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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1310**

State of Minnesota,
Respondent,

vs.

Chad Robert Boswell,
Appellant.

**Filed July 9, 2012
Affirmed
Willis, Judge***

Polk County District Court
File No. 60-CR-10-782

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

Greg Widseth, Polk County Attorney, Crookston, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Willis,
Judge.

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

UNPUBLISHED OPINION

WILLIS, Judge

Appellant challenges his convictions of felony domestic assault, false imprisonment, and a pattern of harassing conduct, arguing that the district court erred by permitting the state to use his prior convictions for impeachment and as relationship evidence. He further challenges his sentences, arguing that the district court abused its discretion by using the same evidence to enhance his sentence. Because the district court did not abuse its discretion by permitting the use of appellant's convictions for impeachment and as relationship evidence and because the district court's decision to depart durationally from the presumptive sentence is supported by the evidence, we affirm.

FACTS

Appellant Chad Robert Boswell and H.G. had an on-again, off-again romantic relationship. Appellant was convicted of domestic abuse against H.G. in 2008. On April 1, 2009, appellant was staying with H.G. and her two children, A.T. and M.T. Appellant became angry with H.G. and accused her of flirting with his friend. H.G. retreated to A.T.'s bedroom, but appellant ordered H.G. to return to her bedroom. When she refused, appellant dragged her by one leg back to her bedroom. H.G. told appellant to leave and returned to A.T.'s bedroom. M.T. was awakened by the noise and came to A.T.'s bedroom. H.G. told M.T. to call 911, but appellant grabbed M.T. and threw him into A.T.'s bedroom. Appellant blocked the doorway to the bedroom so that none of the three could leave. H.G. attempted to climb out the second-story window, but appellant

threatened to harm the children if she did. The children moved toward the window and appellant threatened to harm H.G. if they attempted to climb out. H.G. started to climb out the window. Appellant pulled her back inside and struck her in the face, knocking her unconscious. He fled the house while the children attempted to revive H.G. H.G. was unconscious for about 20 minutes and was treated in the emergency room for contusions and a concussion. Although H.G. had been drinking and admitted to having problems with alcohol, the emergency-room doctor and the sheriff's deputies testified that she was able to respond to questions and appeared well oriented.

At trial, the state moved in limine to impeach appellant with evidence of his probation status, two misdemeanor convictions for crimes of dishonesty, and several felony convictions. The district court ruled that four of the six felony convictions, including the prior assault against H.G., could be used for impeachment purposes but excluded two prior assault convictions as too similar to the charged offense. The district court also determined that appellant's two misdemeanor convictions of giving false information to the police and his current probationary status could be used for impeachment. As a result of this ruling, appellant did not testify.

The state also sought to introduce several of appellant's past convictions as relationship evidence under Minn. Stat. § 634.20 (2008), including the prior domestic assault against H.G., four convictions for domestic abuse against appellant's wife, and one conviction of violation of an order for protection against another family member. The district court ruled that all of these convictions could be presented to the jury as

relationship evidence. The district court gave a cautionary instruction and read a stipulation, which consisted of dates and offenses with no further details, to the jury.

The jury found appellant not guilty of third-degree assault against H.G. and of one count of domestic assault against M.T. But the jury found appellant guilty of two counts of felony domestic assault, against H.G. and A.T.; three counts of false imprisonment, one against each of the three victims; and one count of a pattern of harassing conduct, against H.G. The state requested an upward durational sentencing departure, and the same jury served at the sentencing portion of the trial. The parties stipulated that the evidence presented to the sentencing jury would consist solely of a list of appellant's 16 convictions. The only question for the sentencing jury was, "Is the defendant a danger to public safety?" The sentencing jury found that appellant is a danger to public safety with regard to the conviction of a pattern of harassing conduct. The district court imposed concurrent sentences of 33 months for domestic assault against A.T. and 26 months for false imprisonment of M.T. The district court also sentenced appellant to a concurrent 120 months for a pattern of harassing conduct against H.G., a more than double upward durational departure based on Minn. Stat. § 609.1095, subd. 2 (2008), the dangerous-offender statute. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by ruling that four of appellant's six prior felony convictions could be used for impeachment purposes.

