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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Billy Joe PHILLIPS, Appellant.

No. A07-1124.
|
Sept. 30, 2008.
|
Review Denied Dec. 23, 2008.

West KeySummary

1 **Sentencing and Punishment** ⟵ Scope, Seriousness, and Gravity of Offense

Sentencing and Punishment ⟵ Excessive Force, Brutality, Extreme Conduct

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)2 Upward Departures
350Hk818 Offense-Related Factors
350Hk820 Scope, Seriousness, and Gravity of Offense
350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)2 Upward Departures
350Hk818 Offense-Related Factors
350Hk825 Excessive Force, Brutality, Extreme Conduct

Evidence was sufficient to support the sentencing jury's determination that two aggravating factors were present that supported an upward departure. The defendant was convicted of multiple counts of criminal sexual conduct in connection with the sexual abuse of his stepdaughter. The defendant would wait until the child's mother left, lock the other children out of the home, and force the child to pornographic movies and perform the acts depicted in the movie. The jury determined that the two aggravating factors were multiple penetrations and planning and manipulation.

Goodhue County District Court, File No. K7-03-182.

Attorneys and Law Firms

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, MN; and Stephen N. Betcher, Goodhue County Attorney, Red Wing, MN, for respondent.

Lawrence Hammerling, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, MN, for appellant.

Considered and decided by TOUSSAINT, Chief Judge; SHUMAKER, Judge; and STONEBURNER, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge.

*1 Appellant challenges his sentence for criminal sexual conduct, arguing that the district court made numerous evidentiary errors, the prosecutor committed misconduct during closing arguments, and the bases for the sentencing departure are improper or not supported by the evidence. We affirm.

FACTS

In 1996 and early 1997, appellant Billy Joe Phillips lived with R .A.H., his wife at the time, and her three children in a mobile home in Goodhue County. During this time, Phillips babysat R.A.H.'s children, including her daughter, B.H., when R.A.H. was working or doing errands.

In the summer of 1996, just before her sixth birthday, B.H. began complaining that her vagina hurt and R.A.H. noticed that it was red. Then on December 31, 1996, R.A.H. saw Phillips masturbating under a blanket on the living room couch while B.H. sat nearby. R.A.H. immediately took B.H. to another room.

About a week later, R.A.H. asked B.H. about the incident. B.H. indicated that Phillips had not touched her but had watched pornographic movies with her. R.A.H. confronted Phillips about the incident and reported it to social services. He moved out in February 1997; they divorced that same year.

Six years later, in December 2002, following a discussion in her sixth-grade health class, B.H. told a teacher and a school counselor that she had been sexually abused by Phillips.

After an investigation, Phillips was charged with three counts of first-degree criminal sexual conduct, in violation of Minn.Stat. § 609.342, subd. 1(a), (g), (h)(iii) (2002); three counts of second-degree criminal sexual conduct, in violation of Minn.Stat. § 609.343, subd. 1(a), (g), (h)(iii) (2002); and two counts of fifth-degree criminal sexual conduct, in violation of Minn.Stat. § 609.3451, subd. 1(1), (2) (2002).

Following a five-day bench trial, the court found Phillips guilty as charged and sentenced him to 172 months executed on one count of first-degree criminal sexual conduct, which was a double upward durational departure from the presumptive 86-month sentence. The district court based the upward departure on the victim's vulnerability, the particular cruelty of the offense, the multiple incidents of abuse, and the high degree of sophistication, planning, and manipulation used in committing and concealing the offenses.

We affirmed Phillips's conviction on appeal, but reversed his sentence and remanded for resentencing in light of *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). *State v. Phillips*, No. A04-170, 2006 WL 163375, at *6-7 (Minn.App. Jan.24, 2006), *review granted* (Minn. Apr. 18, 2006), *stay vacated* (Minn. July 19, 2006).

On remand, the state again moved for an upward sentencing departure. The district court allowed four factors to be submitted to the jury: multiple forms of penetration, use of planning and manipulation, particular cruelty, and particular vulnerability of the victim.

During the sentencing trial, the state presented several witnesses. B.H.'s mother, R.A.H., was the first to testify. She explained that she had been married to Phillips and that Phillips would watch B.H. and B.H.'s brothers while she was working or running errands. She said that, during the summer of 1996, B.H. began complaining that her vaginal area hurt and that it was red. She also told the jury about the time she caught Phillips masturbating in the living room near B.H.

***2** B.H. testified next and described the abuse in detail to the sentencing jury. She explained that when she was five years old, Phillips locked her brothers outside the mobile home and masturbated on the living room couch in her presence. When she asked him what he was doing, he told her to go to the bedroom to "find out." He then took her into that room, locked the door, and began playing a videotape of the movie, "Bambi." After a while, he changed the children's movie to a pornographic movie, removed her clothes, and made B.H. perform with him whatever acts were depicted in the pornographic movie.

B.H. testified that Phillips subjected her to multiple forms of penetration. He told her, "It won't hurt." Then, he put his fingers in her vagina, his penis in her vagina, and "his penis in [her] butt;" and he forced her to touch his penis and put it in her mouth. The abuse was ongoing and occurred on multiple occasions. Successive incidents were all similar to the first, in that Phillips would lock B.H.'s brothers outside the mobile home, take her into his bedroom, lock the door, make her take her clothes off, put on pornographic movies, and then "whatever the porn movie did, [she] had to do to him or he did to [her]." B.H. said that she did what Phillips told her to do because she was scared, explaining that one time when Phillips forgot to lock the door "my brother opened the door when [Phillips] was going to hurt me, and he pushed my brother against the wall. So I was afraid that he was going to hurt me too."

Amy Johnson, a child protection social worker who interviewed B.H. after she disclosed the abuse in 2002, also testified. Johnson's interview with B.H. was videotaped, and a copy of the videotape was received into evidence and played for the jury. After the jury saw the videotaped interview, Johnson explained that B.H. had described four forms of penetration: oral penetration by her mouth on Phillips's penis and vaginal penetration by Phillips's penis, fingers, and tongue. Johnson testified that she has interviewed about 150 child victims of sexual abuse, but this case "was the most egregious case [she] ever worked." She told the jury that the abuse "was certainly not typical," citing the numerous and repeated ways in which B.H. had been violated and the length of time over which the abuse occurred.

Beth Ann Carter, a nurse case manager from the Midwest Children's Resource Center, testified next. Carter conducted an interview and medical assessment of B.H. in December 2002. Carter's interview with B.H. was also videotaped, and a

copy of that interview was played for the jury. After the tape was played, Carter told the jury that B.H. had disclosed five types of penetration during the interview: penetration of her vagina with Phillips's hand, penis, and tongue; penetration of her anus with his penis; and penetration of her mouth with his penis. Carter also explained that, unlike in the earlier interview, B.H. revealed that Phillips had engaged in anal intercourse with her by turning her over, making her get on her hands and knees "like a dog" and then "put [ting] his penis in [her] butt."

*3 According to Carter, in her opinion it would have been particularly traumatic for a child to be forced to watch and act out pornography. She said that only five of the 600 children she had interviewed about sexual abuse had been forced to watch and then act out pornography. In terms of severity, Carter ranked the abuse that B.H. endured as a nine or ten on a scale from one to ten, explaining that this case was unusual because of the many forms of sexual penetration.

Lastly, the state called Goodhue County Investigator Peter Badker, who conducted the criminal investigation of Phillips. Badker told the jury that B.H. was between the ages of five and six when Phillips began abusing her; that Phillips would wait until B.H.'s mother left for work and then lock B.H.'s older brothers outside the mobile home and close the blinds; that Phillips would then take B.H. to the bedroom to watch a children's movie and then, after a while, put in a pornographic movie; and that then Phillips and B.H. would act out whatever acts were shown on the pornographic movies.

Badker testified that he had investigated about 25 child sex abuse cases, but that "[t]his case stands out the most" because of the "many different forms and types of penetration and the age of the child." He explained that this case was different from other cases he had investigated

> [b]ecause of the betrayal of the child so young by someone that's supposed to be in a stepfather role, the isolation of the child from her brothers, the use of the pornographic movies and having the child act out and making do the things that are going on in the movies; the fact that Mr. Phillips was masturbating in front of [B.H.], even when [R.A.H.] was home at one point.

Badker said that the masturbation when R.A.H. was home was significant because it shows that B.H. "is not even safe with the mother present." He also testified that he had never investigated another case that involved the child acting out pornography.

Phillips did not testify or offer any evidence in his defense.

The sentencing jury found that four aggravating factors were present: multiple forms of penetration, planning and manipulation, particular cruelty, and particular vulnerability of the victim. Based on these aggravating factors, the district court again sentenced Phillips to a 172-month prison term. This appeal followed.

DECISION

In this sentencing appeal, Phillips alleges three categories of error, namely: (1) improper evidentiary rulings, (2) prosecutorial misconduct, and (3) insufficient evidence or improper reasons for a sentencing departure.

I. Evidentiary Rulings

Phillips complains that certain evidentiary rulings by the trial court and the admission of other evidence to which he did not object violated the Minnesota Rules of Evidence. The state responds variously but points out that, under Minn. R. Evid. 1101(b)(3) and *State v. Rodriguez*, 738 N.W.2d 422, 432 (Minn.App.2007), *review granted* (Minn. Nov. 21, 2007), the rules of evidence do not apply to sentencing procedures. Although that appeared to be the case at the time of the instant sentencing, the Minnesota Supreme Court has since decided *Rodriguez* and has held that the rules of evidence are applicable to sentencing-jury proceedings. *State v. Rodriguez*, 754 N.W.2d 672, 2008 WL 3862857, at *9 (Minn. Aug.21, 2008). Thus, we must analyze Phillips's claims of evidentiary error by applying the codified rules of evidence.

Videotaped interviews and testimonial evidence of victim's out-of-court statements

*4 Phillips first contends that the district court erred by admitting the two videotaped interviews and the testimonial evidence of B.H.'s out-of-court statements from Carter, Johnson, and Badker, because the evidence was needlessly cumulative and inadmissible hearsay. He did not object to the admission of the interviews or the testimonial evidence at trial.

By failing to object to an error at trial, a defendant forfeits appellate consideration of an issue. *State v. Martinez*, 725 N.W.2d 733, 738 (Minn.2007). This court, however, has the

discretion to review the unobjected-to admission of evidence if it amounts to plain error. *Id.; see also* Minn. R.Crim. P. 31.02 (providing for review of "[p]lain errors or defects affecting substantial rights" not brought to district court's attention).

To establish the existence of plain error, a three-prong test must be met: (a) there must be error, (b) the error must be plain, and (c) the error must affect substantial rights. *State v. Griller,* 583 N.W.2d 736, 740 (Minn.1998). Error is plain if it is clear or obvious. *State v. Strommen,* 648 N.W.2d 681, 688 (Minn.2002). And clear or obvious error is shown if the alleged "error contravenes case law, a rule, or a standard of conduct." *State v. Ramey,* 721 N.W.2d 294, 302 (Minn.2006). An error affects a defendant's substantial rights if the error was prejudicial and affected the outcome of the case. *Griller,* 583 N.W.2d at 741. If the appellate court concludes that all three prongs are met, it "will consider whether a new trial is necessary to ensure fairness and the integrity of judicial proceedings." *Id.* at 742.

Phillips contends that the videotaped interviews and testimonial evidence of B.H.'s statements were needlessly cumulative. Under the rules of evidence, 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.

"Cumulative evidence" is "[t]hat which goes to prove what has already been established by other evidence." *Black's Law Dictionary* 343 (5th ed.1979). Rule 403 does not prohibit cumulative evidence but rather permits the court to exclude relevant evidence that is needlessly cumulative. Cumulative evidence is inherently corroborative and may also serve the functions of providing context, clarity, or detail, or augmenting credibility, or of illuminating the same point in a variety of ways so as to increase the likelihood of the jury's comprehension and appreciation of that point. Thus, the key to a proper assessment of the court's exercise of discretion in admitting the evidence of which Phillips complains is the adjective "needless" in rule 403.

Keeping in mind that one of the departure grounds was that of particular cruelty, the jury needed evidence of what allegedly made Phillips's conduct toward B.H. particularly cruel. The state offered such evidence from three different points of view, namely, those respectively of a child-protection social worker, a nurse, and a criminal investigator. The social worker had interviewed 150 children who had been sexually abused, and she was able to testify that the nature and multiplicity of Phillips's penetrations of B.H. were atypical. The nurse had interviewed about 600 children, and she was able to explain that only five had been forced to watch and then to act out pornographic acts, again showing the a typicality of this abuse. And, finally, the police investigator testified that the scheme Phillips employed and the various types of penetration in which he engaged made the case stand out among the 25 child sex-abuse cases he had investigated.

***5** Although each of these witnesses testified to the same subject matter, each did so from the perspective of a different background, collectively making a case for the proposition that Phillips's conduct was atypical and, therefore, particularly cruel. This cumulative evidence was not needless, and the court did not abuse its discretion in allowing it.

Phillips next argues that the videotaped interviews were inadmissible hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). But an out-of-court statement is not hearsay and is admissible as substantive evidence if (1) the declarant testifies at the trial or hearing; (2) the declarant is subject to cross-examination concerning the statement; (3) the statement is consistent with the declarant's testimony; and (4) the statement is helpful to the trier of fact in evaluating the declarant's credibility as a witness. Minn. R. Evid. 801(d)(1)(B).

B.H. did testify at the trial and was subject to cross-examination about her prior statement, which was consistent with her trial testimony. But Phillips contends that the videotaped interviews were not helpful in evaluating B.H.'s credibility, and thus not admissible as prior consistent statements, because B.H. was not cross-examined during the sentencing-jury trial and her credibility was never challenged. *See State v. Farrah,* 735 N.W.2d 336, 344 (Minn.2007) (requiring that the statement be helpful to the trier of fact and explaining that "[t]o be helpful ..., the witness's credibility must have been challenged"); *State v. Nunn,* 561 N.W.2d 902, 909 (Minn.1997) ("[B]efore the [prior consistent] statement can be admitted, the witness'[s] credibility must have been challenged, and the statement must bolster the witness'[s] credibility with respect to that aspect of the witness'[s] credibility that was challenged.").

