STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1315

State of Minnesota,
Respondent,

vs.

Daniel Jeffrey Zahl,
Appellant.

Filed July 11, 2011
Affirmed
Larkin, Judge

Stevens County District Court
File No. 75-CR-09-131

Lori A. Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

William J. Watson, Interim Stevens County Attorney, Morris, Minnesota (for respondent)

Jennifer M. Macaulay, St. Paul, Minnesota; and

Brian M. Marsden, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Larkin, Judge; and Willis, Judge.*

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

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

LARKIN, Judge

Appellant challenges his convictions of false imprisonment and child endangerment, arguing that the district court erred in admitting evidence of other bad acts and that the evidence was insufficient to sustain the convictions. We affirm.

FACTS

On April 1, 2009, B.A. called 911 and reported that she was locked in her basement and that her child was upstairs in a bathtub. Morris Police Specialist Shane Nelson was dispatched to the scene. Nelson arrived at B.A.'s home and saw a male, later identified as appellant Daniel Zahl, walking away from the house. Zahl looked at Nelson and then turned around and walked into the residence. Zahl exited the residence shortly thereafter and identified himself to Nelson. B.A. exited the house at this point. She informed Nelson that Zahl was the individual he was looking for. B.A. then went back into the house. Zahl told Nelson that B.A. had asked him to leave. Nelson entered the residence and observed B.A. toweling off a small, unclothed child who had wet hair.

Morris Police Sergeant Ross Tiegs also responded to the scene. Nelson described Zahl to Tiegs, and Tiegs left the scene to find Zahl, who had left the premises. Tiegs located Zahl in an alley near B.A.'s home and stopped him. Tiegs asked Zahl if there had been a problem between him and B.A. that morning. Zahl said that he had accidentally locked B.A. in the basement. Zahl told Tiegs that when he realized his mistake, he went back inside the house and unlocked the basement door. Tiegs asked Zahl if he knew his child was in the bathtub, and Zahl told him he was only out of the residence for "two

seconds" before he went back in the house and released B.A. from the basement. Tiegs informed Zahl that leaving an unattended child in a bathtub and locking a person in a basement may be crimes and that the case would be submitted to the county attorney for review.

Less than an hour after speaking with Tiegs, Zahl called B.A. four times. In one of the phone calls, Zahl told B.A. that he was going to be charged with child endangerment. Zahl asked B.A., "Did you know I'm going to fu**ing kill you?" He also commented that B.A. "should be" crying because he was "going to fu**ing kill" her. B.A. went to the police station and reported the phone calls. B.A. was emotional and very upset when she made the report.

Zahl was ultimately charged with one count of false imprisonment under Minn. Stat. § 609.255, subd. 2 (2008), and one count of child endangerment under Minn. Stat. § 609.378, subd. 1 (b)(1) (2008). The case was tried to a jury. At trial, B.A. proved to be a reluctant witness. She testified that she may have exaggerated her statements to the police, and she claimed that she did not remember certain incidents that had occurred between herself and Zahl. As a result, the prosecutor was given permission to treat B.A. as a hostile witness.

The evidence at trial showed that Zahl is the father of B.A.'s children, but they did not live together on April 1, 2009. On that day, Zahl was at B.A.'s home. B.A. was taking out the garbage when she overheard Zahl refer to her as "dumb" over a baby monitor. Zahl was bathing their child, C., at the time. B.A. confronted Zahl regarding the comment and told him to leave the house. Zahl walked down to the basement and

B.A. followed him, leaving C. in the bathtub. They argued in the basement, and Zahl eventually walked upstairs and locked the basement door with a chain. B.A. attempted to leave the basement and discovered that the door was locked. She and Zahl yelled at each other through the locked door. B.A. was concerned about C. being alone in the bathtub and told Zahl to open the door because his child was in the bathtub.

Zahl was convicted of both offenses, and this appeal follows.

D E C I S I O N

I.

