STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0751

State of Minnesota,
Respondent,

vs.

Louis Myles Davis,
Appellant.

Filed January 21, 2014
Affirmed in part, reversed in part, and remanded
Kirk, Judge

Aitkin County District Court
File No. 01-CR-12-893

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

James P. Ratz, Aitkin County Attorney, Nicholas B. Wanka, Assistant County Attorney, Aitkin, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate State Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Presiding Judge; Johnson, Judge; and Kirk, Judge.

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

KIRK, Judge

On appeal from convictions for third-degree assault and felony domestic assault, appellant argues that the district court erred by admitting evidence of a prior incident of alleged domestic violence as relationship evidence, and by awarding 89 days of jail credit rather than 91 days. Appellant also asserts that the prosecutor committed misconduct by the way she referred to the relationship evidence in her closing argument, that admission of the relationship evidence effectively compelled him to testify, and that the district court should have granted him limited-use immunity before he testified. We affirm in part, reverse in part, and remand.

FACTS

On September 18, 2012, appellant Louis Myles Davis was at the home of his girlfriend, J.W. The two were in a sexual relationship and appellant had been staying at J.W.'s house for a few days. Appellant and J.W. were at odds that day. They do not agree about the causes of their conflict, or about who struck first, but they agree that tensions led to a physical altercation; J.W. hit appellant with a mop and appellant punched J.W. in the eye. After the fight, they avoided each other for the rest of the day.

The next day, J.W. dropped appellant off at a previously scheduled medical appointment and then went to the sheriff's office and reported the incident. Deputy Lawrence Derksen interviewed J.W. and took photos of her right eye, which was bruised and swollen shut. When J.W. went to the emergency room, doctors found that she also

had a nasal fracture. Deputy Derksen later took a statement from appellant and photographed bruises on his shoulder and back.

Appellant was initially charged with one count of felony domestic assault. The state amended the complaint twice, finally charging him with two counts of felony domestic assault in violation of Minn. Stat. § 609.2242, subd. 4 (2012), and one count of third-degree felony assault in violation of Minn. Stat. § 609.223, subd. 1 (2012). Before trial, the state moved to admit evidence of a March 28, 2012 incident between appellant and J.W. as relationship evidence under Minn. Stat. § 634.20 (2012). That incident had resulted in separate domestic-assault charges that were pending in Mille Lacs County when this matter went to trial.

Over appellant's objection, the district court admitted evidence of the previous incident, but with the limitation that the state should not inform the jury that charges were pending in Mille Lacs County. J.W. and appellant both testified at trial, and both discussed the March 28 incident from the witness stand. J.W. testified first, and the court gave a cautionary instruction to the jury before she did so. Before appellant took the stand, his attorney assured the court that he understood his right not to testify, that his decision to testify was "his choice alone," and that he understood that his decision would subject him to the state's cross-examination about the March 28 incident. The district court then questioned appellant directly, confirming that he had thoroughly discussed the decision with his attorney, understood his right to remain silent, and understood that a decision not to testify could not be held against him. Before the jury went out to

deliberate, the judge gave a limiting instruction regarding the use of the March 28 relationship evidence.

The jury convicted appellant of all three counts. On January 28, 2013, the district court sentenced appellant to 27 months' imprisonment on the third-degree assault conviction. The district court did not impose sentence on the other two convictions and did not announce any jail-time credit. A jail-credit report prepared in anticipation of sentencing states that appellant had accrued 89 days as of January 25, 2013. The warrant of commitment gave appellant 89 days' credit for time served as of the date sentence was pronounced.

D E C I S I O N

I. The district court did not err by admitting evidence of the March 28 incident.

We review evidentiary rulings for abuse of discretion, and the burden is on the appellant to establish that the district court abused its discretion and that unfair prejudice resulted. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Evidence of a defendant's prior conduct is generally inadmissible for the purpose of proving the character of the defendant or that he acted in a manner consistent with a particular character trait. *See* Minn. R. Evid. 404(b) (providing that "[e]vidence of another crime, wrong, or act is not admissible to prove the character of a person to show action in conformity therewith"); *see also State v. Spreigl*, 272 Minn. 488, 496, 139 N.W.2d 167, 172 (1965) (discussing the "natural and inevitable tendency" to infer guilt based on a record of past wrongs). Evidence of prior conduct may be admitted for other limited purposes, but only if proven by clear and convincing evidence. Minn. R. Evid. 404(b).

The legislature has carved out an exception to this exclusionary rule, providing for admission of evidence of similar prior conduct in domestic abuse cases:

> 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.