Although Phillips did not blatantly attack B.H.'s credibility, the court reasonably could have surmised an implicit challenge that allowed the court to determine that the prior consistent statements were admissible in accordance with the plain language of rule 801(d)(1)(B). There was a five-year delay in the reporting, which itself can raise a credibility issue. B.H.'s recounting of some details was vague and occasionally she could not recall particular acts by Phillips. Stale reporting, generalities instead of sharp and precise details, and problems with recall are all components of a credibility issue and all existed here to some extent. Furthermore, because the trial judge was present for the presentation of the evidence, he was in the best position to glean a credibility challenge that might not be readily apparent from the sterile pages of a transcript on appeal, and the judge is entitled to considerable deference in this discretionary ruling.

Neither *Nunn* nor *Farrah* provides a clue as to when credibility should be deemed to be "challenged." It is unlikely that the court in each of those cases intended to limit credibility challenges to instances in which there are express and direct claims of untruthfulness. The committee comment to rule 801(d)(1)(B) is helpful on this point. Noting that Minnesota rejects the federal counterpart to rule 801(d)(1)(B)-which allows prior consistent statements only to rebut express or implied charges of recent fabrication, or improper influence or motive-the committee comment states:

> ***6** [E]vidence of a prior consistent statement should be received as substantive evidence to rebut an inference of unintentional inaccuracy, even in absence of any charge of fabrication or impropriety. Also, evidence of prompt complaint in sexual assault cases should be received as substantive evidence in the prosecution's case in chief, without the need for any showing that the evidence is being used to rebut a charge of "recent fabrication or improper influence or motive."

Minn. R. Evid. 801 1989 comm. cmt.

There is clearly no challenge to credibility if a defendant admits that the testimony of a witness who made a prior statement is true. And there clearly is a challenge when the defendant states or suggests that the witness is lying. Between these two opposite ends of a spectrum can be found any number of credibility challenges, both express and implied. It is in this gray area that the discretion of the trial judge is paramount. Demeanor, context, manner of interrogation, testimony of opposing witnesses, and points made in opening statements, final arguments, or arguments of motions are some of the factors the trial judge might consider in deciding whether or not credibility has been challenged for purposes of the application of rule 801(d)(1)(B). The videotaped interviews were not inadmissible hearsay, and the court did not abuse its discretion in allowing the tapes.

Other claimed evidentiary errors

Before the videotape of Johnson's interview with B.H. was received into evidence, Phillips's defense counsel objected to the admission of a portion of the tape that referred to an incident in which Phillips threatened R.A.H. with a butcher knife. The district court overruled the objection and admitted the unredacted interview, determining that the evidence might be used to show the victim's vulnerability and that any prejudice was outweighed by its probative value. On appeal, Phillips claims that the court erred by admitting the unredacted videotape, which included the butcher-knife references.

In addition, although he did not object at the time of trial, Phillips claims that certain other evidence from the unredacted videotapes was erroneously admitted. Specifically, he claims that the district court erred by failing to sua sponte exclude statements in the videotaped interviews from B.H. that Phillips had threatened to kill her and her other family members and that she wanted Phillips to go to jail; statements from Johnson that Phillips's conduct was wrong and that she believed B.H.; and statements from B.H. referring to possible abuse of another child by Phillips.

The district court has considerable discretion in admitting evidence, and we review an evidentiary ruling for abuse of that discretion. *Martinez,* 725 N.W.2d at 737. "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). An error is prejudicial only if "there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Post,* 512 N.W.2d 99, 102 n. 2 (Minn.1994).

***7** We review the admission of evidence to which no objection was made for plain error. *Martinez,* 725 N.W.2d at 738. To establish plain error, the defendant must show that his substantial rights were affected-that is, that the error was prejudicial and affected the outcome of the case. *Griller,* 583 N.W.2d at 741.

Evidence of other possible abuse and of post-abuse threats was of questionable admissibility and was likely erroneously

admitted. Nevertheless, Phillips has failed to show that the error in admitting that evidence was sufficiently prejudicial as to have affected the outcome of the sentencing trial. *Id.*

The evidence from B.H.'s testimony revealed multiple forms of penetration; Carter, Johnson, and Badker testified that the case was unusual given these multiple forms of penetration; and B.H.'s testimony also established that Phillips waited until her mother left the mobile home, locked the brothers outside the home, locked B .H. in the bedroom, and then had her watch children's movies before transitioning to the pornographic movies, which he ultimately required her to act out. This evidence supports the sentencing jury's finding of two of the aggravating factors: multiple forms of penetration and a high degree of sophistication, planning, or manipulation. As explained below, the existence of these aggravating factors is sufficient to justify the upward durational departure in this case. Thus, even considering the cumulative effect of all of the claimed evidentiary errors, the evidence that remains is independently sufficient to support the two aggravating factors noted.

II. Prosecutorial Misconduct

Phillips next claims that he is entitled to a new sentencing trial because the prosecutor mischaracterized evidence and inflamed the passions of the sentencing jury during closing arguments. Although he claims error on appeal, Phillips did not object to the prosecutor's closing argument during the sentencing trial or seek a curative instruction. He has therefore waived his right to appellate review of the prosecutor's argument. *State v. Ives,* 568 N.W.2d 710, 713 (Minn.1997).

However, we may exercise our discretion to review prosecutorial misconduct to which no objection was made if it amounts to plain error. *Ramey,* 721 N.W.2d at 297. The plain error analysis asks whether (1) the prosecutor's argument was error; (2) the error was plain; and (3) it affected the defendant's substantial rights. *Id* . at 298. If the defendant demonstrates that a prosecutor's conduct constitutes plain error, the burden shifts to the state to show that the misconduct did not affect the defendant's substantial rights. *Id.* at 302.

"A closing argument must be proper, not perfect. Unartful statements inevitably occur in the midst of a heated and impassioned closing argument, even among the best of orators." *State v. Atkins,* 543 N.W.2d 642, 648 (Minn.1996). But that does not mean that the prosecutor must make a colorless closing argument. *State v. Williams,* 586 N.W.2d 123, 127 (Minn.1998). Rather, the prosecutor "has the right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom." *Id.* (quotation omitted). The closing argument must be based on the evidence produced at trial or the reasonable inferences from that evidence. *State v. Porter,* 526 N.W.2d 359, 363 (Minn.1995). And a prosecutor must avoid inflaming the jury's passions and prejudices against the defendant. *State v. Duncan,* 608 N.W.2d 551, 556 (Minn.App.2000), *review denied* (Minn. May 16, 2000). On review, we must "consider the closing argument as a whole rather than focus on particular phrases or remarks that may be taken out of context or given undue prominence." *State v. Johnson,* 616 N.W.2d 720, 728 (Minn.2000) (quotation omitted).

Alleged mischaracterization of the evidence

***8** Phillips first asserts that the prosecutor mischaracterized evidence during closing argument by referring to the state's "experts," even though only one witness, Carter, was qualified by the court as an expert witness. Phillips cites no authority indicating that a prosecutor's allegedly incorrect reference to a witness as an expert constitutes prosecutorial misconduct and is a ground for a new trial. Thus, it is unlikely that Phillips has supported his claim of prosecutorial error.

During the sentencing trial, Johnson, Badker, and Carter explained in detail their respective backgrounds and experiences in child sexual-abuse issues. Each had training and experience that provided knowledge and information beyond that likely possessed by lay jurors. In other words, each witness brought some expertise to the proceeding, and it was not prosecutorial error to refer to the witnesses collectively as "experts."

Phillips next argues that the prosecutor's closing argument mischaracterized Badker's and Johnson's testimony. We disagree.

During her closing, the prosecutor summarized the testimony of Badker and Johnson as it related to particular cruelty. She explained that Badker said that

> [t]his [case] stands out. This case stands alone in terms of cruelty, the isolation of the [child], the use of pornography, not only the double-the double acts of cruelty. Forcing a young child to watch pornography is one act of cruelty. But

> requiring her to act that out is doubly cruel[ ], particularly cruel.

The prosecutor then examined Johnson's testimony, noting that "[t]his case stuck out in [Johnson's] mind" and that Johnson "believed that [B.H.] was treated with particular cruelty, in a way that she was shown pornography, had to act it out over a long period of time at such a young age."

These statements are consistent with Badker's and Johnson's testimony. Badker testified that he had investigated about 25 child sex abuse cases but that "[t]his case stands out the most" because of the "many different forms and types of penetration and the age of child." He told the jury that this case was different from other cases he had investigated, noting specifically B.H.'s isolation and the use of pornography. Similarly, Johnson testified that this case "was the most egregious case [she] ever worked," telling the jury that the abuse "was certainly not typical," noting the length of time over which the abuse occurred, and calling the forced reenactment of the pornographic scenes "huge[ly] significan[t]."

Alleged appeal to passions of the jury

Phillips next argues that the prosecutor committed misconduct by making an emotional appeal to the jury and inflaming their passions during closing arguments. He claims that the prosecutor's remarks are similar to remarks criticized in *State v. McNeil,* 658 N.W.2d 228, 234-35 (Minn.App.2003). In that case, which also involved sexual abuse of a child, the prosecutor referred to the victim's lost virginity, telling the jury that they could not give the child back her virginity but could "give her justice." *Id.* at 235. We disapproved of those remarks, explaining that the prosecutor's argument had nothing to do with the facts of the case or the elements of the crime charged. *Id.* Nonetheless, we concluded that the remarks did not deprive the defendant of a fair trial, "given the extraordinary weight of the evidence" against the defendant. *Id.* at 236.

***9** Unlike the remarks in *McNeil,* the prosecutor's statements here focused on the facts of the case. Although the prosecutor referred to children as "gifts" and noted that parents, including stepparents, have the "responsibility" to care for and nurture their children, the prosecutor also explained how Phillips had "failed miserably in his" role as a stepfather. She explained that instead of caring for B.H., Phillips

> taught her how to be sexual; he taught her how acts of sexual intercourse [feels]. How it feels when her vagina is penetrated and how it feels to [be] having sex, how to pleasure him with her mouth. How it feels when a tongue is in her mouth and in her vagina. This is what he [taught] her.
>
> Instead of keeping her safe and protecting her and helping her grow and develop and bloom, he [chose] this opportunity to demean, to threaten, isolate. "This won't hurt a bit." "This will be fun." This is what he told this child. How he violated, penetrated, demeaned and punished her.

It is undisputed that Phillips was B.H.'s stepfather and that B.H. was a child when the sexual abuse occurred. The evidence showed that Phillips penetrated B.H.'s vagina with his mouth and penis, engaged in anal intercourse with her, forced her to perform oral sex on him, and told her that the acts would not hurt. The prosecutor's remarks taken as a whole accurately described the facts based on the evidence presented. They were not inflammatory. Phillips has failed to demonstrate that the prosecutor's conduct constituted plain error.

III. Sentencing Departure

The sentencing jury found, beyond a reasonable doubt, that four aggravating factors existed: multiple forms of penetration, use of planning and manipulation, particular cruelty, and particular vulnerability of the victim. Based on those findings, the district court imposed a sentence of 172 months-a double upward durational departure from the presumptive sentence under the Minnesota Sentencing Guidelines. On appeal, Phillips raises several arguments challenging the district court's decision to depart from the presumptive sentence. We review departures from the presumptive sentence for an abuse of discretion. *State v. Thompson,* 720 N.W.2d 820, 828 (Minn.2006).

A defendant has a right to have a jury determine beyond a reasonable doubt the existence of any aggravating factors which permit the district court to upwardly depart from the presumptive sentence in the sentencing guidelines. Minn. Sent. Guidelines II.D; *Blakely,* 542 U.S. at 303, 124 S.Ct. at 2537; *State v. Shattuck,* 704 N.W.2d 131, 142 (Minn.2005). If a jury finds facts supporting a departure, a district court may exercise its discretion to depart from the presumptive sentence in the sentencing guidelines, but departure is not required. Minn. Sent. Guidelines II.D. A departure is justified only if substantial and compelling circumstances exist. *Id.; Shattuck,* 704 N.W.2d at 141.

***10** The sentencing guidelines provide a nonexclusive list of aggravating factors that may constitute substantial and compelling circumstances to justify an upward sentencing departure. Minn. Sent. Guidelines II.D.2(b). The existence of two or more factors, when considered together, may justify a departure. *See, e.g., State v. Losh,* 721 N.W.2d 886, 897 (Minn.2006) (holding two aggravating factors provided sufficient evidence justifying the departure). But even the existence of a single aggravating factor can justify departure. *See, e.g., State v. O'Brien,* 369 N.W.2d 525, 527 (Minn.1985) (upholding double durational departure when only one aggravating factor was present).

Multiple penetrations

Multiple forms of sexual penetration can constitute an aggravating factor. *Taylor v. State,* 670 N.W.2d 584, 588 (Minn.2003); *State v. Morales-Mulato,* 744 N.W.2d 679, 691 (Minn.App.2008), *review denied* (Minn. Apr. 29, 2008). Phillips does not challenge the sufficiency of the evidence to support the sentencing jury's finding of multiple forms of penetration. Instead, he argues that multiple forms of penetration cannot justify a departure in his case because the district court only said that particular cruelty, standing alone, would justify a departure. While resentencing Phillips, the district court stated that particular cruelty "is noted by this Court to be sufficient alone to support a finding of substantial and compelling circumstances leading to a departure upward from the standard guidelines sentence." But the district court did not indicate whether the aggravating factor of multiple forms of penetration was also sufficient, standing alone, to justify the departure in this case.

We have held that multiple forms of penetration can support a double departure, even if no other aggravating factors exist. *State v. Butterfield,* 555 N.W.2d 526, 531 (Minn.App.1996), *review denied* (Minn. Dec. 17, 1996); *State v. Mesich,* 396 N.W.2d 46, 52 (Minn.App.1986), *review denied* (Minn. Jan. 2, 1987). And, in this case, the record unquestionably establishes that Phillips's criminal sexual conduct against B.H. involved multiple forms of sexual penetration, including vaginal intercourse, anal intercourse, digital penetration of B.H.'s vagina, fellatio, and cunnilingus.

Planning and manipulation

Minnesota caselaw also recognizes planning and manipulation as aggravating factors. *See, e.g., State v. Kindem,* 338 N.W.2d 9, 17-18 (Minn.1983); *State v. Sebasky,* 547 N.W.2d 93, 101 (Minn.App.1996), *review denied* (Minn. June 19, 1996). But Phillips contends that the prosecution failed to prove this aggravating factor beyond a reasonable doubt. His argument is without merit, as the evidence clearly establishes that Phillips engaged in planning, sophistication, or manipulation when he committed the offenses against B.H.