Zahl claims that the district court erred by admitting evidence of prior episodes of domestic discord between himself and B.A. and by admitting evidence of the threatening phone calls that he made shortly after the charged incident. We review a district court's evidentiary rulings for an abuse of discretion. *State v. Matthews*, 779 N.W.2d 543, 553 (Minn. 2010). "On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Prior Conduct

Before trial, the state moved to admit evidence of three prior incidents of domestic discord involving Zahl and B.A. Specifically, the state sought to introduce evidence that Zahl attempted to hit B.A. with his car in 2006, when she was pregnant; that police responded to a domestic disturbance between the two in 2007, during which Zahl spat on B.A.; and that B.A. contacted law enforcement in 2008 because Zahl would not leave her home after she asked him to. The state moved for admission of the evidence as *Spreigl*

evidence, as "similar conduct" evidence under Minn. Stat. § 634.20 (2008), and as strained-relationship evidence. Although the district court granted the state's motion, the record is not clear regarding the district court's ruling. The district court stated, "I deem the matter to be relationship evidence as defined in the rules and thus admissible."

Zahl makes multiple arguments in challenging the admissibility of this evidence. But the record shows that the state did not admit substantive evidence of the prior incidents at trial. Although the state asked B.A. if she recalled the 2006 and 2007 incidents, her answer was either "no," "I don't know," or "I don't remember." After B.A. denied or disclaimed knowledge of the prior incidents, the state did not attempt to prove the incidents with other evidence.

Zahl nonetheless argues that he was prejudiced by the state's leading questions regarding the incidents and that the questions were more prejudicial than probative. "The term 'unfair prejudice,' as to a criminal defendant speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *State v. Smith*, 749 N.W.2d 88, 95 (Minn. App. 2008) (quotation omitted). Here, the jury heard the prosecutor ask B.A. if she recalled each prior incident and heard her deny knowledge of the incidents. The only information regarding the prior incidents was the prosecutor's leading questions. But the district court instructed the jury that statements of counsel are not evidence. We presume that the jury followed this instruction. *See State v. Vang*, 774 N.W.2d 566, 578 (Minn. 2009) (explaining that appellate courts presume that the jury follows the district court's

instructions). Under these circumstances, the prosecutor's leading questions were not more prejudicial than probative.

Subsequent Phone Calls

Zahl also argues that the district court erred by admitting evidence that Zahl called B.A. after the charged incident and threatened to kill her. The district court allowed this evidence regarding the phone calls stating, "I think [the phone calls are] also evidence of relationship evidence and secondly, that it was so – so contemporaneous in time with the alleged incident that I felt it was still relevant and – and admissible."

On direct examination, the prosecutor asked B.A. if she went to the police station to report phone calls that she had received from Zahl. B.A. testified that she did not remember exactly what Zahl said during the phone calls. In response, the prosecutor showed her a statement that she had made to the police. B.A. acknowledged that reading the statement had refreshed her recollection. She then testified that Zahl called her a "dumb bit**", threatened to kill her, and told her he was going to be charged with child endangerment.

"Immediate-episode evidence is a narrow exception to the general character evidence rule." *State v. Riddley*, 776 N.W.2d 419, 425 (Minn. 2009). Such evidence is admissible "where two or more offenses are linked together in point of time or circumstances so that one cannot be fully shown without proving the other, or where evidence of other crimes constitutes part of the res gestae." *State v. Wofford*, 262 Minn. 112, 118, 114 N.W.2d 267, 271 (1962). "Res gestae" means "[t]he events at issue, or other events contemporaneous with them." *Black's Law Dictionary* 1423 (9th ed. 2009).