Minn. Stat. § 634.20 (2012). In *State v. McCoy*, the supreme court adopted section 634.20 as a rule of evidence applicable in domestic abuse cases. 682 N.W.2d 153, 161 (Minn. 2004). Such evidence still may not be used to prove a trait of character or conformity with that trait. *State v. Lee*, 645 N.W.2d 459, 466 (Minn. 2002). But it may be used to demonstrate the history of the relationship between the accused and the victim of domestic abuse. *McCoy*, 682 N.W.2d at 159. Before admitting evidence under this exception, the district court need only apply the balancing test prescribed by the statute; the defendant's commission of the prior act need not be proven by clear and convincing evidence. *Id.* As with evidentiary decisions generally, we review a district court's decision to admit relationship evidence under section 634.20 for abuse of discretion. *Id.* at 161.

Appellant first argues that the relationship evidence should not have been admitted because it was more prejudicial than probative. He correctly notes that the probative value of relationship evidence is that "past acts of abuse committed by the same defendant against the same victim illuminate[] the history of their relationship and put[] the charged crime in the context of the relationship." But appellant does not argue, or

even assert, that evidence of the March 28 incident lacks this type of probative value. He does provide a fleeting argument that the evidence is unfairly prejudicial, detailing similarities between the incidents and noting that both involved a punch in the eye, a fractured nose, and a claim of self-defense by appellant. But appellant provides no analysis showing that the evidence's probative value was outweighed by its prejudicial potential. We reject this argument because it fails to demonstrate that the probative value of the relationship evidence was outweighed by its prejudicial potential.

Appellant next argues that the district court erred by performing "little to no analysis of the danger of unfair prejudice." After the attorneys presented their arguments on the issue, the district court simply stated: "All right. Balancing the factors involved the [c]ourt will allow for the relationship testimony as the offer of proof indicates." This analysis was conclusory, but a cursory on-the-record statement of the district court's analysis does not constitute error because it does not show that the district court failed to perform the analysis. *State v. Bell*, 719 N.W.2d 635, 638–40 (Minn. 2006). The district court heard arguments from both sides and stated on the record that it was "[b]alancing the factors involved." Appellant asserts that "[a] thorough analysis . . . would have compelled the conclusion that the [relationship] evidence was unfairly prejudicial." But as noted above, appellant fails to demonstrate why this evidence was more prejudicial than probative. The burden is on appellant to do so. *Amos*, 658 N.W.2d at 203. And we do not presume error. *Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949) (stating, in a civil case, that "on appeal error is never presumed"). We therefore reject

this argument as well, and conclude that the district court did not err by admitting the relationship evidence.

II. The district court erred by granting 89 days of jail-time credit.

Appellant asserts that he should have been given 91 days of jail-time credit to account for the two days that passed between preparation of the jail-credit report and sentencing. The state concedes that the district court miscalculated the amount of jail-time credit. We concur.

We review the district court's factual findings regarding jail-credit determinations for clear error. *State v. Johnson*, 744 N.W.2d 376, 379 (Minn. 2008). A criminal defendant is entitled to credit for time spent in custody "in connection with the offense or behavioral incident being sentenced." Minn. R. Crim. P. 27.03, subd. 4(B). Each day or portion of a day spent in jail is counted as a full-day's credit. Minn. Sent. Guidelines cmt. 3.C.05 (2012).

The jail-credit report shows that in connection with the September 18 offense, appellant was held in the Aitkin County Jail for 49 days, plus 3 days in the Mille Lacs County Jail, followed by another 37 days in the Aitkin County Jail, for a total of 89 days ending on January 25, 2013. The parties agree that appellant was also in custody on January 26 and 27, for a total of 91 days. Thus the district court's conclusion, reflected in the warrant of commitment, that appellant was entitled to 89 days' credit, was clearly erroneous, and we remand for the district court to correct this error.

III. The prosecutor did not commit misconduct.

Appellant also argues that admission of the relationship evidence was unfairly prejudicial "based on . . . the way the evidence was used by the prosecutor." This argument is misplaced because it does not relate to the district court's evidentiary decision; improper prosecutorial use of relationship evidence might constitute prosecutorial misconduct, but it does not retroactively render the evidence inadmissible. We therefore address this argument under the framework applicable to prosecutorial misconduct. Because the framework for prosecutorial misconduct differs depending on whether a defendant objected to the alleged misconduct at trial, an examination of the prosecutor's references to the evidence is necessary to determine whether appellant objected.

In her closing argument the prosecutor made three references to the March 28 incident. First, she said, "[J.W.] had reason to be afraid that the defendant would assault her on September 18th of 2012. The defendant had previously hit her twice with a closed fist [on] March 28th of 2012." Defense counsel did not object. Later, the prosecutor referred to testimony that appellant had previously accused J.W. of cheating on him, and stated that "the defendant also accused [J.W.] of cheating on him just prior to hitting her [on] March 28th of 2012." Again the defense did not object.