During the sentencing trial, B.H. testified in detail about the sexual assaults. She told the sentencing jury that the first assault began with Phillips masturbating in the living room in her presence. When B.H. asked Phillips what he was doing, he told her to go to the bedroom to "find out." Once inside the bedroom with B.H., Phillips locked the door and put on a children's movie for B.H. to watch. After awhile, he replaced that movie with a pornographic movie, and then he forced B.H. to perform whatever acts were depicted on that movie. During the subsequent assaults, Phillips would wait until B.H.'s mother left. He would then lock B.H.'s brothers outside the mobile home and take her to the bedroom, lock the door, play a pornographic movie, and instruct B.H. to perform whatever acts she saw the female characters in those movies do. This level of planning supports the jury's finding.

***11** The presence of these two aggravating factors-multiple penetrations and planning and manipulation-supports the sentencing departure in this case. We therefore decline to address in detail Phillips's arguments relating to the two other aggravating factors, particular cruelty and particular vulnerability.

We note, however, that the district court did not instruct the jury on the definition of "particular cruelty." A district court must instruct on the meaning of the term "particular cruelty" if that factor is submitted to the jury. *State v. Weaver,* 733 N.W.2d 793, 802 (Minn.App.2007), *review denied* (Minn. Sept. 18, 2007). The court erred by failing to do so in this case. However, because the other aggravating factors justified the double upward departure, the district court's failure to define or explain the term "particular cruelty" for the jury does not constitute reversible error in this case.

Affirmed.

All Citations

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Joshua Anthony JONES, Appellant.

No. A11–434.

April 2, 2012.

Hennepin County District Court, File No. 27–CR–10–18303.

Attorneys and Law Firms

Lori Swanson, Attorney General, St. Paul, MN; and Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, MN, for respondent.

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, St. Paul, MN, for appellant.

Considered and decided by KALITOWSKI, Presiding Judge; SCHELLHAS, Judge; and BJORKMAN, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge.

***1** Appellant Joshua Anthony Jones challenges his convictions of two counts of aiding and abetting second-degree assault, two counts of aiding and abetting second-degree assault for the benefit of a gang, prohibited person in possession of a firearm, and prohibited person in possession of a firearm for the benefit of a gang. The convictions arose from an incident in the Little Earth area of Minneapolis, in which two individuals on a bicycle, one pedaling and the other sitting on the handlebars, approached two men. After exchanging words, the person on the handlebars jumped off the bike and fired two shots in the direction of the two men. Appellant argues that the district court: (1) abused its discretion by allowing the state to amend the complaint; (2) erred in admitting witness statements under the forfeiture-by-wrongdoing exception to the Confrontation Clause; (3) erred by admitting prejudicial expert gang testimony that affected appellant's substantial rights; (4) erred by accepting appellant's stipulation to a prior conviction without obtaining a waiver of his right to a jury trial on that element; and (5) erred in sentencing appellant. Appellant also challenges the admission of evidence in a supplemental pro se brief. We affirm appellant's convictions but reverse and remand for resentencing.

DECISION

I.

Appellant argues that the district court abused its discretion in permitting the state to amend the complaint after the trial began. A district court may "permit an indictment or complaint to be amended at any time before verdict or finding if no additional or different offense is charged and if the defendant's substantial rights are not prejudiced." Minn. R.Crim. P. 17.05. "The district court has broad discretion to grant or deny leave to amend a complaint, and its ruling will not be reversed absent a clear abuse of that discretion." *State v. Baxter*, 686 N.W.2d 846, 850 (Minn.App.2004).

Initially, the state charged appellant with one count of second-degree assault and one count of second-degree assault for the benefit of a gang. As to both counts, the complaint referred to "the victims." Before trial, the state added two counts to the complaint: prohibited person in possession of a firearm, and prohibited person in possession of a firearm for the benefit of a gang. The state also added aiding and abetting in connection with the assault charges.

At issue here is the state's motion after trial commenced to amend the complaint to separate the assault counts as to the two victims. Over appellant's objection, the district court allowed the amendment. In making its ruling, the district court noted that both victims were referred to in the original complaint. The amendment resulted in the addition of two assault counts identical to those already in the complaint: second-degree assault and second-degree assault for the benefit of a gang.

Appellant asserts that the amended complaint charged an additional offense because "it required proof of additional elements." For purposes of rule 17.05, an additional or different offense is charged if the amendment affects an essential element of the charged offense. *Gerdes v. State,* 319 N.W.2d 710, 712 (Minn .1982). In the initial complaint, the state identified "victims" with respect to the two assault charges. At trial, appellant did not dispute that there were two victims to the shooting. The assault crimes to be proven pursuant to the amended complaint remained second-degree assault and second-degree assault for the benefit of a gang. And the additional counts were based on the same alleged facts underlying the originally charged counts. *Cf. State v. Guerra,* 562 N.W.2d 10, 13 (Minn.App.1997) (holding that an amended complaint charged a different offense because the underlying facts, date, and object of the amended offense were all different from the original charge). Thus, the amended complaint neither required the state to prove any additional elements nor affected an essential element of the charged offenses.

***2** Because the amendment did not affect an essential element of the charged offenses, the amendment did not "charge an additional offense." Therefore, appellant's substantial rights were not prejudiced. *See Gerdes,* 319 N.W.2d at 712 (stating that in order for a defendant's rights to be substantially prejudiced, "it must be shown that the amendment either added or charged a different offense"). We conclude that the district court did not abuse its discretion in permitting the state to amend the complaint.

II.

Appellant argues that the district court erred in admitting witness statements under the forfeiture-by-wrongdoing exception to the Confrontation Clause. The Sixth Amendment guarantees the accused the right to confront the witnesses against him. U.S. Const. amend. VI. In *Crawford v. Washington,* the Supreme Court held that the Confrontation Clause prohibits the admission of testimonial statements of a witness "who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." 541 U.S. 36, 53–54, 124 S.Ct. 1354, 1365 (2004). "There is a narrow exception to the confrontation right, referred to as forfeiture by wrongdoing, which extinguishes confrontation claims on essentially equitable grounds." *State v. Cox,* 779 N.W.2d 844, 850 (Minn.2010) (quotation omitted). "The forfeiture-by-wrongdoing exception is aimed at defendants who intentionally interfere with the judicial process." *Id.* Whether an evidentiary ruling violated a criminal defendant's right to confrontation is a question of law, which we review de novo. *State v. Caulfield,* 722 N.W.2d 304, 308 (Minn.2006).

Appellant challenges the district court's admission of an out-of-court statement made by George Ortley, who was identified by eyewitnesses as the individual with appellant on the bicycle at the time of the shooting. During the investigation, Ortley provided a recorded statement to a police officer. In the statement, Ortley said that when he and appellant arrived at the location of the shooting, he was seated on the bike seat pedaling, and appellant was on the handlebars. Ortley stated that he and appellant had words with a male, and appellant got off the bike and fired two shots. Although he was subpoenaed, Ortley did not appear for trial.

The state sought to introduce the recording of Ortley's statement under the forfeiture-by-wrongdoing exception to the Confrontation Clause, asserting that written gang bylaws were intended to prevent members from being available as witnesses at criminal trials. Over appellant's objection, the district court concluded that the exception was applicable. The court admitted Ortley's statement into evidence after redacting Ortley's identification of appellant as the person sitting on the handlebars.

It is undisputed that for purposes of the Confrontation Clause, Ortley's statement was testimonial and unconfronted. Thus, the issue is the applicability of the forfeiture-by-wrongdoing exception. Appellant argues that forfeiture by wrongdoing was inapplicable and that the error in admitting Ortley's statement was not harmless beyond a reasonable doubt.

***3** The Minnesota Supreme Court recently stated that "the forfeiture-by-wrongdoing exception requires the [s]tate to prove (1) that the declarant-witness is unavailable, (2) that the defendant engaged in wrongful conduct, (3) that the wrongful conduct procured the unavailability of the witness and (4) that the defendant intended to procure the unavailability of the witness." *Cox,* 779 N.W.2d at 851. The state's burden is to prove each factor by the preponderance of the evidence. *Id.* at 852.

But on this record, we need not determine whether the state satisfied the *Cox* requirements because any possible error in admitting Ortley's statement was harmless beyond a reasonable doubt. Violations of the confrontation clause "are

subject to a constitutional harmless-error-impact analysis." *Id.* To be harmless, the error "must be harmless beyond a reasonable doubt." *State v. Courtney,* 696 N.W.2d 73, 79 (Minn.2005). An error is harmless beyond a reasonable doubt if the guilty verdict "actually rendered was surely unattributable to the error." *State v. Juarez,* 572 N.W.2d 286, 292 (Minn.1997). In considering the effect the error had on the verdict, we look to the record as a whole. *Id.* Overwhelming evidence of guilt is a very important factor in assessing whether an evidentiary error impacted the verdict, but is not the sole consideration of the reviewing court. *State v. Al–Naseer,* 690 N.W.2d 744, 748 (Minn.2005).

Here, appellant argues that the admission of Ortley's statement was not harmless beyond a reasonable doubt because the "only issue in the case was the identity of the shooter," that is, the identification of "the person riding on the handlebars of the bike," and Ortley's statement identifying himself as the person pedaling the bike was highly persuasive. We disagree.

The state charged appellant with *aiding and abetting* second-degree assault and *aiding and abetting* second-degree assault for the benefit of a gang. To prove the assault charges, the state had to prove that appellant acted alone or intentionally aided, advised, hired, counseled, or conspired with another. *See* Minn.Stat. § 609.05, subd. 1 (2010). Accordingly, whether appellant was the shooter, and whether he was pedaling the bike or on the handlebars, were not determinative on the issue of his guilt.

Moreover, Ortley's statement was neither critical to the prosecution nor highly persuasive. Overwhelming evidence demonstrated that appellant was one of the two individuals on the bike. Appellant's cousin A.G., the victim who testified, identified appellant as the man on the handlebars. Frank Gerring, the director of youth services for Little Earth, obtained footage of the incident from ten security cameras located throughout Little Earth. Gerring testified that he is familiar with appellant, and identified the man on the handlebars of the bike as either appellant or appellant's brother. An eyewitness who knows appellant and Ortley testified that she saw appellant and Ortley approach the victims on the bicycle just before the shots were fired, and she identified appellant and Ortley in photo line-ups. Because overwhelming evidence identifies appellant as one of the individuals on the bicycle, we conclude beyond a reasonable doubt that the guilty verdicts were not attributable to Ortley's statement.

III.

***4** Appellant challenges the district court's admission of gang expert testimony. Appellant concedes that because he did not object to the admission of the testimony at trial, the applicable standard of review is plain error. *See State v. Martinez,* 725 N.W.2d 733, 738 (Minn.2007) (stating that an appellate court "has discretion to consider an error not objected to at trial if it is plain error that affects substantial rights"). "In order to constitute plain error, there must be (1) error, (2) that is plain, and (3) that affects substantial rights." *Id.* If any prong is not satisfied, the claim fails and will not be considered, but if all three prongs are satisfied, we assess "whether we should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.* at 738–39.

To prove that appellant committed the crimes of assault and prohibited person in possession of a firearm for the benefit of a gang, the state needed to prove that appellant committed the crime "for the benefit of, at the direction of, in association with, or motivated by involvement with a criminal gang, with the intent to promote, further, or assist in criminal conduct by gang members." Minn.Stat. § 609.229, subd. 2 (2010).

The admissibility of gang expert testimony is well established in Minnesota. *See State v. Martinez,* 725 N.W.2d 733, 739 (Minn.2007); *State v. Jackson,* 714 N.W.2d 681, 691–92 (Minn.2006); *State v. Blanche,* 696 N.W.2d 351, 372–74 (Minn.2005); *State v. DeShay,* 669 N.W.2d 878, 884–86 (Minn.2003); *State v. Lopez–Rios,* 669 N.W.2d 603, 612–13 (Minn.2003). "To be admissible, gang expert testimony 'must add precision or depth to the jury's ability to reach conclusions about matters that are not within its experience.' " *Jackson,* 714 N.W.2d at 691 (quoting *DeShay,* 669 N.W.2d at 888).

To address concerns about the prejudicial effect of gang expert testimony, the supreme court recommends that "firsthand-knowledge testimony be used to prove the 'for the benefit of a gang' element when feasible." *Id.* Courts must avoid admitting expert testimony that "is largely duplicative of firsthand knowledge testimony." *Id.* And the supreme court has "cautioned against the use of gang expert testimony that is based largely on hearsay." *Id.*

Jerome Wilhelmy, an investigator in the Office of Special Investigations of the Department of Corrections, testified on behalf of the state as a gang expert. Wilhelmy testified that he

is familiar with Native American gangs, including the Native Mob. He described the establishment, location, operation, membership, and leadership structure of the Native Mob, and the gang's primary criminal activities. He stated that, in his opinion, the Native Mob is a criminal gang. Wilhelmy testified regarding the Native Mob's identifying colors, letters, and hand signs, and identified these letters, colors, and symbols on items from appellant's and Ortley's residences. Wilhelmy testified that the Native Gangster Disciples are a rival gang and identified its colors. He explained how violent crimes benefit the Native Mob and the member who commits the crime, and he described the role of respect within the gang. He stated that members must follow rules and bylaws and demand respect from each other and from other gangs, and if a member is disrespected by a rival gang member, they must retaliate, or face consequences from their own gang.

***5** We conclude that the district court did not err by admitting Wilhelmy's testimony. Wilhelmy's testimony was relevant and helpful as to whether the Native Mob is a criminal gang and whether appellant committed crimes for the benefit of a gang. The testimony would have assisted the jurors in making findings on these two issues. *See id.* at 692 (stating that "jurors are unlikely to be familiar with gang culture").

Appellant argues that Wilhelmy's testimony was neither necessary nor helpful and was duplicative in light of A.G.'s testimony. A.G. testified that he and the other victim are members of the Native Gangster Disciples, a rival gang of the Native Mob. He said that at the time of the shooting, the other victim was wearing blue, which is associated with the Native Gangster Disciples. He testified that appellant is his cousin and a member of the Native Mob, and the individuals on the bike wore red and white, which are Native Mob colors. A.G. said he does not have personal knowledge of the types of crimes the Native Mob members participate in, but knew of shootings between the gangs and that the Native Mob includes members who engage in a pattern of criminal activity. A.G. also talked about the role of respect within his gang.

