§ 609.72, subd. 1 (2008). The district court stayed imposition of sentence on all three convictions and placed Birts on probation.

This appeal follows.

D E C I S I O N

State's Motion to Strike

The record on appeal consists of the papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any. Minn. R. Crim. P. 28.02, subd. 8. The state moves to strike portions of Birts's pro se brief that contain multiple facts that are not in the record. Our review of the record confirms that it does not contain the facts identified by the state. We therefore grant the motion to strike. *See State v. Breaux*, 620 N.W.2d 326, 334 (Minn. App. 2001) (stating "matters not part of the record must be stricken").

Admission of Relationship Evidence

Birts argues that the district court erred by admitting relationship evidence under Minn. Stat. § 634.20. We review the district court's evidentiary rulings for an abuse of discretion. *State v. Matthews*, 779 N.W.2d 543, 553 (Minn. 2010).

Minnesota law 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. 'Similar conduct' includes, but is not limited to, evidence of domestic abuse . . . . 'Domestic abuse' and 'family or household members' have the meanings given under section 518B.01, subdivision 2.

Minn. Stat. § 634.20. Relationship evidence is offered to "illuminate the history of the relationship" of the accused and the alleged victim. *State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004). Relationship evidence can assist the jury by providing a context with which it c[an] better judge the credibility of the principals in the relationship." *Id.* at 161. "[T]he interests of justice are best served by admitting relationship evidence when it provides context for the crime charged." *Matthews*, 779 N.W.2d at 553 (quotation omitted).

Similar Conduct

Birts argues that the admitted evidence did not show "similar conduct." "Similar conduct" includes evidence of domestic abuse. Minn. Stat. § 634.20. When a father causes or inflicts fear of physical harm, bodily injury, or assault on his children, domestic abuse has occurred. Minn. Stat. § 518B.01, subd. 2(a), (b)(2) (2008). All of the relationship evidence involved Birts either slapping his children in the face, hitting them with a belt, or chasing them around a parking lot. The district court did not abuse its discretion by concluding that these incidents were evidence of "similar conduct."

Lack of Recantation by T.B.

Birts cites *State v. Lindsey*, 755 N.W.2d 752 (Minn. App. 2008), *review denied* (Minn. Oct. 29, 2008), arguing that the state did not need the relationship evidence because T.B. did not recant and her trial testimony was consistent with her prior statements. In *Lindsey*, this court held that relationship evidence was properly admitted when victim's testimony contradicted her prior statements to investigators. 755 N.W.2d at 757. But *Lindsey* does not support the proposition that relationship evidence is *only*

admissible when a victim's testimony contradicts her prior statements. The fact that the victim made contradictory statements was simply one factor this court weighed in favor of admissibility. *Id.* Here, T.B. alleges that Birts abused her, which he denies. The fact that T.B. has not recanted her accusation does not weigh against the admissibility of the relationship evidence.

Balancing of Probative Value Against Prejudice

The four prior incidents of relationship evidence have significant probative value because they help illuminate Birts's relationship with his children, specifically T.B., and also assist the jury in judging Birts's and T.B.'s credibility.

"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). We conclude that the relationship evidence is not so prejudicial that its probative value is outweighed. The district court minimized any prejudice by cautioning the jury multiple times that evidence of the prior incidents was offered for the limited purpose of assisting in determining whether Birts committed the acts with which he is charged and that the jury was not to convict Birts on the basis of prior occurrences because it might result in double punishment. The district court's cautionary instructions "lessened the probability of undue weight being given by the jury to the evidence." *State v. Kennedy*, 585 N.W.2d 385, 392 (Minn. 1998).

Cumulative Nature of Relationship Evidence

Birts argues that the district court erred by admitting cumulative relationship-evidence testimony and that he was therefore denied a fair trial and is entitled to have his conviction reversed. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403.

Birts's argument that the relationship evidence was cumulative has merit. Three of the relationship-evidence incidents were described by multiple witnesses.[1] And the defense did not cross-examine O.B. or mother, so their credibility was not at issue. Although testimony about the incidents was admissible under section 634.20, the testimony was needlessly cumulative and the district court therefore erred by admitting some of it. *See State v. Townsend*, 546 N.W.2d 292, 296 (Minn. 1996) (agreeing with defendant that district court should have excluded extensive testimony pertaining to crime scene and nature of victim's injuries and pregnancy). But "not every erroneous admission of evidence requires reversal." *Id*. at 297.