In the third reference, the prosecutor said, "This is not the first time that the defendant has claimed self-defense in an altercation with [J.W.]. The defendant admitted that he claimed self-defense in the altercation that occurred with J.W. [on] March 28th [] of 2012." This time, defense counsel objected. The court asked if counsel wanted to be

heard or just make a record of the objection, and counsel responded, "I just don't believe that he made that comment so I just want to make that for the record." This objection was not made on the ground that prosecutorial misconduct had occurred, but on the ground that the prosecutor was relying on facts not in the record. In other words, counsel objected to the assertion that appellant had claimed self-defense in the March 28 incident. We therefore analyze appellant's claim under the framework for unobjected-to prosecutorial misconduct.[1]

In *State v. Griller*, the supreme court stated the plain error standard for review of errors to which the defendant did not object during the trial:

> [B]efore an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights. If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.

583 N.W.2d 736, 740 (Minn. 1998). In *State v. Ramey*, the supreme court adopted this same standard for review of alleged prosecutorial misconduct where the defendant made no objection at trial. 721 N.W.2d 294, 299 (Minn. 2006). The *Ramey* court held that while the burden is on an appellant to show that plain error occurred, "when prosecutorial misconduct reaches the level of plain or obvious error—conduct the prosecutor should know is improper—the prosecution should bear the burden of demonstrating that its misconduct did not prejudice the defendant's substantial rights." *Id*. at 300.

[1] We note also that the facts-not-in-evidence objection is without merit. Appellant did in fact testify that he was defending himself in the March 28 incident.

If the prosecutor's statements can reasonably be construed as placing the events in the context of the relationship between appellant and J.W., then there was no plain error, and we need not inquire further. The first two statements permissibly place the events in context by demonstrating the climate of fear and jealousy that were apparently characteristic of the relationship, and we conclude there was no plain error as to those two statements. The prosecutor's third statement requires more scrutiny.

The prosecutor told the jury:

> You have to determine the credibility of the defendant's statements. The defendant's version of events is biased as he has a direct interest in the outcome of this trial. This is not the first time that the defendant has claimed self-defense in an altercation with [J.W.]. The defendant admitted that he claimed self-defense in the altercation that occurred with [J.W.] [on] March 28th of [] 2012.

This comment, rather than placing the events in the context of the relationship, argues against the credibility of appellant. But we have held that closing arguments for or against the credibility of witnesses, including the defendant, are proper. *State v. Yang*, 627 N.W.2d 666, 679 (Minn. App. 2001) (stating that the prosecuting attorney has a right to argue that the state's witnesses were credible), *review denied* (Minn. July 24, 2001); *State v. Dupay*, 405 N.W.2d 444, 449-50 (Minn. App. 1987) (prosecutor's closing-argument comment that defendant had not mentioned his alibi when first questioned by police was a permissible attack on defendant's credibility); *State v. Johnson*, 359 N.W.2d 698, 702 (Minn. App. 1984) (stating that "[t]he prosecutor may analyze the evidence and vigorously argue that defendant and his witnesses lack credibility"). We conclude that

the third statement was a proper argument against appellant's credibility and did not constitute prosecutorial misconduct.

IV. Appellant was not compelled to testify, and the district court did not err by failing to grant him limited-use immunity.

Appellant argues that the admission of the relationship evidence compelled him to testify about the March 28 incident, and that the district court should have granted him limited-use immunity to prevent the state from using his testimony against him in any future proceeding regarding that incident.

A. Appellant was not compelled to testify.

Appellant asserts that he "had no choice but to address the [March 28] incident in his testimony, but prior to him taking the stand, there was no discussion with the [district] court regarding the fairness of compelling a defendant to respond to an unresolved criminal case . . . ." Appellant's assertion that he was compelled to testify about the March 28 incident is without merit because it ignores the fact that he could have chosen not to testify at all, and because the district court permitted his testimony only after confirming that his decision to testify was knowing and voluntary.

The record suggests that appellant took the stand based on a strategic decision that by testifying about both incidents he might bolster his self-defense claim. One of defense counsel's earliest direct-exam questions asked appellant to describe the March 28 incident. Appellant did so at length, admitting that he hit J.W. on March 28, and asserting that he did so in self-defense. Whatever appellant's reasons for testifying, the record shows that he validly waived his Fifth Amendment rights before doing so.

B. The district court did not err by failing to grant limited-use immunity.

Appellant next argues that the district court erred by failing to grant him limited-use immunity. This argument is without merit. Appellant never requested such immunity, and no legal authority supports the proposition that the district court was obligated to grant such immunity on its own initiative.

Appellant cites *State v. Phabsomphou*, in which we held that where a defendant testified in a probation-revocation hearing about a pending domestic assault charge, the district court had adequately protected his constitutional rights by granting him limited-use immunity barring his hearing testimony from being used in subsequent proceedings on the pending charge. 530 N.W.2d 876, 879 (Minn. App. 1995), *review denied* (Minn. June 29, 1995). *Phabsomphou* is distinguishable in that the district court had offered limited-use immunity in exchange for the defendant's testimony. *Id.* at 877. Here, appellant testified on his own initiative after the district court confirmed that he understood the implications of this decision.

Affirmed in part, reversed in part, and remanded.