We conclude that any overlap in the testimony of Wilhelmy and A.G. was immaterial. Wilhelmy's testimony provided more precise information than A.G.'s testimony and Wilhelmy offered testimony on topics not covered by A.G. Thus, Wilhelmy's testimony was not needlessly cumulative. *See id.* (stating gang expert's testimony was not needlessly cumulative when two other witnesses testified about gang activity).

Appellant asserts that Wilhelmy's testimony was based on hearsay. But appellant does not identify any hearsay statements, and the record indicates that Wilhelmy's testimony was based on personal knowledge acquired through his years of experience. Appellant also asserts that Wilhelmy's testimony about the criminal activity of the Native Mob and the role of respect and retaliation in gang culture was unfairly prejudicial. He likens the testimony to that in *Blanche* where an expert testified about gang member credibility. 696 N.W.2d at 374. We disagree. In *Blanche,* the expert's testimony contained improper statements about gang culture not made in this record.

Moreover, even if the admission of some of Wilhelmy's testimony was improper, the error did not affect appellant's substantial rights. "An error affects substantial rights when there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *State v. Clark,* 755 N.W.2d 241, 252 (Minn.2008) (quotations omitted). The supreme court has determined that when there is ample independent evidence establishing a defendant's links to a gang and supporting the conclusion of guilt as to the crimes charged, and the expert testimony corroborates other witnesses' testimony and likely is no more influential than the other evidence, any error does not affect substantial rights and reversal is not warranted. *Martinez,* 725 N.W.2d at 739.

***6** We conclude that ample independent evidence in the record connects appellant with the Native Mob and supports a conclusion of guilt with respect to the offenses charged for the benefit of a gang. Multiple eyewitnesses identified appellant as one of the individuals on the bicycle, and testified that appellant is a member of the Native Mob and wore Native Mob colors at the time of the shooting. A.G. and another eyewitness testified that he and the other victim are members of a rival gang, and A.G. said the other victim wore blue, their gang's identifying color. Officers found clothing in the colors of the Native Mob at the locations where they found appellant and Ortley. Moreover, Wilhelmy's testimony, like that in *Martinez,* corroborated the testimony of witnesses and "likely was no more influential than much of the other evidence presented linking [appellant] to the crime." *Id.* Because appellant's substantial rights were not affected, any possible error does not warrant reversal.

IV.

Appellant stipulated that he was prohibited from possessing a firearm in relation to the charged offense prohibited person in possession of a firearm for the benefit of a gang. Appellant argues that he did not waive his right to a jury trial on this element. Whether a criminal defendant waived his right to a jury trial is reviewed de novo. *State v. Tlapa,* 642 N.W.2d 72, 74 (Minn.App.2002), *review denied* (Minn. June 18, 2002).

Our review of the transcript indicates that although appellant stated that he intended to stipulate to the prior conviction, his statement does not constitute a valid waiver of his right to a jury trial on the element that he is a person prohibited from possessing a firearm. *See State v. Kuhlmann,* 806 N.W.2d 844, 849–50 (Minn.2011) (distinguishing a criminal defendant's stipulation to a previous-conviction element from a defendant's waiver of a right to a jury trial on that element).

Appellant asserts that the error requires automatic reversal. But following *Kuhlmann,* which was decided after appellant submitted his brief, this argument is unavailing. In *Kuhlmann,* the court held that a failure to obtain a personal waiver of a right to a jury trial on the previous-conviction element of the charged offenses is not structural error and therefore does not require automatic reversal. 806 N.W.2d at 851–52. The court determined that the error fell "into the category of 'trial errors' occurring in the prosecution of the case," which are "quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 851, 852. Because Kuhlmann never objected to the error at trial, the court applied a plain-error analysis. *Id.* at 852.

Like Kuhlmann, appellant did not object to the waiver error at trial. Because appellant did not object to the error, "we must determine whether there was error, that was plain, and that affected ... substantial rights." *Id.* If each prong is satisfied, we address the error only if it seriously affects the fairness and integrity of the judicial proceedings. *State v. Griller,* 583 N.W.2d 736, 740 (Minn.1998). If the error was prejudicial and affected the outcome of the case, then it affects substantial rights. *Id.* at 741.

***7** We conclude that the error did not have a significant effect on appellant's substantial rights. Appellant agreed to the stipulation, which prevented the jury from hearing about appellant's prior conviction. The state could have readily proved that appellant was prohibited from possessing a firearm due to a prior conviction if appellant had not stipulated to the prior conviction. Thus, the error was not prejudicial and did not affect the outcome of the trial.

V.

Appellant argues that the district court made two sentencing errors, and the state concedes both errors. "We review a sentence imposed by a district court to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court." *State v. Pugh,* 753 N.W.2d 308, 310 (Minn.App.2008) (quotation omitted). This court reviews a district court's decision on sentencing for an abuse of discretion. *State v. Franklin,* 604 N.W.2d 79, 82 (Minn .2000).

The jury found appellant guilty on all counts and also found the presence of two aggravating factors, which could support an upward durational departure. But at sentencing, the district court stated that it would not impose an upward departure but would impose a presumptive sentence under the guidelines. The court imposed consecutive sentences of 84 months' imprisonment each for the two convictions of second-degree assault for the benefit of a gang, and a concurrent sentence of 84 months' imprisonment for the conviction of prohibited person in possession of a firearm for the benefit of a gang. The court also ordered that appellant was not eligible for supervised release.

First, appellant asserts that the district court erred in imposing the three 84–month sentences as sentences falling within the presumptive range. We agree. Because the offenses involved a firearm and were committed for the benefit of a gang, a mandatory minimum sentence and an extended maximum sentence apply to each sentence pursuant to Minn.Stat. § 609.11, subd. 5 (2010), and Minn.Stat. § 609.229, subds. 3–4 (2010). *See* Minn. Sent. Guidelines 11.G (2010). But as the state concedes, there were errors on the sentencing worksheets relating to each of the offenses, and the district court appears to have relied on these erroneous worksheets in concluding that sentences 84 months in duration were within the presumptive range. Our review of the record and applicable law does not support a conclusion that the 84–month sentences are within the presumptive range under the sentencing guidelines. Thus, we reverse and remand for resentencing.

Second, appellant alleges that the district court erred in pronouncing sentences that denied appellant the right to supervised release under Minn.Stat. § 609.229, subd. 4(b). The state agrees and both parties ask that this court remand the issue to the district court for resentencing in light of *State v. Leathers*, 799 N.W.2d 606 (Minn.2011), which was decided after appellant was sentenced.

***8** In *Leathers*, the court addressed whether the phrase "full term of imprisonment" in Minn.Stat. § 609.221, subd. 2(b) (2010), which establishes a minimum sentence for a person convicted of assaulting a peace officer, requires a defendant to serve his entire sentence with no eligibility for supervised release. 799 N.W.2d at 608–09. The court determined that "the definition of the phrase 'full term of imprisonment' ... means two-thirds of a defendant's executed prison sentence," making Leathers possibly eligible for supervised release after he serves a full two-thirds of his sentence. *Id.* at 611.

If a defendant is convicted of a crime for the benefit of a gang and the underlying crime is a felony, the defendant is "not eligible for probation, parole, discharge, work release, or supervised release until that person has served the full term of imprisonment." Minn.Stat. § 609.229, subd. 4(b). Because the language in Minn.Stat. § 609.229, subd. 4(b), contains the phrase "full term of imprisonment," which is identical to the language the court interpreted in *Leathers*, we conclude that *Leathers* is applicable and the district court erred by imposing a sentence that prohibits appellant from being eligible for supervised release.

VI.

In a pro se supplemental brief, appellant asserts that the district court committed plain error in admitting into evidence web pages and photographs from web pages without establishing the proper foundation. We disagree. The state offered the evidence during an evidentiary hearing on whether the forfeiture-by-wrongdoing exception permitted the admission of Ortley's statement. Thus, the rules of evidence, including the foundation requirement, did not apply. Minn. R. Evid. 104(a) ("Preliminary questions concerning ... the admissibility of evidence shall be determined by the court.... In making its determination it is not bound by the rules of evidence ...."), 1101(b)(1) (providing that the rules of evidence do not apply to the determination of questions of fact preliminary to admissibility of evidence when determined by the court under rule 104(a)).

Affirmed in part, reversed in part, and remanded.

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Walter Alexander WILLIAMS, Appellant.

No. A11–1158.

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May 29, 2012.

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Review Denied August 21, 2012.

Ramsey County District Court, File No. 62CR109760.

Attorneys and Law Firms

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Considered and decided by STAUBER, Presiding Judge; CLEARY, Judge; and RODENBERG, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge.

***1** On appeal from convictions of felony domestic assault and domestic assault by strangulation, appellant argues that he is entitled to a new trial because the district court (1) abused its discretion by denying his *Batson* challenge to the state's peremptory strike of an African–American prospective juror; (2) abused its discretion by determining that the probative value of appellant's prior assault on an ex-girlfriend and violation of an order for protection was not substantially outweighed by the danger of unfair prejudice; and (3) reversibly erred by reading to the jury a statement prepared by the prosecution concerning appellant's prior violation of an order for protection. We affirm.

FACTS

Appellant lived with his girlfriend, O.W., and her two young children in the lower-level unit of a duplex in St. Paul. Appellant's sister lived in the upper-level unit. On October 22, 2010, appellant and O.W. had a house-warming party in their unit. Appellant became drunk and got into a verbal altercation with one of the male guests, who had made a lewd gesture at O.W. Appellant also became angry when O.W. asked to "go out" with the male guest and some other friends.

O.W. testified that after the guests left, appellant lunged at her and hit her repeatedly. He squeezed her around the neck with both hands several times and choked her so that she could not breathe. He dragged her around by the neck and through some broken glass. At one point, O.W. grabbed some small steak knives to ward him off, but appellant knocked them away and struck her in the face. Appellant also kicked and stomped on her. The assault lasted about three hours, until appellant finally left the house. When O.W. made a police report some twelve hours later, a police officer observed bruising, cuts, some dried blood, and gouge marks on O.W.'s neck.

Appellant testified that O.W. was the aggressor in the incident. He claimed that she threatened him with two large butcher knives and that he grabbed the knives and pushed her down in self-defense. He denied otherwise assaulting O.W., but he could not explain the gouges on her neck.

Appellant's sister testified that she was awake in the upstairs duplex unit during the course of the alleged assault. She did not hear any noises, voices, or other sounds from appellant and O.W.'s unit below. Normally, she would hear muffled voices and sounds if there was activity below.

Appellant was charged with felony domestic assault in violation of Minn.Stat. § 609.2242, subd. 4 (2010), and domestic assault by strangulation in violation of Minn.Stat. § 609.2247, subd. 2 (2010). During jury selection, after the parties had passed the panel for cause, the state used its first peremptory challenge to strike an African–American veniremember. Appellant's counsel raised a *Batson* challenge, arguing the strike was motived by race. A discussion between the court and counsel occurred at the bench and off the record. The trial judge indicated that he would be denying

the *Batson* challenge. It was nearly the end of the day, and the district court dismissed the jurors for the day and then discussed the *Batson* challenge on the record. The state initially indicated that it struck the juror based on a "gut feeling," but then argued that it struck the prospective juror because (1) he initially failed to disclose a disorderly conduct conviction which involved a negative interaction with police and (2) he was currently going through a divorce. The district court determined those were "valid race-neutral reasons" for excluding the veniremember and denied the *Batson* challenge.

***2** During trial, the state introduced an audio recording of a police interview with appellant, during which appellant volunteered that he had previously strangled and punched an ex-girlfriend. Appellant objected that this evidence was more prejudicial than probative. The court overruled his objection, relying on a statute which allows the admission of relationship evidence concerning prior similar conduct in domestic-assault cases. *See* Minn.Stat. § 634.20 (2010).

The state also sought to admit relationship evidence in the form of a stipulation or statement regarding appellant's prior violation of an order for protection. Appellant objected to the form of the evidence, arguing that the state had the burden of presenting witnesses for cross-examination. Over appellant's objection, the district court read the state's proposed stipulation to the jury as evidence of the violation.

The jury found appellant guilty on both counts.

DECISION

I.

Appellant argues that the district court erred by rejecting his *Batson* challenge to the state's peremptory strike of an African–American veniremember without making a contemporaneous record or applying step three of the required analysis. Whether the opponent of a peremptory strike has proven racial discrimination is ultimately a question of fact. *State v. Reiners*, 664 N.W.2d 826, 830 (Minn.2003). We accord "great deference" to the district court's factual determination unless it is clearly erroneous. *Id.* at 830–31.

Exercising a peremptory challenge to strike a prospective juror on the basis of race violates the Equal Protection Clause of the United States Constitution. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 1719, 90 L.Ed.2d 69 (1986). The United States Supreme Court has set forth three steps for determining whether a peremptory challenge is based on race. *Id.* at 96–98, 106 S.Ct. at 1723–24. First, the opponent of the challenge must make a prima facie case of racial discrimination. *Purkett v. Elem*, 514 U.S. 765, 767, 115 S.Ct. 1769, 1770, 131 L.Ed.2d 834 (1995). Second, the party exercising the challenge must offer a race-neutral explanation. *Id.* Third, the district court must determine whether the race-neutral reason is pretextual—in other words, "whether the opponent of the strike has proved purposeful racial discrimination." *Id.* at 767, 115 S.Ct. at 1770–71; *see also* Minn. R.Crim. P. 26.02, subd. 7(3) (mandating the three-step analysis).

A. Contemporaneous record

Appellant first argues that the district court abused its discretion by failing to make a contemporaneous record of the *Batson* challenge. Appellant's counsel raised the challenge after both parties had exercised their peremptory strikes. The district court held a sidebar discussion, which was not on the record. Shortly thereafter, the district court dismissed the jurors at the end of the day and placed the *Batson* analysis on the record. Appellant argues that this delay undermined the accuracy of the *Batson* analysis, created ambiguity in the record, and gave the state an opportunity to refine its argument that the peremptory strike was race-neutral.

***3** District courts are required to conduct all proceedings concerning *Batson* challenges on the record and outside the presence of the jury. Minn. R.Crim. P. 26.02, subd. 7(2). Here, the district court substantially complied with that requirement by recreating the sidebar discussion on the record immediately after dismissing the jurors for the day. The parties had the opportunity to correct or add to the record to ensure that it accurately reflected the sidebar discussion. None of the parties pointed out any inaccuracies or otherwise objected on the record, and district court noted that the state's reasons accurately reflected the sidebar discussion. This procedure, although perhaps not ideal, avoided the cumbersomeness of repeatedly dismissing and recalling the jury, particularly since the challenge took place at the end of the day when the court was almost ready to dismiss the jury. *Cf. State v. Lindsey*, 632 N.W.2d 652, 658–59 (Minn.2001) (noting that district court has considerable discretion in matters of courtroom procedure and judicial economy). The record adequately preserved the *Batson* challenge.