If testimony was erroneously admitted, but no constitutional right was implicated, we will reverse only if the district court's error "*substantially influenced* the jury's decision." *State v. Vang*, 774 N.W.2d 566, 576 (Minn. 2009) (quotation omitted) (emphasis added). Here, even without the cumulative testimony, the evidence of Birts's

[1] O.B., mother, and Nesser, the family court evaluator working with the family, testified about the belt incident. T.B., O.B., mother, and Nesser testified about the syrup incident. T.B., mother, and Nesser testified about the January 1, 2008 incident.

guilt is strong. T.B. testified about the current offense, and her mother and the responding police officer testified about injuries they observed on T.B. And the jury would still have heard testimony about each relationship-evidence incident. On this record, we conclude that the district court's error in admitting cumulative relationship evidence was harmless because the error did not substantially influence the jury's decision.

Exclusion of Birts's Proffered Evidence

Birts argues that the district court erred by excluding evidence that social services determined that the allegations of maltreatment of T.B. by Birts on December 16, 2008, were not substantiated. And he also argues that the court erred by excluding a copy of a district court order that vacated an ex parte order for protection (OFP) against him and dismissed the case on the basis that the petitioner, T.B.'s mother, failed to meet "her burden of proof in showing that [Birts] intended to cause physical harm or inflict fear of physical harm upon [T.B.] when he was attempting to keep her from jumping out of a moving car in sub-zero weather."

A defendant has a constitutional due-process right to present a meaningful defense. *State v. Anderson*, 789 N.W.2d 227, 235 (Minn. 2010). But "a defendant's constitutional right to a fair trial . . . is shaped by the rules of evidence, which are designed to assure both fairness and reliability in assessing guilt or innocence." *Id.* (quotation omitted). While Birts "has a right to introduce evidence that helps explain his conduct to the jury, that right is not unlimited." *See id.* (noting that the district court may exclude testimony without violating a defendant's constitutional rights where, for

example, the probative value of such evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury). And "[a] defendant has no constitutional right to present irrelevant evidence." *State v. Woelfel*, 621 N.W.2d 767, 773 (Minn. App. 2001) (quotation omitted), *review denied* (Minn. Mar. 27, 2001).

Social Services' Finding that Maltreatment was Not Substantiated

Birts attempted to submit into evidence a letter from Scott County Health and Human Services (SCHHS) that states that a report was received alleging that Birts abused T.B. and that SCHHS "did not determine that abuse occurred or that child protective services are needed" because "there was not enough evidence to support a finding of maltreatment." Upon the prosecutor's objection, the district court excluded the letter, along with testimony from the author of the letter and testimony from Birts about the content of the letter. Noting the difference in the child-protection and criminal laws, the district court sustained the prosecutor's objection on the bases that "a mini trial on whether there was maltreatment . . . depletes the focus of the jury from what they need to focus on" and "what Scott County Human Services does or what [family court evaluator] does is irrelevant to whether the defendant is guilty of a crime." We agree with the court's ruling.

The differences between physical abuse for maltreatment purposes and criminal purposes are significant. *Compare* Minn. Stat. § 626.556, subd. 2(g) (2008) (defining physical abuse), *with* Minn. Stat. § 609.377, subd. 1 (defining malicious punishment of a child), Minn. Stat. § 609.2242, subd. 1(1) (defining domestic assault), *and* Minn. Stat. § 609.72, subd. 1 (defining disorderly conduct). Because of these differences as well as

differences between child-protection procedures for maltreatment determinations and criminal trials, any probative value of Scott County's finding that maltreatment was not substantiated is outweighed by danger that the jury would be confused and improperly influenced about whether the finding meant that Birts had already been found not guilty. The district court did not err by excluding the evidence.

Order Vacating Ex Parte OFP and Dismissing OFP Petition

Testifying for the prosecution, a police officer explained that when Birts came to the police station to pick up OFP papers, he arrested him on an unrelated warrant. When Birts attempted to introduce evidence about the OFP and the fact that the district court vacated the ex parte order and dismissed the OFP petition filed by T.B.'s mother in connection with the incident on December 16, 2008, the district court sustained the prosecutor's objection and excluded the vacation and dismissal order. Birts argues that the district court abused its discretion.