Minnesota appellate courts have "repeatedly affirmed the admission of immediate-episode evidence when there is a close causal and temporal connection between the . . . bad act and the charged crime." *Riddley*, 776 N.W.2d at 425. Immediate-episode evidence may include evidence of an attempt to conceal a crime or an attempt to avoid apprehension for a crime. *See State v. Kendell*, 723 N.W.2d 597, 608-09 (Minn. 2006) (determining that a murder committed in one apartment constituted immediate-episode evidence because the murder was committed to avoid apprehension for murders committed in the apartment next door); *State v. Martin*, 293 Minn. 116, 128, 197 N.W.2d 219, 226-27 (1972) (determining that the district court properly admitted testimony, in a murder trial, regarding earlier robberies committed by the defendant because the murder was motivated by defendant's desire to conceal the robberies); *see also Riddley*, 776 N.W.2d at 426-27 (finding that evidence of an earlier robbery was not admissible under the immediate-episode doctrine when there was no indication that a later murder was committed to conceal the earlier robbery).

Zahl made the phone calls within an hour after the charged incidents. At no later than 10:15 a.m., Tiegs told Zahl he might be charged with a crime. Zahl called B.A. at 10:39, 10:41, 10:42, and 10:45 a.m. In the phone calls, Zahl complained that he might be charged with a crime and threatened to kill B.A. Zahl's threats to B.A. are reasonably characterized as an attempt to avoid prosecution for his earlier actions. Because there was a close causal and temporal connection between the charged incident and the phone calls, the district court did not abuse its discretion by admitting evidence of the phone calls. *See Riddley*, 776 N.W.2d at 425 (explaining that evidence is admissible under the

immediate-episode doctrine "when there is a close causal and temporal connection between the . . . bad act and the charged crime"). Because the evidence regarding the phone calls was admissible as immediate-episode evidence, we do not address Zahl's arguments that the evidence was inadmissible under Minn. Stat. § 634.20.

Zahl also argues that the phone conversations were not proved by clear and convincing evidence. "The clear and convincing standard requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt." *State v. Miller*, 754 N.W.2d 686, 701 (Minn. 2008) (quotation omitted). "This standard is met when the truth of the facts sought to be admitted is highly probable." *Id.* (quotation omitted). Both B.A. and Zahl testified that the phone conversations took place. B.A. testified that Zahl threatened to kill her. Although Zahl denied that he threatened to kill B.A., he admitted that he called B.A. a "dumb bit**," and this admission tended to corroborate B.A.'s testimony.

Finally, Zahl asserts that the evidence was irrelevant and more prejudicial than probative. We disagree. The telephone calls were relevant because they tended to show Zahl's consciousness of guilt and to explain why B.A. was a reluctant witness at trial. *See* Minn. R. Evid. 401 (explaining that relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); *see also State v. McArthur*, 730 N.W.2d 44, 52 (Minn. 2007) (explaining that "[e]vidence of witnesses' fears of testifying and of purported threats against witnesses both tend to be relevant to general witness credibility or to explain a witness's reluctance to testify or

inconsistencies in a witness's story"); *State v. Harris*, 521 N.W.2d 348, 353 (Minn. 1994) ("[E]vidence of threats to witnesses may be relevant in showing consciousness of guilt."). And although evidence of the phone calls may have been damaging, the evidence did not "persuade[] by illegitimate means, giving one party an unfair advantage." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted).

In sum, the district court's admission of evidence regarding the threatening phone calls was not reversible error.

II.

Zahl also claims that the evidence is insufficient to sustain his convictions. In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). The evidence is construed in the light most favorable to the verdict, and we will not re-weigh the evidence. *State v. Franks*, 765 N.W.2d 68, 73 (Minn. 2009).

Assessing the credibility of the witnesses is exclusively the fact-finder's function. *State v. Tovar*, 605 N.W.2d 717, 726 (Minn. 2000). We assume that the fact-finder "believed the state's witnesses and disbelieved any evidence to the contrary." *State v.*

Moore, 438 N.W.2d 101, 108 (Minn. 1989). Even when a witness's credibility is seriously called into question, the fact-finder is entitled to believe the witness. *State v. Pippitt*, 645 N.W.2d 87, 94 (Minn. 2002). All inconsistencies in the evidence are resolved in favor of the state. *State v. Bergeron*, 452 N.W.2d 918, 924 (Minn. 1990).