Appellant argues that the delay between the sidebar and the on-the-record analysis gave the state an opportunity to refine

its argument responsive to the *Batson* challenge. District courts are required to resolve *Batson* objections "as promptly as possible," and in any event before swearing in the jury. Minn. R.Crim. P. 26.02, subd. 7(2). Here, the delay between the sidebar discussion and the on-the-record analysis was relatively short. Following the sidebar, the district court empaneled the jurors, gave them abbreviated instructions, dismissed the jury, and immediately conducted the *Batson* analysis. The analysis took place before the jury was sworn.

Our caselaw establishes that a short delay in the *Batson* context may be permissible. For example, we reversed the district court's grant of a *Batson* challenge on grounds of pretext even though the parties had an opportunity to formulate their positions during an overnight recess. *State v. Campbell,* 772 N.W.2d 858, 860, 866 (Minn.App.2009), *review denied* (Minn. Dec. 23, 2009). Similarly, the supreme court affirmed the denial of a defendant's *Batson* challenge even though the state had requested an opportunity to research the law on the issue, and the district court agreed to postpone final resolution of the challenge until the parties made further arguments the next morning. *State v. Gaitan,* 536 N.W.2d 11, 16 (Minn.1995). The supreme court declined to adopt a bright-line rule requiring the state to offer its reasons immediately. *Id.* Thus even if the state here did have an opportunity to refine its arguments while the trial judge attended to the comfort of the jurors at the end of the day, the delay did not alter the district court's analysis nor did it result in any deficiency in the court's prompt and accurate determination on the *Batson* challenge.

***4** Moreover, because appellant has not established any prejudice resulting from the district court's procedure, any error would be harmless. *See State v. Rivers,* 787 N.W.2d 206, 211–12 (Minn.App.2010) (holding that although *Batson* violations themselves are not subject to harmless-error review, the district court's failure to correctly follow the three-step *Batson* procedure was harmless because no prejudice resulted), *review denied* (Minn. Oct. 19, 2010). We conclude that the district court did not abuse its discretion in placing the *Batson* analysis on the record shortly after appellant raised it in a sidebar discussion.

B. Step three of *Batson* analysis

Appellant argues that the district court reversibly erred in failing to discuss step three of the *Batson* analysis on the record. He maintains that step three would have revealed the state's reasons for striking the veniremember as pretexts for purposeful racial discrimination.

Step three of the *Batson* analysis concerns whether the opponent of the strike has met his burden of proving that the state's reasons are pretexts for purposeful discrimination. *State v. Bailey,* 732 N.W.2d 612, 618 (Minn.2007). This is a factual determination that generally turns on credibility. *State v. Taylor,* 650 N.W.2d 190, 202 (Minn.2002); *State v. McRae,* 494 N.W.2d 252, 254 (Minn.1992). Each step of the *Batson* analysis should be addressed on the record, and when the court reaches step three, it should "state fully its factual findings, including any credibility determinations," on the record. *Reiners,* 664 N.W.2d at 832.

The district court addressed step three, albeit in a somewhat truncated fashion, by stating it believed the state's proffered reasons were "*valid* race-neutral reasons." (Emphasis added.) Implicit in this determination are (1) a credibility determination in favor of the state; (2) a factual finding that the state's reasons were ultimately valid, i.e., *not* pretextual; and (3) the conclusion that appellant did not prove purposeful discrimination. *See Rivers,* 787 N.W.2d at 211–12 (noting that even though district court did not separately address step three, it implicitly found that reasons for strike were valid and not pretextual, and any error in failure to articulate step three was harmless); *see also McRae,* 494 N.W.2d at 254 (noting that step three concerns whether facially-valid, race-neutral reasons for strike were ultimately valid and believable).

Although the district court did not detail the reasons for its credibility determination, the supreme court has recognized that "the record may not accurately reflect all relevant circumstances" that the district court may properly consider in ruling on *Batson* challenges. *State v. White,* 684 N.W.2d 500, 506 (Minn.2004). The district court heard the state's reasons for the strike twice and expressly stated it believed they were valid. In the context of the record before us, this finding directly refuted appellant's argument of pretext and reasonably reflected step three of the *Batson* analysis.

C. Purposeful discrimination

***5** Appellant also argues that the record suggests the state's peremptory strike was motivated by purposeful race-based discrimination. As noted above, whether a strike was motivated by purposeful discrimination is a factual question that turns largely on credibility. *Taylor,* 650 N.W.2d at 202. We will not reverse the district court's determination absent clear error. *Reiners,* 664 N.W.2d at 830–31.

In deciding whether there was purposeful discrimination, the district court may take into account the persuasiveness of the proffered reasons for the strike, whether they have any basis in trial strategy, the prosecutor's demeanor, and the demeanor of the challenged veniremember. *Miller–El v. Cockrell,* 537 U.S. 322, 339, 123 S.Ct. 1029, 1040, 154 L.Ed.2d 931 (2003); *McRae,* 494 N.W.2d at 257. It may also consider whether the state asked pertinent questions before striking the veniremember, whether its reasons apply equally to non-minority veniremembers who were not removed, and whether the state asked all veniremembers the same questions. *Bailey,* 732 N.W.2d at 618; *Taylor,* 650 N.W.2d at 202; *Campbell,* 772 N.W.2d at 865. When there is "no evidence from which to infer an intent to discriminate, the *Batson* objection must be overruled." *Reiners,* 664 N.W.2d at 834.

Here, the state offered two reasons for striking the prospective juror: (1) he initially failed to disclose a disorderly conduct conviction which involved a negative interaction with police and (2) he was currently going through a divorce.[1] These reasons were plausible and persuasive. As to the first, the district court asked all of the veniremembers if they had ever been party to a civil or criminal proceeding, including being "charged with a crime of any kind, *disorderly conduct,* DWI, theft, whatever." (Emphasis added.) Even though the first veniremember to respond had been convicted of disorderly conduct several times, the challenged veniremember did not disclose his conviction. Later, when the court questioned each juror individually, the challenged veniremember stated he forgot to mention that he had been cited for disorderly conduct. The prospective juror's dishonesty or inability to initially recall the conviction may have reflected poorly on his ability to recall evidence and pay full attention at trial. Moreover, his citation stemmed from a negative interaction with a police officer. At trial, the state called two police officers as witnesses. The veniremember's negative history with an individual police officer may have tainted his view of those witnesses, despite his assertion of neutrality. The state's first rationale thus had a plausible basis in trial strategy.

1 Although the state initially claimed it exercised the strike based on a "gut feeling," it went on to articulate two other reasons. The district court implicitly found these reasons credible despite the state's failure to immediately articulate them.

The state's second rationale—that the veniremember was going through a divorce at the time of trial—is also persuasive. As the prosecutor noted, the allegations in this case involved a couple splitting up and appellant moving out of their shared home. Appellant argues that the state's rationale was much too broad because the allegations concerned an episode of violence early in the relationship, not a divorce. But the state's reasons did not have to be so compelling as to justify removal for cause. *See Reiners,* 664 N.W.2d at 833 (noting that the purpose of a peremptory challenge is to "excuse prospective jurors who can be fair but are otherwise unsatisfactory to the challenging party"). The veniremember could have been more sympathetic to appellant as a result of going through a divorce himself. This rationale also had a plausible basis in trial strategy.

***6** The record does not support any discriminatory intent underlying the state's peremptory challenge. The state asked all veniremembers the same questions and did not single out the challenged veniremember for special questioning. No other veniremembers belatedly disclosed criminal convictions; nor were any others involved in divorce proceedings at the time. Accordingly, the district court did not clearly err in finding that the state articulated valid, race-neutral reasons for the peremptory strike.

II.

Appellant next argues that the district court abused its discretion by admitting relationship evidence that was more prejudicial than probative under Minn.Stat. § 634.20. The challenged evidence consisted of (1) appellant's voluntary admission, during a recorded custodial interrogation, that he previously "got a domestic by strangulation" when he choked and punched his ex-girlfriend and (2) appellant's prior violation of an order for protection involving the ex-girlfriend.

In domestic-assault cases, evidence of "similar conduct by the accused" against other household members is relevant and admissible "unless the probative value is substantially outweighed by the danger of unfair prejudice." Minn.Stat. § 634.20; *State v. McCoy,* 682 N.W.2d 153, 161 (Minn.2004) (adopting statute as rule of evidence in domestic assault cases). "Similar conduct" includes domestic abuse and violations of orders for protection. Minn.Stat. § 634.20. The district court has broad discretion in weighing the probative value of evidence against its prejudicial effect. *State v. Gassler,* 505 N.W.2d 62, 70 (Minn.1993) (applying Minn. R. Evid. 403); *McCoy,* 682 N.W.2d at 159 (recognizing that balancing test for relationship evidence mirrors that provided in Minn. R. Evid. 403).

Appellant does not dispute that the evidence in question concerned quite similar conduct—his strangulation and physical assault on an ex-girlfriend. But he argues that the similarity of the conduct rendered it unfairly prejudicial because it suggested he had a propensity to strangle women. "Unfair prejudice" requires something more than just a showing that the evidence is severely damaging. *State v. Bell,* 719 N.W.2d 635, 641 (Minn.2006). Instead, it refers to evidence that "persuades by illegitimate means, giving one party an unfair advantage." *Id.* (quotation omitted). The similarity of the conduct here did not give the state an unfair advantage. The conduct is precisely the sort that the legislature has deemed relevant by providing for its admission unless the probative value is "*substantially* outweighed" by the risk of unfair prejudice. Minn.Stat. § 634.20 (emphasis added).

Appellant also argues that the evidence was unfairly prejudicial because it did not concern his relationship with O.W., which had been nonviolent until this incident. The purpose of relationship evidence under Minn.Stat. § 634.20 is to "put the crime charged in the context of the relationship between [the accused and the victim] ." *McCoy,* 682 N.W.2d at 159. But evidence showing how the defendant acted toward *former* girlfriends and household members "sheds light on how [he] interacts with those close to him, which in turn suggests how the defendant may interact with the victim." *State v. Valentine,* 787 N.W.2d 630, 637 (Minn.App.2010), *review denied* (Minn. Nov. 16, 2010). As a result, relationship evidence is not limited to that concerning the defendant's relationship with the victim. *Id.* Because the evidence here showed how appellant treated a former girlfriend, it was also probative of his relationship with O.W., particularly since he challenged her credibility. At trial, appellant claimed that O.W. had been the aggressor who initiated the assault. The relationship evidence put this claim in the context of his interactions with an ex-girlfriend. *See State v. Lindsey,* 755 N.W.2d 752, 757 (Minn.App.2008) (holding that such evidence was probative where credibility of the victim was at issue), *review denied* (Minn. Oct. 29, 2008). As a result, the relationship evidence was admissible under *Valentine* even though it did not directly relate to appellant's relationship with O.W.

*7 Finally, in weighing the probative value of the evidence, the district court noted that its prejudicial effect was diminished because the admission did not refer to a conviction. The court gave the jury limiting instructions immediately before they heard the evidence and again before closing arguments. Such instructions mitigate the risk that the jury will lend undue weight to the evidence. *Id.* The district court therefore did not abuse its discretion in admitting the relationship evidence.

III.

Appellant contends that even if his violation of an order for protection was admissible, its form was inadmissible because the statement was not actually evidence. He also argues that the district court reversibly erred when it assumed the role of an advocate by presenting the prosecutor's statement to the jury, thereby jeopardizing the judge's impartiality.

At trial, the district court read the following statement to the jury:

> THE COURT: Members of the Jury, I'm going to read for you a stipulation—
>
> [DEFENSE COUNSEL]: Objection, your Honor.
>
> THE COURT: Excuse me, this is not a stipulation but I will tell you that in this case, for your information, the defendant committed the act of Violation of a Domestic Abuse Order for Protection in January of 2008 against a person whose initials are C.A.R.

Appellant objected to the statement and sought to require the state to carry its burden of proof by adducing evidence of the violation, such as live witnesses. He did not stipulate to the statement at any time.

A. Evidentiary error

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos,* 658 N.W.2d 201, 203 (Minn.2003). An abuse of discretion occurs if the court improperly applied the law. *Dobrin v. Dobrin,* 569 N.W.2d 199, 202 (Minn.1997). To merit reversal, the appellant must establish (1) an abuse of discretion (2) that resulted in prejudice. *Amos,* 658 N.W.2d at 203.

As noted above, Minn.Stat. § 634.20 provides for the admission of *evidence* of similar relationship conduct in domestic abuse cases. The statute does not define "evidence." However, we construe "technical words in a statute according

to their technical meaning" and in light of their context. *State v. Taylor,* 594 N.W.2d 533, 535 (Minn.App.1999).

The context of the statute suggests that the legislature was referring to such evidence as the courts may allow under the rules of evidence. *See McCoy,* 682 N.W.2d at 160–61 (noting that rules of evidence are delegated exclusively to judicial branch of government, but adopting Minn.Stat. § 634.20 as a "rule of evidence for the admission of evidence of similar conduct"). Evidence generally consists of testimony, exhibits, and stipulations. *See* Minn. R. Evid. 601–1006 (addressing the admissibility of testimony and exhibits); *State v. Wright,* 719 N.W.2d 910, 916 n. 1 (Minn.2006) (recognizing that parties may stipulate to form of evidence); 10 *Minnesota Practice,* CRIMJIG 1 .02A, 1.02B (2006) (defining evidence as testimony and exhibits).

***8** The manner of presentation of the fact of appellant's prior conviction was erroneous, as there was no stipulation for its admission and there was no witness presenting the information to the jury in a manner contemplated by the rules of evidence. The district court erred in allowing the presentation of the fact of appellant's prior conviction to the jury in this fashion.

B. Harmless error

When a district court errs in admitting evidence, we apply the harmless-error standard to determine whether there is a reasonable possibility that the erroneously admitted evidence significantly affected the verdict. *State v. Post,* 512 N.W.2d 99, 102 n. 2 (Minn.1994). If there is a reasonable possibility that the verdict might have been more favorable to the defendant without the evidence, the error is prejudicial. *Id.* An error of constitutional magnitude is harmless beyond a reasonable doubt if "the verdict rendered is surely unattributable to the error" in light of the record as a whole. *State v. Juarez,* 572 N.W.2d 286, 292 (Minn.1997) (quotation omitted).