The state introduced the subject of the OFP through its witness, and Birts offered an order *denying the OFP* to support and corroborate his testimony that he did not assault his daughter. Assuming, as the state would have us do, that the order is inadmissible, we conclude that under the theory of curative admissibility, the district court should have admitted Birts's proferred order vacating the ex parte OFP and dismissing the OFP petition.

"Where one party introduces inadmissible evidence, he cannot complain if the court permits his opponent in rebuttal to introduce similar inadmissible evidence." *State v. DeZeler*, 230 Minn. 39, 45, 41 N.W.2d 313, 318 (1950). In *State v. Carlson*, 264

N.W.2d 639, 642 (Minn. 1978), the supreme court discussed the theory of curative admissibility, explaining that one party may have the right to introduce evidence that refutes the impression created by the other party's evidence. *See also State v. Hull*, 788 N.W.2d 91, 101 (Minn. 2010) (citing *Carlson*).

Assuming the order denying the OFP was inadmissible, which is consistent with the state's argument on appeal, the district court should have allowed Birts to rebut the existence of the OFP. Mentioning OFP papers without further explanation implies that Birts did something wrong. The prosecution opened the door to the subject and Birts should have been allowed to rebut the state's evidence. The district court therefore erred by excluding Birts's proferred evidence.

Because the district court's exclusion of the evidence implicates Birts's constitutional right to present a complete defense, the error is constitutional. *See Anderson*, 789 N.W.2d at 235 (stating that "[a] defendant has the constitutional right to present a complete defense"). Birts's conviction will stand if the constitutional error committed was harmless beyond a reasonable doubt. *See State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009). "For constitutional error, the inquiry is whether the guilty verdict actually rendered was surely unattributable to the error." *State v. Larson*, 788 N.W.2d 25, 32 (Minn. 2010). "To determine whether a constitutional evidentiary error is harmless beyond a reasonable doubt, we look to the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, whether it was effectively countered by the defendant, and the strength of the evidence of guilt." *Id.* (quotation omitted).

We cannot conclude that the mere mention that Birts picked up OFP papers at the police station was highly persuasive, and the prosecutor did not mention the OFP papers or the existence of an OFP in closing argument. Although Birts was denied an opportunity to rebut the testimony about the OFP papers, the evidence of his guilt is strong. Based on the record, we conclude that the error is harmless beyond a reasonable doubt because the jury's verdict is surely unattributable to the error.

Other Errors

Throughout his brief, Birts makes assertions of prosecutorial misconduct and improper vouching. As to improper vouching, Birts provides virtually no argument and cites no authority. Without argument or citation to legal authority in support of the allegations, Birts's argument is waived. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (deeming issues not supported by argument or authority waived). As to prosecutorial error, we have carefully considered the claims and conclude that none has merit.

Cumulative Effect of Evidentiary Errors

Birts argues that the cumulative effect of allowing cumulative and prejudicial relationship evidence and precluding relevant evidence requires reversal. An appellant is "entitled to a new trial if the errors, when taken cumulatively, had the effect of denying appellant a fair trial." *State v. Jackson*, 714 N.W.2d 681, 698 (Minn. 2006) (quotation omitted). Having carefully reviewed the record, we are satisfied that any errors that occurred in this case did not deny Birts the right to a fair trial. Birts's cumulative-error argument therefore lacks merit.

Sufficiency of the Evidence

Birts argues that the evidence is insufficient to sustain his convictions of gross-misdemeanor malicious punishment of a child and misdemeanor domestic assault. When considering a challenge to the sufficiency of the evidence, we "review the evidence presented at trial to determine whether the jury could reasonably have found the defendant guilty of the crime charged." *State v. Vick*, 632 N.W.2d 676, 690 (Minn. 2001). We review the evidence "in a light most favorable to the state" and assume that the jury "believed the state's witnesses and disbelieved the defendant's witnesses." *State v. McBride*, 666 N.W.2d 351, 364 (Minn. 2003).

"A parent, . . . who, by an intentional act or a series of intentional acts with respect to a child, evidences unreasonable force or cruel discipline that is excessive under the circumstances is guilty of malicious punishment of a child . . . ." Minn. Stat. § 609.377, subd. 1. Here, the evidence established that Birts became upset with T.B. about the location of her school books, struggled with her, and punched her in the thigh three times. T.B. had a mark under her eye, a swollen leg, and a sprained hand. Based on this evidence, a jury could reasonably conclude that punching T.B. in the leg hard enough to cause visible swelling in this situation is unreasonable force or cruel discipline that was excessive under the circumstances. Birts's argument therefore lacks merit.