False Imprisonment

In order to convict Zahl of false imprisonment, the state was required to prove that he intentionally confined or restrained B.A. without her consent. *See* Minn. Stat. § 609.255, subd. 2. "Intentionally" means "the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause that result." Minn. Stat. § 609.02, subd. 9(3) (2008). "A jury is permitted to infer that a person intends the natural and probable consequences of their actions." *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000).

Zahl asserts that the evidence that he intentionally locked B.A. in the basement was circumstantial, and he argues for the application of the heightened scrutiny that applies when any element of an offense is proved by circumstantial evidence. *See State v. Al-Naseer*, 788 N.W.2d 469, 471 (Minn. 2010) ("The heightened scrutiny applied to circumstantial evidence is not limited to cases in which every element required for conviction was proven entirely by circumstantial evidence. Instead, the heightened scrutiny applies to any disputed element of the conviction that is based on circumstantial evidence."). "The intent element of a crime, because it involves a state of mind, is generally proved circumstantially, and the jury is in the best position to evaluate the credibility of witnesses and weigh the evidence regarding intent." *State v. Davis*, 656

N.W.2d 900, 905 (Minn. App. 2003), *review denied* (Minn. May 20, 2003). "[I]n order to reach a conclusion beyond a reasonable doubt on circumstantial evidence alone, all circumstances proved must be consistent with that conclusion and inconsistent with any other rational conclusion." *State v. Farr*, 357 N.W.2d 163, 166 n.1 (Minn. App. 1984).

It is hard to imagine stronger circumstantial proof of Zahl's intent. Although B.A. was a reluctant witness, she testified that Zahl locked her in the basement, that she and Zahl argued through the locked door, and that Zahl refused to let her out. This testimony is sufficient to establish, beyond a reasonable doubt, that Zahl intentionally confined or restrained B.A. against her will.

Child Endangerment

In order to convict Zahl of child endangerment, the state was required to prove that he endangered C. by "intentionally or recklessly causing or permitting [the] child to be placed in a situation likely to substantially harm the child's physical, mental, or emotional health or cause the child's death." Minn. Stat. § 609.378, subd. 1 (b)(1). "[C]hild-neglect and child-endangerment statutes require that [the actor's] conduct was more likely than not to result in substantial harm to the [child]." *State v. Tice*, 686 N.W.2d 351, 355 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

Zahl argues that the evidence was insufficient to convict him of child endangerment because "[t]he only evidence submitted to the jury indicated that the bathtub the child was left in unattended for a couple minutes was empty." We disagree. Nelson testified that when he entered the home, B.A. was drying off an

unclothed child and that the child "had wet hair, consistent with being in a bathtub." This testimony suggests that the bathtub contained water. Moreover, B.A. testified that while she was locked in the basement, she yelled at Zahl to open the door because C. was in the bathtub. Although B.A. testified at trial that she didn't know that Zahl had drained the tub when she called the police, the jury might have chosen not to credit her testimony that the bathtub was empty. *See Bergeron*, 452 N.W.2d at 924 (providing that inconsistencies in the evidence are resolved in favor of the state).

Zahl also argues that leaving a child in an "empty" bathtub does not create a situation more likely than not to cause substantial harm. Even if the bathtub were empty, the endangerment standard would be satisfied. A two-year-old child left unattended in a wet bathtub could easily slip and sustain a serious injury or could turn on the water resulting in burns or drowning. We stress that the standard must be applied in the context presented: C. was alone in the bathtub, Zahl locked C.'s mother in the basement, and he left the home. This is not a case in which a parent stepped out of the room for a few moments while his or her child was in a bathtub. *See Tice*, 686 N.W.2d at 355 (stating that "we must presume that the child-neglect statute, as well as the child-endangerment statute, requires more than a simple deviation from the standard of care). Zahl intentionally locked B.A. in the

basement and left the home even though he knew that C. was unsupervised in a bathtub on another floor. This evidence is sufficient to sustain Zahl's conviction.

Affirmed.

Dated:

Judge Michelle A. Larkin