Here, viewing the record as a whole, there is no reasonable possibility that the statement read by the trial judge affected the verdict. O.W. testified to each element at issue for both offenses. Her testimony was corroborated by photographs of her injuries, medical records, and the testimony of two police officers and an emergency room physician. The jurors could see for themselves O.W.'s four-foot-eleven frame in contrast to appellant's nearly six-foot stature. Given the wealth of other evidence in the record, there is no reasonable possibility that the verdict would have been more favorable to appellant without the brief statement regarding his violation of an order for protection. We are satisfied that the verdict is unattributable to the challenged statement. As a result, any error in admitting the statement as evidence was harmless beyond a reasonable doubt.

C. Impartiality

Appellant further argues that the trial judge's impartiality was compromised when the judge read the statement concerning appellant's prior conviction, thereby assuming the role of the prosecutor. A criminal defendant has a constitutional right to an impartial judge, and a district court judge's conduct must be "fair to both sides." *State v. Dorsey,* 701 N.W.2d 238, 250 (Minn.2005) (quotation omitted). The judge must not adopt a partisan position. *Id.* at 252. In determining whether a judge's conduct amounts to a denial of an impartial judge and a fair trial, the supreme court has examined whether the conduct prejudiced the jury. *McKenzie v. State,* 583 N.W.2d 744, 747 (Minn.1998).

Appellant argues that the statement prejudiced the jury by suggesting the court had an opinion regarding appellant's guilt. But the statement itself did not convey any impression of bias. And though the trial judge initially misspoke and referred to the statement as a stipulation, he immediately corrected the error. The court's mere act of reading of the statement did not express or imply that the judge had an opinion regarding appellant's guilt or that he was advocating for the state.

***9** Moreover, the district court gave limiting instructions advising the jury not to lend undue weight to the statement. It delivered these instructions both immediately after reading the statement and again before closing arguments. It also instructed the jury to disregard anything the court may have said or done that suggested it had an opinion about the case. The jury is presumed to have followed those instructions. *See State v. Ferguson,* 581 N.W.2d 824, 835 (Minn.1998) ("Courts presume that juries follow the instructions they are given.").

The district court's brief and neutrally phrased statement is distinguishable from cases where the judge expressly advocated for one side or the other. In *Block v. Target Stores, Inc.,* for example, the district court committed prejudicial error by engaging in extensive, one-sided cross-examination of an expert witness that demeaned the witness's qualifications and destroyed his credibility. 458 N.W.2d 705, 713 (Minn.App.1990), *review denied* (Minn. Sept. 28, 1990).

Similarly, in *Hansen v. St. Paul City Ry.*, the district court judge engaged in a number of "caustic clashes" with the defendant's attorney, all of which occurred in the presence of the jury. 231 Minn. 354, 360, 43 N.W.2d 260, 264 (1950). Here, by contrast, the statement was not expressly identified as the state's evidence, and its content did not imply that the district court favored the prosecution. There is no reasonable possibility that the statement swayed the jury. The statement did not amount to a denial of an impartial judge or a fair trial.

Affirmed.

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Reuben B. WOODS, Appellant.

No. A10–1076.

|

June 13, 2011.

|

Review Denied Aug. 24, 2011.

Hennepin County District Court, File No. 27–CR–08–32387.

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Considered and decided by STAUBER, Presiding Judge; KALITOWSKI, Judge; and WORKE, Judge.

UNPUBLISHED OPINION

WORKE, Judge.

***1** Appellant challenges his criminal-sexual-conduct conviction, arguing that: (1) the evidence was insufficient to sustain a conviction; (2) the district court abused its discretion by excluding evidence of the victim's sexual past; and (3) the district court abused its discretion by not granting a *Schwartz* hearing. Appellant also raises several arguments in a pro se brief. We affirm.

DECISION

Sufficiency of the Evidence

Appellant Reuben B. Woods challenges the sufficiency of the evidence to sustain his criminal-sexual-conduct conviction. In considering a claim of insufficient evidence, review by this court is limited to a thorough review of the record "to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn.1989). An appellate court "cannot retry the facts, but must take the view of the evidence most favorable to the state." *State v. Merrill*, 274 N.W.2d 99, 111 (Minn.1978). The jury is in the best position to weigh the evidence and evaluate the credibility of witnesses; therefore, its verdict must be given due deference. *State v. Engholm*, 290 N.W.2d 780, 784 (Minn.1980). An appellate court assumes that the jury believed the state's witnesses and disbelieved any contradictory evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn.1989). And 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 that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn.2004).

Appellant was convicted of third-degree criminal-sexual conduct against J.P., a vulnerable adult. Third-degree criminal-sexual conduct is the use of force or coercion to accomplish sexual penetration. Minn.Stat. § 609.344, subd. 1(c) (Supp.2007). "Force" means "the infliction, attempted infliction, or threatened infliction by the actor of bodily harm" which results in the victim "reasonably believ[ing] that the actor has the present ability to execute the threat." Minn.Stat. § 609.341, subd. 3 (2006). "Coercion" means "words or circumstances," which "cause the [victim] reasonably to fear that the actor will inflict bodily harm upon the [victim] or ... causes the [victim] to submit to sexual penetration ... against the [victim's] will." *Id.*, subd. 14 (2006). "Consent" means

> words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean the existence of a prior or current social relationship between the actor and the complainant or that the complainant failed to resist a particular sexual act.

Id., subd. 4(a) (2006).

Appellant contends that J.P. consented to the sexual encounter, and raises several concerns about the evidence leading to his conviction. Appellant questions the credibility of J.P.'s testimony, which was the only testimony about the assault. J.P., age 22, suffers from a rare neurological disorder characterized by various developmental deficiencies: J.P. has a poor short-term memory, is easily confused, reads only at a third-grade level, and requires constant supervision. J.P. volunteered at a nursing home where appellant was employed. J.P. testified that appellant asked her to go with him into a room in the basement of the nursing home. Once in the room, appellant asked J.P. to perform oral sex and inserted his penis into her mouth. J.P. further testified that appellant told her to get under a desk, told her to turn around under the desk, unzipped her pants, inserted his fingers into her vagina and engaged in anal sex. J.P. testified that she continually asked appellant to stop and told him that he was hurting her, but that appellant did not stop. J.P. also testified that she was fearful that appellant might have a weapon in his pocket. J.P. stated that appellant stopped only when she answered a cell-phone call from her father during the assault. J.P. did not report the incident to her father at the time; she reported the incident to her mother the following day when she realized that her mother would see her bloodied underwear in the laundry.

***2** Appellant asserts that J.P.'s testimony is unreliable due to her cognitive deficiencies. Appellant also argues that the circumstances surrounding J.P.'s report of the alleged abuse are dubious: she did not report the incident to her father when she answered her cell phone and only confessed to her mother when she feared that she would get in trouble. Appellant further contends that J.P. gave inconsistent accounts of the circumstances surrounding the assault: J.P. initially told social services that appellant previously called her and invited her to his house for sex, but said nothing about this invitation at trial and did not recall reporting this to social services. Finally, appellant argues that the medical evidence demonstrated that the lacerations in J.P.'s anus were inconclusive as to whether forced or consensual sexual contact occurred.

Appellant's arguments are without merit. J.P's testimony was sufficient to enable the jury to convict appellant of third-degree criminal-sexual conduct by force or coercion. And, in a criminal-sexual-assault case, "testimony by a victim need not be corroborated." Minn.Stat. § 609.347, subd. 1 (Supp.2007). Additionally, "[i]n light of [ ] conflicting testimony, it [is] the exclusive function of the jury to weigh the credibility of the [victim]." *State v. Haala,* 415 N.W.2d 69, 79 (Minn.App.1987), *review denied* (Minn. Dec. 22, 1987); *see also State v. Voorhees,* 596 N.W.2d 241, 252 (Minn.1999) (stating that inconsistencies must be resolved in favor of the jury's verdict). Accordingly, the evidence presented at trial was sufficient to sustain appellant's conviction.

Evidence of Victim's Sexual History

Appellant also challenges the district court's decision to preclude evidence of J.P.'s sexual history. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos,* 658 N.W.2d 201, 203 (Minn.2003). Appellant bears the burden of establishing that the district court abused its discretion and that he was prejudiced. *See id.* A district court abuses its discretion when it acts "arbitrarily, capriciously, or contrary to legal usage." *State v. Profit,* 591 N.W.2d 451, 464 n. 3 (Minn.1999) (quotation omitted).

Evidence of prior sexual conduct of a victim "shall not be admitted nor shall any reference to such conduct be made in the presence of the jury." Minn. R. Evid. 412(1). An exception exists, however, when "consent of the victim is a defense in the case" and the evidence is of "the victim's previous sexual conduct tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue, relevant and material to the issue of consent." Minn. R. Evid. 412(1)(A)(i). But the evidence is admissible "only if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature." Minn.Stat. § 609.347, subd. 3 (Supp.2007). Finally, the court must find by a preponderance of the evidence that the facts offered by the defendant are true. *Id.*

***3** Appellant argues that the district court abused its discretion by disallowing the evidence of J.P.'s interview with social services in which J.P. disclosed a sexual encounter with another coworker. Appellant contends that the events were strikingly similar in nature to his interaction with J.P.: J.P. met the other man at work, like she met appellant; the other man is black, like appellant; and J.P. engaged in anal sex with the man. Considering these similarities, appellant asserts that this evidence was relevant to whether J.P. consented to the sexual encounter with appellant and, in turn, whether appellant committed a crime. Appellant further argues that the probative nature was not substantially outweighed by the prejudicial impact.

But "[t]o qualify as a *pattern* of clearly similar sexual behavior, the sexual conduct must occur regularly and be similar in all material respects." *State v. Davis,* 546

N.W.2d 30, 34 (Minn.App.1996) (emphasis added), *review denied* (Minn. May 21, 1996). Appellant's proffered evidence consisted of one isolated incident. One incident does not equate to regular conduct, regardless of how similar it was to the incident at issue here; thus, the evidence would not have established a pattern of sexual conduct. Additionally, the interview does not establish that J.P. consented to anal sex with the other man; J.P.'s own statements seem to indicate that she was again confused by the request for sexual favors from another person, and this confusion is symptomatic with her cognitive disability. Likewise, appellant's reliance on the factual distinction that J.P. "refused to indicate an unwillingness" to engage in sexual conduct in both incidents is also unconvincing. The probative value is substantially outweighed by the prejudicial impact; therefore, the district court did not abuse its discretion by disallowing evidence of J.P.'s alleged past sexual conduct.

Alternatively, appellant asserts that this evidence was admissible to demonstrate an additional source of J.P.'s sexual knowledge. As support, appellant cites to the supreme court's decision in *State v. Benedict* in which the court stated that a defendant should be allowed "some leeway in questioning the victim ... to show that someone else ... was the source of ... knowledge of sexual matters" when the jury might otherwise infer that the experience with the defendant was the lone source of knowledge. 397 N.W.2d 337, 341 (Minn.1986). But appellant failed to raise this issue before the district court and is precluded from arguing it for the first time on appeal. *See State v. Roby*, 463 N.W.2d 506, 508 (Minn.1990) (stating that this court will generally not consider matters not argued to and considered by the district court).

***Schwartz* Hearing**

Appellant finally argues that the district court abused its discretion by failing to order a hearing to allow him to question a juror who became ill during deliberations. A jury's deliberations are inviolate. *State v. Hoskins*, 292 Minn. 111, 125, 193 N.W.2d 802, 812 (1972). But cases must be decided "strictly according to the evidence presented and not by extraneous matters or by the predilections of individual jurors." *State v. Varner*, 643 N.W.2d 298, 304 (Minn.2002). "A defendant who has reason to believe that the verdict is subject to impeachment shall move the court for a summary hearing." Minn. R.Crim. P. 26.03, subd. 19(6) (2008). Such a hearing, referred to as a "*Schwartz* hearing," allows a defendant to question jurors under oath to determine whether any jury misconduct occurred or whether any outside influence improperly affected the verdict. *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960). A defendant is entitled to a *Schwartz* hearing once he establishes a prima facie case of juror misconduct. *State v. Larson*, 281 N.W.2d 481, 484 (Minn.1979). A prima facie case of misconduct exists when evidence which, "standing alone and unchallenged, would warrant the conclusion of jury misconduct." *Id.* This court reviews the denial of a *Schwartz* hearing for an abuse of discretion. *State v. Church*, 577 N.W.2d 715, 721 (Minn.1998).

***4** Appellant's jury deliberated for nearly two days before the court deputy informed the district court that one of the jurors, S.C., was feeling ill. Within minutes, the deputy returned with two verdicts and informed the district court that S.C. was being taken to the hospital. The jury convicted appellant of third-degree criminal-sexual conduct (force or coercion) and acquitted appellant of third-degree criminal-sexual conduct (mental impairment). The remaining jurors were polled and confirmed the truth and accuracy of their verdicts. The following day, the district court summoned S.C. to be polled. Appellant requested a *Schwartz* hearing to determine if S.C's medical condition influenced her verdicts. The court denied appellant's request and polled S.C., who confirmed the truth and accuracy of the verdicts.

Appellant asserts that the jury was deadlocked and then suddenly reached a unanimous verdict around the time that S.C. became ill. Appellant argues that there is a reasonable probability that S.C.'s illness affected her verdict, and thus a *Schwartz* hearing should have been granted. But advancing a reasonable probability is considerably different than establishing a prima facie case. Additionally, the evidence that a district court may consider in a *Schwartz* hearing is limited. *State v. Buchmann*, 380 N.W.2d 879, 883 (Minn.App.1986). Indeed, Minn. R. Evid. 606(b) governs the polling of jurors and precludes a district court from inquiring about "any matter ... occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith." Instead, the scope of a *Schwartz* hearing is limited to "question[ing] whether extraneous prejudicial information was improperly brought to the jury's attention, or whether any outside influence was improperly brought to bear upon any juror, or as to any threats of violence or violent acts brought to bear on jurors, from whatever source, to reach a verdict." *Id.* Here, appellant did not seek to probe whether

any prejudicial information, outside influence, or threats of violence impacted the verdict; thus, appellant's desire to inquire into whether the juror rushed her verdict so she could get to the hospital would have been impermissible. Accordingly, appellant cannot establish a prima facie case of juror misconduct warranting a *Schwartz* hearing. The district court did not abuse its discretion.