For a conviction of domestic assault under section 609.2242, subdivision 1(1), the state must prove beyond a reasonable doubt that Birts committed an act against a family or household member with intent to cause fear of immediate bodily harm or death. "Family or household member" includes children. Minn. Stat. § 518B.01, subd. 2(b)(2).

Birts argues that "the state did not prove that appellant had the specific intent to cause fear."

"'With intent to' . . . means that the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result." Minn. Stat. § 602.02, subd. 9(4) (2008). Intent is "an inference drawn by the jury from the totality of circumstances." *State v. Fardan*, 773 N.W.2d 303, 321 (Minn. 2009) (quotation omitted). Intent may be proved by circumstantial evidence, including drawing inferences from the defendant's conduct, the character of the assault, and the events occurring before and after the crime. *Davis v. State*, 595 N.W.2d 520, 525–26 (Minn. 1999). "A jury is permitted to infer that a person intends the natural and probable consequences" of his or her actions. *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000). The natural and probable consequence of Birts punching T.B. in the thigh three times, along with his other actions towards her that day, was instilling in T.B. fear of harm. On this record, the evidence is sufficient to support Birts's conviction for domestic assault.

Sentencing

Birts argues that all three of his convictions arose from the same behavioral incident and that the district court erred by imposing separate sentences. "Minnesota law generally prohibits a person from being punished twice for conduct that is part of the same behavioral incident . . . ." *State v. Holmes*, 778 N.W.2d 336, 339 (Minn. 2010). "[I]f a person's conduct constitutes more than one offense under the laws of this state, the

person may be punished for only one of the offenses." Minn. Stat. § 609.035, subd. 1 (2008).

The state concedes that Birts received separate sentences for malicious punishment and domestic assault and that one should be vacated because both counts arise from the same behavioral incident. "[S]ection 609.035 contemplates that a defendant will be punished for the most serious of the offenses arising out of a single behavioral incident because imposing up to the maximum punishment for the most serious offense will include punishment for all offenses." *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (quotation omitted). Birts was convicted of gross-misdemeanor malicious punishment of child and misdemeanor domestic assault. We therefore vacate Birts's sentence for misdemeanor domestic assault because it is the less serious offense.

But, as to Birts's separate convictions for gross-misdemeanor malicious punishment of a child and disorderly conduct, the multiple-victim exception to section 609.035 allows a court to impose one sentence per victim if multiple sentences do not result in "punishment grossly out of proportion to the defendant's culpability." *State v. Schmidt*, 612 N.W.2d 871, 878 (Minn. 2000) (quotation omitted). The witness at the bank was the separate victim of Birts's disorderly conduct offense. The district court did not abuse its discretion by sentencing Birts separately on his convictions of malicious punishment of a child and disorderly conduct. We therefore affirm the sentences.

Pro Se Brief

In his pro se supplemental brief, Birts argues that the evidence is insufficient to sustain his conviction of disorderly conduct. The disorderly conduct statute prohibits a

person from publicly engaging in "brawling or fighting" or "offensive, obscene, abusive, boisterous, or noisy conduct . . . tending reasonably to arouse alarm, anger, or resentment in others." Minn. Stat. § 609.72, subd. 1(3). The person must know or have reasonable grounds to know that the conduct will, or will tend to, alarm, anger or disturb others. *Id.*, subd. 1. In the middle of a bank driveway entrance, Birts engaged in a physical confrontation with T.B. resulting in her crying out for help. Such conduct supports a finding that Birts engaged in brawling or fighting, and that he had reasonable grounds to know that his brawling or fighting would tend to alarm, anger, or disturb others. Based on the record, Birts's claim is without merit.

Birts also complains that he was prejudiced because the presiding district court judge at a pretrial hearing prosecuted him in 2006 on an unrelated offense. The district court and the parties discussed on the record the fact that the judge, when working as a prosecutor, prosecuted Birts on an unrelated matter, and Birts agreed to go forward at the pretrial hearing with the judge presiding. Birts nonetheless complains that his defense counsel "avoid[ed]" his request to have the presiding judge removed and that his counsel failed to call certain witnesses. But Birts provides no citation to the record or legal authority to support his arguments. Without argument or citation to legal authority, we deem Birts's claims waived, and we will not consider them. *Krosch*, 642 N.W.2d at 719.

Affirmed in part and vacated in part; motion granted.