Pro Se Arguments

Appellant also raises several issues in his pro se brief, but does not cite to any caselaw. If a brief contains no argument or citation to legal authority in support of its allegations raised, the allegations are waived. *State v. Krosch,* 642 N.W.2d 713, 719 (Minn.2002). Consequently, appellant's pro se arguments are waived in this case.

***5 Affirmed.**

All Citations

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End of Document

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Antawon Antonio BAKER, Appellant.

No. A13–2321.

Nov. 3, 2014.

Review Denied Jan. 28, 2015.

Sherburne County District Court, File No. 71–CR–12–1910.

Attorneys and Law Firms

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Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, MN, for appellant.

Considered and decided by HOOTEN, Presiding Judge; JOHNSON, Judge; and KLAPHAKE, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge.*

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

***1** On appeal from his conviction of burglary, appellant Antawon Antonio Baker argues that the district court erred by denying his request for a *Schwartz* hearing regarding jury misconduct. We affirm.

DECISION

Appellant argues that the district court erred by denying his request for a *Schwartz* hearing because a juror was allegedly intimidated into convicting him. *See Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960) (stating the procedure for questioning jurors following a verdict to determine whether jury misconduct occurred). "In cases in which a petitioner alleges juror misconduct, the trial court may order a hearing with jurors who were privy to the alleged misconduct in the presence of all interested parties." *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn.2004) (citing *Schwartz*, 258 Minn. at 328, 104 N.W.2d at 303). To warrant a *Schwartz* hearing to examine possible jury misconduct, a "defendant must first present evidence that if unchallenged would warrant the conclusion that jury misconduct occurred." *State v. Jackson*, 615 N.W.2d 391, 396 (Minn.App.2000), *review denied* (Minn. Oct. 17, 2000). This court will reverse a district court's decision not to hold a *Schwartz* hearing only if it abused its discretion by denying a request for the hearing. *State v. Church*, 577 N.W.2d 715, 721 (Minn.1998).

After appellant's trial, a juror spoke with appellant's defense counsel. Appellant's defense counsel requested a *Schwartz* hearing and submitted an affidavit outlining the conversation. The juror explained that she felt "strongly intimidated and pressured into voting for conviction," and that "the jury ignored the evidence, and were mostly interested in getting done with the deliberations so they could go home." Based on this evidence, the district court denied appellant's request for a *Schwartz* hearing by reasoning,

> The evidence that's proffered to the Court at this time does not indicate that there was any extraneous, prejudicial information improperly brought to the jury's attention nor does the information indicate that there was any outside influence improperly brought to bear on any juror. And finally the evidence does not demonstrate that there was threat of violence or a violent act brought to bear on the jurors from whatever source, whether it be internal or external to reach a verdict.

We conclude that the district court did not abuse its discretion by denying appellant's request. "The trial court must distinguish between testimony about 'psychological' intimidation, coercion, and persuasion, which would be inadmissible, as opposed to express acts or threats of violence." Minn. R. Evid. 606(b) 1989 committee cmt.

The juror stated that she felt "strongly intimidated and pressured," but did not indicate that she had been threatened with violence, received improper extraneous prejudicial information, or outside influence.

***2** Appellant argues that because defense counsel "did not question [the juror] in any way and simply allowed her to speak what was on her mind ... it is quite possible that more details would have emerged if [the juror] was questioned about threats of physical violence." We disagree. Appellant is correct that "it is undesirable to permit attorneys or investigators for a defeated litigant to harass jurors by submitting them to interrogation ... without more protection for the ascertainment of the facts." *Schwartz,* 258 Minn. at 303, 104 N.W.2d at 328. But appellant bears the burden to "present evidence that if unchallenged would warrant the conclusion that jury misconduct occurred." *Jackson,* 615 N.W.2d at 396. Standing alone and unchallenged, the juror's statements do not warrant a *Schwartz* hearing. Consequently, the district court did not err by denying appellant's request.

Affirmed.

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Court of Appeals of Minnesota.

Cindy MOSHIER, Appellant,

v.

Roger B. JARVIS, Respondent.

A18-0358
|
A18-0742
|
Filed March 11, 2019
|
Review Denied May 28, 2019

Wright County District Court, File No. 86-CV-16-3867

Attorneys and Law Firms

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Considered and decided by Bratvold, Presiding Judge; Halbrooks, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

JESSON, Judge

***1** Appellant Cindy Moshier, who was injured in a car accident caused by respondent Roger Jarvis, appeals the district court's denial of her motions for a new trial and a *Schwartz* hearing. Moshier further challenges the district court's application of the collateral-source statute and calculations for cost-shifting under rule 68 of the Minnesota Rules of Civil Procedure. Because we discern no abuse of discretion in the district court's denial of Moshier's motions and conclude that the district court reached the correct result when applying the collateral-source statute and rule 68, we affirm.

FACTS

In 2012, appellant Cindy Moshier was riding with her husband near Highway 37 and Ames Road. Respondent Roger Jarvis—who was making a left-hand turn—collided with the Moshiers' vehicle in an almost head-on manner, causing the Moshiers' car to speed off the road into a ditch. The car's airbags deployed, causing significant bruising to Moshier's stomach, right shoulder, and left breast. Moshier's husband was transported to the hospital, but Moshier did not go to the hospital until a few days later to get her injuries evaluated.[1]

1 Moshier's husband settled his claim against Jarvis during mediation and is not part of this appeal.

Jarvis conceded liability for the accident. And in late 2017, a trial began on the issues of causation and damages. Moshier testified that as a result of the car accident, she suffers from significant neck pain, post-traumatic stress disorder (PTSD), and some memory loss. According to Moshier, she tried several treatments to help her neck pain, including physical therapy, six weeks of chiropractic care, and consultation and treatment from a pain management doctor. After the accident, Moshier stated that she was unable to work because of physical and mental health problems resulting from the accident and because her boss at a new job was a bully. Although Moshier maintained that her neck pain worsened significantly after the car accident, she also testified about previous issues with neck pain resulting from a three-wheeler accident, a previous car accident, and fibromyalgia. But Moshier testified that as a result of the 2012 collision with Jarvis, she cannot get in a car or enjoy the things she used to. According to Moshier, her children and husband are worried about her becoming a recluse.

In support of her case, Moshier presented testimony from a witness to the accident, her husband, and two expert witnesses. Moshier's pain management doctor testified that he believed Moshier's injuries from the accident were an aggravation of pre-existing injuries and that he did not feel that she was back to her pre-accident condition. He further testified that that he believed Moshier had reached "maximum

medical improvement" and did not need further treatment, could do light work, and lead a fairly normal life. Moshier also presented testimony from a clinical psychologist who diagnosed her with PTSD and a cognitive disorder with some memory impairment. The clinical psychologist testified that she believed these conditions resulted from the car accident, that Moshier had permanent psychological injury, and that she could not work in a competitive environment.

***2** Jarvis presented his own expert witness, a pain management doctor who testified that Moshier's injury from the car accident would have resolved in six to twelve weeks and continued to slowly get better with time. Jarvis's expert testified that there was no evidence Moshier would need further treatment. She also testified that Moshier could work. This expert did not dispute that Moshier had PTSD but testified that the PTSD did not stem from the car accident.

Before the case was submitted to the jury, the parties discussed the proper wording of the special verdict form with respect to the tort threshold for recovery under the Minnesota No-Fault Automobile Insurance Act. Moshier objected to the use of the phrase "diagnostic testing" instead of "diagnostic x-rays" on the special verdict form. The district court left the phrasing on the special verdict form as "diagnostic testing" but used the phrase "diagnostic x-rays" when reading the instructions to the jury. After deliberating, the jury found that Jarvis's negligence was a direct cause of the vehicle collision and, as a result, Moshier sustained a disability for 60 days or more. Accordingly, the jury awarded Moshier: $ 10,000 for past healthcare expenses excluding diagnostic testing; $ 2,000 for past healthcare expenses for diagnostic testing; $ 2,500 for past pain, disfigurement, disability, and emotional distress; and $ 500 for past wage loss. The verdict totaled $ 15,000. The jury did not award Moshier damages for future suffering or diminished earning capacity.

After trial, Moshier learned that the jury foreperson failed to disclose a prior felony conviction during voir dire. Moshier moved for a *Schwartz* hearing[2] and a new trial as a result of juror misconduct, but the district court denied that motion. Moshier also moved for a new trial on the basis of other errors of law, which the district court denied as well.

2 "A [*Schwartz*] hearing is a posttrial hearing in which jurors are examined under oath to address concerns of juror misconduct." *Pajunen v. Monson Trucking, Inc.*, 612 N.W.2d 173, 174 (Minn. App. 2000), *review denied* (Minn. Aug. 15, 2000).

Shortly after the trial, the district court found that Moshier was the prevailing party but that her award needed to be reduced by any collateral source payments. After reducing Moshier's award to account for benefits she received from her automobile insurance, the district court concluded that her net award was $ 0. The court further found that Jarvis was able to recover his costs and disbursements because he made a total-obligation offer pursuant to rule 68 of the Minnesota Rules of Civil Procedure that exceeded the jury verdict. Accordingly, the district court entered judgment in favor of Jarvis in the net amount of $ 2,367.30. Moshier appeals.[3]

3 Moshier timely filed a notice of her appeal of the denial of her motion for a new trial. After the district court determined collateral sources and rule 68 cost-shifting calculations, Moshier appealed those determinations. This court granted her motion to consolidate her appeals.

DECISION

Automobile accidents can often cause severe economic and noneconomic distress to victims if they are not compensated for their injuries. *See* Minn. Stat. § 65B.42(1) (2018). Recognizing this problem, the legislature enacted the Minnesota No-Fault Automobile Insurance Act to ensure that automobile accident victims receive "prompt payment" for specific basic costs like medical expenses, income loss, or funeral expenses. *Id.*; Minn. Stat. § 65B.44 (2018). But, to prevent the overcompensation of individuals suffering minor injuries, the statute establishes certain tort thresholds that victims must meet in order to recover additional noneconomic damages such as compensation for pain and suffering. Minn. Stat. § 65B.42(2), .51, subd. 3 (2018).

***3** In addition to preventing overcompensation, the Minnesota No-Fault Insurance Act also seeks to avoid double recovery. Minn. Stat. § 65B.42(5) (2018). It does so by providing that in cases where a car accident victim has been compensated for their injuries by a collateral source, any subsequent award from a court must be reduced by that amount. Minn. Stat. § 65B.51, subd. 1 (2018); *see also* Minn. Stat. § 548.251, subd. 1 (2018) (defining collateral sources).

With this statutory framework in mind, we turn to Moshier's arguments. First, Moshier argues that the district court abused its discretion in denying her motion for a new trial, in part because of erroneous jury instructions explaining the tort thresholds Moshier needed to meet to recover noneconomic damages. Once Moshier received a jury award, she contends

that the district court improperly applied the collateral-source statute when reducing her award to prevent double recovery. After the district court calculated Moshier's net verdict, she further maintains that the district court incorrectly applied the cost-shifting procedures of rule 68 of the Minnesota Rules of Civil Procedure. And finally, according to Moshier, the district court erred by not granting a *Schwartz* hearing or new trial on the basis of alleged juror misconduct. We review each argument in turn.

I. The district court did not abuse its discretion by denying Moshier's motion for a new trial.

Moshier first argues that the district court incorrectly denied her motion for a new trial. Specifically, Moshier alleges that a new trial is warranted based on the district court's erroneous special verdict form and because the jury rendered a verdict contrary to the weight of the evidence.

A new trial may be granted for reasons including errors of law objected to at trial or if the verdict is contrary to law or not justified by the evidence. Minn. R. Civ. P. 59.01(f), (g). We review the decision to deny a new trial for an abuse of discretion. *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 (Minn. 2018).

The special verdict form

Moshier contends that the district court erred as a matter of law in its construction of the special verdict form and that, as a result, a new trial is warranted. According to Moshier, the district court should have used a separate jury interrogatory to determine if she met the tort threshold required by Minnesota's No-Fault Automobile Insurance Act, and it was error for the district court to use the phrase "diagnostic testing" instead of "diagnostic x-rays" on the special verdict form.

Minnesota's No-Fault Automobile Insurance Act allows the recovery of noneconomic damages—which includes compensation for pain and suffering, loss of consortium, and inconvenience—only in certain cases. Minn. Stat. § 65B.51, subd. 3. Among those cases are instances where the plaintiff's statutorily outlined damages exceed $ 4,000 or the plaintiff's injury resulted in a disability for 60 days or more. *Id.* Accordingly, in order to recover noneconomic damages, a plaintiff must prove that she satisfied this tort threshold required by the statute. *Nemanic v. Gopher Heating & Sheet Metal, Inc.*, 337 N.W.2d 667, 670 (Minn. 1983). If an issue is raised regarding whether the tort threshold requirement was satisfied, "the question should be submitted to the jury as part of the special verdict." *Id.* at 670 (citing *Murray v. Walter*, 269 N.W.2d 47, 50 (Minn. 1978)). And, the district court "has broad discretion regarding the form and substance of special verdict questions." *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 313 (Minn. 1995).

***4** Here, through a special verdict form, the district court asked the jury to determine whether Moshier sustained a permanent injury and whether Moshier sustained a disability for 60 days or more. Further, the special verdict form required the jury to determine the amount that would fairly compensate Moshier for her past healthcare expenses "excluding diagnostic testing," and the amount that would fairly compensate Moshier for her past healthcare expenses for diagnostic testing. The jury determined that Moshier sustained a disability for 60 days or more and that her past healthcare expenses excluding diagnostic testing amounted to $ 10,000. Each of these determinations separately and independently meant that Moshier satisfied the tort threshold requirement to recover noneconomic damages. *See* Minn. Stat. § 65B.51, subd. 3.

Although Moshier argues that it was error for the district court to not pose a separate question asking whether Moshier's medical expenses exceeded $ 4,000 and that it was error to use the phrase "diagnostic testing" instead of "diagnostic x-rays," an erroneous jury instruction only warrants reversal when it is prejudicial. *Lewis v. Equitable Life Assurance Soc'y of the U.S.*, 389 N.W.2d 876, 885 (Minn. 1986). An instruction is prejudicial when a "more accurate instruction would have changed the outcome of the case." *Domagala v. Rolland*, 805 N.W.2d 14, 31 (Minn. 2011).

The outcome in this case would not have changed had the judge used the special verdict form Moshier suggests. Here, the jury found that Moshier sustained a 60 day disability. Because the No-Fault Automobile Insurance Act requires only one criterion to be satisfied in order to meet the tort threshold, this finding alone was sufficient to permit Moshier to recover noneconomic damages. *See* Minn. Stat. § 65B.51, subd. 3. Further, despite the alleged errors, the jury found that Moshier's past healthcare expenses, excluding diagnostic testing, amounted to $ 10,000, also satisfying the tort threshold. Because the jury found that Moshier satisfied the tort threshold, Moshier was not prejudiced by the allegedly erroneous jury instruction and is not entitled to a new trial.[4] Accordingly, it was not an abuse of discretion for

the district court to deny her motion for a new trial on this ground.

4 Moshier contends that a more accurate instruction would have changed the outcome of her trial because the jury was confused by the district court's instructions and the special verdict form, noting that the jury did not adopt either party's proposed award amount for past medical expenses. But there are a multitude of reasons why the jury could have determined that both parties' proposed awards were incorrect. And a jury award of alleged inadequate damages does not necessarily demonstrate prejudice during jury deliberations. *Markowitz v. Ness*, 413 N.W.2d 843, 846 (Minn. App. 1987).

Verdict contrary to the evidence

Moshier also argues that the district court abused its discretion by denying her motion for a new trial because the jury rendered a verdict contrary to the evidence. *See* Minn. R. Civ. P. 59.01(g). Moshier contends that the evidence established that she did not have a PTSD diagnosis before the accident but that the jury did not award any future damages and that it awarded past pain and suffering damages lower than what the defense asked for. Moshier suggests that the only explanation for this verdict is that the jury was influenced by passion and prejudice, especially because they deliberated for a short amount of time.

In appeals from a district court's denial of a motion for a new trial, we will not set aside a jury verdict "unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Navarre v. S. Wash. Cty. Sch.*, 652 N.W.2d 9, 21 (Minn. 2002) (quotations omitted). In cases where a jury completes a special verdict form, our review analyzes "whether the special verdict answers can be reconciled in any reasonable manner consistent with the evidence and its fair inferences." *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 555 (Minn. 2008) (quotations and citation omitted). Further, our review of a special verdict is even more limited where the jury's findings turn upon assessing the credibility of witnesses. *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 662-63 (Minn. 1999).

***5** Our review of the record supports the district court's conclusion that Moshier is not entitled to a new trial on this basis. Although Moshier presented evidence of her injuries and their effects, Jarvis challenged the extent and nature of Moshier's injuries through cross-examination and his expert witness. Based on this evidence, the jury awarded some damages for past healthcare expenses and past pain and suffering, but chose not to award any future damages. While Moshier may disagree with the jury's award, nothing in the record suggests that it is manifestly contrary to the evidence. Accordingly, it was not an abuse of discretion for the district court to deny Moshier's motion for a new trial on this ground.

II. The district court reached the correct conclusion in offsetting Moshier's award.

Moshier also argues that the district court erred in its application of the collateral-source statute. Specifically, Moshier contends that a defendant cannot collaterally offset medical expenses paid by a participant in the Medical Assistance[5] program and that it was error for the district court to deduct any medical healthcare expenses which were available to pay the asserted healthcare subrogation lien. Because this is a mixed question of law and fact, we correct erroneous applications of law, but review the district court's conclusions under an abuse of discretion standard. *In re Estate of Sullivan*, 868 N.W.2d 750, 754 (Minn. App. 2015).

5 The Medical Assistance program is the state version of Medicaid.

As part of the No-Fault Act's goal of preventing double recovery, when an individual injured in a car accident brings a negligence action, the district court is required to offset any award by the value of no-fault benefits that are paid or payable by an insurer. *Do v. Am. Family Mut. Ins. Co.*, 779 N.W.2d 853, 857 (Minn. 2010). Under Minnesota Statutes section 65B.51, subdivision 1:

> With respect to a cause of action in negligence accruing as a result of injury arising out of the operation, ownership, maintenance or use of a motor vehicle ... the court shall deduct from any recovery the value of basic or optional economic loss benefits paid or payable, or which would be payable but for any applicable deductible.

The district court concluded that Moshier received $ 20,253.62 in medical expense personal injury protection benefits and $ 235.62 in wage loss personal injury protection benefits from her automobile insurance carrier. Although the district court offset these amounts citing the general collateral-source statute, Minnesota Statutes section 548.251 (2018),[6] it should have offset these amounts under the above statute, Minnesota Statutes section 65B.51, subdivision 1, which specifically addresses the deduction of no-fault benefits. That provision does not provide for any "adding back" of the premiums that Moshier paid for her automobile

insurance, so the district court should not have considered that amount. But in any event, Moshier's award from the jury for past healthcare expenses and past wage loss only totaled $ 12,500. When offsetting this amount by the value of the personal injury protection benefits that Moshier received, the net award is clearly $ 0. Accordingly, although the district court applied the wrong statute, it ultimately reached the correct result.[7]

6 Minnesota Statutes section 548.251 is the more generally applicable collateral-source statute intended to prevent double recovery by plaintiffs. Under that statute, a party may file a motion requesting that the district court make a determination of collateral sources and offset any recovery pursuant to the guidelines of that statute. Minn. Stat. § 548.251, subds. 2, 3.

7 Neither party argued that Minnesota Statutes section 65B.51, subdivision 1, governed the procedure for offsetting Moshier's award. Instead, the district court and both parties relied on the more general collateral-source statute. But even if Minnesota Statutes section 548.251 applied, Moshier's arguments are not persuasive. Although Moshier contends that a district court is prohibited by law from collaterally offsetting medical expenses paid by a participant in the Medicaid program, she points to no Minnesota or federal law to support this assertion. And although Moshier suggests that the district court should have applied the jury verdict to pay the subrogation lien first, this position similarly lacks support in statute or caselaw. Finally, Moshier contends that an asserted subrogation lien cannot be collaterally offset pursuant to Minnesota Statutes section 548.251, subdivision 2(1), which is correct. But here, the district court did *not* collaterally offset the subrogation lien.

***6** Because Moshier's position is not supported by law and because the district court, although incorrect in its reasoning, ultimately reached the correct result in offsetting Moshier's award, we affirm.

III. The district court correctly concluded that Jarvis was entitled to cost-shifting under rule 68 of the Minnesota Rules of Civil Procedure.

Moshier argues that the jury verdict exceeded the total-obligation offer made by Jarvis and, as a result, the district court erred in its interpretation and application of the cost-shifting provision of rule 68 of the Minnesota Rules of Civil Procedure. This again presents a mixed question of fact and law, so we correct erroneous applications of law, but review the district court's conclusions under an abuse of discretion standard. *Sullivan*, 868 N.W.2d at 754.

Under rule 68, any party may make an offer of settlement anytime more than ten days before trial. Minn. R. Civ. P. 68.01(a). If a rule 68 offer is not accepted, it can affect a party's ability to recover costs. Minn. R. Civ. P. 68.03. In cases where a defendant makes an offer, if either the defendant prevails or if the relief awarded to the plaintiff is less favorable than the defendant's offer, the plaintiff must pay the defendant's costs and disbursements that he or she incurred after making the offer. Minn. R. Civ. P. 68.03(b)(1). In order to determine if the relief awarded is less favorable than a total-obligation offer, the "total-obligation offer is compared with the amount of damages awarded to the plaintiff, plus applicable prejudgment interest, the plaintiff's taxable costs and disbursements, and applicable attorney fees, all as accrued to the date of the offer." Minn. R. Civ. P. 68.03(c)(2).

Here, the district court concluded that Jarvis made a total-obligation offer of $ 30,000 to Moshier, which exceeded her jury verdict, prejudgment interest, her taxable costs and disbursements, and "applicable attorney fees." Accordingly, the district court found that Jarvis was entitled to recover his costs from Moshier, ultimately resulting in a judgment in Jarvis' favor in the amount of $ 2,367.30.

Moshier argues that the district court incorrectly concluded that the total obligation offer exceeded Moshier's total relief, contends that the district court should have calculated the total amount of her relief before it was offset,[8] and maintains that she is entitled to attorney fees. Moshier proposes that, had she accepted Jarvis's $ 30,000 offer, that amount would have been reduced by prejudgment interest, pre-offer costs and disbursements, and accrued attorney fees. Once these costs were subtracted from the $ 30,000 offer, Moshier contends that her net recovery would have been $ 13,986.81, an amount less than the $ 15,000 jury verdict.[9]

8 Even if we adopted Moshier's argument that, in its calculations, the district court should have used the amount of the jury award before it was collaterally offset, her relief would have totaled $ 19,671.04 after adding the jury verdict ($ 15,000), costs and disbursements ($ 3,328.03), and prejudgment interest ($ 1,343.01). Although Moshier is not entitled to recover attorney fees, even if we included her attorney fees of $ 10,000, her

total relief would be $ 29,671.04, an amount that is still less than Jarvis's $ 30,000 total-obligation offer.

9 Moshier cites no authority for her proposition that, for rule 68 cost-shifting purposes, a district court compares an individual's net recovery with a jury award. Further, the text of the rule states that the total-obligation *offer* is compared with the jury verdict. Minn. R. Civ. P. 68.03(c)(2).

***7** But Moshier's proposed calculation method is incorrect. Although the district court used erroneous figures, it followed the correct process for determining whether Moshier's total relief exceeded Jarvis's total-obligation offer. Once Moshier's jury verdict was offset by no-fault benefits she previously received, her remaining award was $ 2,500 for past pain and suffering and $ 264.38 for lost wages, amounting to a total award of $ 2,764.38. Prejudgment interest on this amount totals $ 247.52. *See* Minn. Stat. § 549.09, subd. 1(c)(1)(i) (2018). Moshier's costs and disbursements totaled $ 3,328.03. When adding Moshier's costs and disbursements to her offset jury award, her total relief amounted to $ 6,339.93, a figure that is clearly less than the $ 30,000 total-obligation offer.

Even if we included Moshier's attorney fees in our analysis, as Moshier urges us to do, her total relief ($ 16,339.93) would still be less than Jarvis's total-obligation offer. But we note that Moshier is not entitled to recover any of her attorney's fees. Although rule 68.03 states that *applicable* attorney fees should be considered when determining whether a total-obligation offer exceeded a plaintiff's recovery, rule 68.04 makes clear that the rule does not create a right to attorney fees that is not provided for under applicable substantive law. Rule 68.04 states that "applicable attorney fees" under rule 68 means "any attorney fees to which a party is *entitled* by statute, common law, or contract for one or more of the claims resolved by an offer made under the rule." (Emphasis added.) Certain statutes, like the Minnesota Human Rights Act, provide that a prevailing party may recover reasonable attorney fees as part of their costs. *See* Minn. Stat. § 363A.33, subd. 7 (2018). But nothing in Minnesota statutes or specific to this case suggests the Moshier would be entitled to recover her attorney fees from Jarvis.[10] Without the inclusion of attorney fees, it is evident that Moshier's relief was less than Jarvis's total-obligation offer for rule 68 cost-shifting purposes. As such, the district court correctly concluded that Jarvis's total-obligation offer exceeded Moshier's relief.

10 Although Moshier presumably had a contract with her attorney regarding her payment of attorney fees, Moshier has not alleged any contractual basis that would entitle her to recover her attorney fees from Jarvis.

IV. The district court did not abuse its discretion by denying Moshier's motion for a *Schwartz* hearing and a new trial on the basis of juror misconduct.

Finally, Moshier contends that it was an abuse of discretion for the district court to deny her motion for a *Schwartz* hearing and a new trial on the basis of juror misconduct. Moshier contends that the jury foreperson lied during voir dire by failing to reveal felony convictions and that this prejudiced her and warrants a new trial.

The purpose of a *Schwartz* hearing is "to investigate potential juror misconduct and prevent the practice of attorneys contacting and questioning jurors after a verdict has been rendered." *Pajunen*, 612 N.W.2d at 175. In general, district courts should liberally grant *Schwartz* hearings. *Quinn v. Winkel's, Inc.*, 279 N.W.2d 65, 69 (Minn. 1979). But, before a *Schwartz* hearing will be granted, a prima facie showing of juror misconduct must be made. *State v. Larson*, 281 N.W.2d 481, 484 (Minn. 1979). A *Schwartz* hearing is only warranted if the "evidence which, standing alone and unchallenged, would warrant the conclusion of jury misconduct." *Id.* We review the denial of a *Schwartz* hearing for an abuse of discretion. *State v. Church*, 577 N.W.2d 715, 721 (Minn. 1998).

The district court, in denying Moshier's motion for a *Schwartz* hearing, found that a *Schwartz* hearing was unnecessary because there was no evidence that the foreperson gave false testimony. Voir dire was not recorded, and there was no evidence that the alleged misconduct prejudiced the verdict.

***8** We agree with the district court. Although Moshier argues that there was some indication of juror misconduct because the jury foreperson's concealment of his past was indicative of deception, Moshier did not provide any evidence —other than speculation—that the alleged misconduct prejudiced the verdict. The district court's conclusions that Moshier did not make the requisite evidentiary showing that juror misconduct occurred to warrant a *Schwartz* hearing and that Moshier did not show that the foreperson's undisclosed conviction impacted the verdict and rendered an unfair outcome are supported by the record. Accordingly, it was not an abuse of discretion for the district court to deny Moshier's motion for a *Schwartz* hearing. *See State v. Benedict*, 397 N.W.2d 337, 340 (Minn. 1986) (noting that while the district court could have ordered a *Schwartz* hearing, it was not an

abuse of discretion for it to refuse to do so where the defendant failed to make a sufficient showing that the juror lied); *Blatz v. Allina Health System*, 622 N.W.2d 376, 394 (Minn. App. 2001) (noting that it was not an abuse of discretion for the district court to deny a *Schwartz* hearing where the moving party failed to establish the a juror's answer was untruthful or misconduct in light of the absence of a transcript and the dismissal of charges), *review denied* (Minn. May 16, 2001). Similarly, the district court did not abuse its discretion by denying Moshier's motion for a new trial based on juror misconduct because Moshier again failed to demonstrate a connection between the alleged juror misconduct and the verdict in the case.

In sum, the district court did not abuse its discretion by denying Moshier's motion for a new trial and a *Schwartz* hearing. Further, the district court reached the correct result when applying both the collateral-source statute and rule 68's cost-shifting process and concluding that Jarvis's total-obligation offer exceeded Moshier's relief. Accordingly, we affirm.

Affirmed.

All Citations

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