Appellant asserts that the district court abused its discretion by permitting the state to use evidence of his prior convictions for impeachment purposes. We review for an

abuse of discretion the district court's decision on whether a witness may be impeached by prior convictions. *State v. Swinger*, 800 N.W.2d 833, 837 (Minn. App. 2011), *review denied* (Minn. Sept. 28, 2011). A witness may be impeached by evidence that the witness has been convicted of (1) a felony, if the probative value of the evidence outweighs its prejudicial effect or (2) any crime involving dishonesty or false statement.¹ Minn. R. Evid. 609(a). Generally, only convictions that occurred within the ten-year period preceding the current charges may be used. Minn. R. Evid. 609(b).

In deciding whether convictions not involving dishonesty or false statement may be used for impeachment purposes, the district court must weigh the probative value against the prejudicial effect of the evidence; in doing so, the district court considers the five factors set forth in *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). The five *Ihnot* factors are: ““(1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime . . . , (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue.”” *Ihnot*, 575 N.W.2d at 586 (quoting *State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978)). The district court must consider and weigh each factor with respect to each conviction and demonstrate on the record that it has done so. *Swinger*, 800 N.W.2d at 837.

¹ Appellant concedes that his two convictions of giving false information to the police and his probationary status could properly be used for impeachment. *See State v. Head*, 561 N.W.2d 182, 186 (Minn. App. 1997) (stating that convictions of crimes of dishonesty are admissible for impeachment purposes and the district court does not have discretion to exclude them), *review denied* (Minn. May 28, 1997).

The district court ruled that the state would be permitted to introduce evidence of four of six prior convictions: failure to register as a predatory offender, terroristic threats, fourth-degree criminal sexual conduct, and the previous domestic-assault conviction involving H.G. The parties agreed that this last conviction would be admitted as part of the substantive evidence supporting the charge of a pattern of harassing conduct.

The district court considered and set forth on the record its analysis of the *Ihnot* factors. The district court concluded that the four felony convictions had impeachment value because the jury would be allowed to “see the whole history, the whole person of [appellant].” This was an appropriate consideration. *See State v. Williams*, 771 N.W.2d 514, 518 (Minn. 2009) (affirming use of the “whole person” test as helpful for assessing credibility). The convictions were within ten years of the current charges. *See id.* at 519 (noting that prior convictions showing a pattern of lawlessness favored their admissibility as impeachment evidence). The district court excluded two of the six offered convictions because they were too similar to the charged offenses but permitted use of the other four convictions because they were not. *See id.* (concluding that the heightened danger of a jury misusing impeachment evidence was not implicated when charges were dissimilar). The district court noted that credibility would be an issue and, having weighed “the importance of [appellant’s] testimony,” concluded that the impeachment evidence should be admitted.

Appellant argues that his testimony was crucial because the incident was witnessed only by the victims and appellant; by ruling the impeachment testimony was admissible, the district court forced appellant to choose not to testify, and, therefore, the

jury did not hear his version of the events. But appellant made no offer of proof regarding his intended testimony. *See id.* (concluding that district court did not abuse its discretion by admitting impeachment evidence when defendant failed to make an offer of proof of his proposed testimony). Finally, although credibility was a central issue at trial, appellant's counsel thoroughly cross-examined each of the victims and raised doubts about the veracity of their testimony, based on H.G.'s intoxication and inconsistent statements made by the child victims. The district court did not abuse its discretion by ruling that four of appellant's felony convictions could be used to impeach him.

II. The district court did not abuse its discretion by admitting evidence of appellant's prior convictions for domestic abuse as relationship evidence under Minn. Stat. § 634.20.

Appellant argues that the district court erred by admitting evidence of his six prior convictions of domestic abuse. In a trial on domestic-abuse charges, the district court may admit evidence of similar conduct against other family or household members, unless the probative value is outweighed by the potential for unfair prejudice, the evidence would unduly delay the trial or waste time, or the evidence is cumulative in nature. Minn. Stat. § 634.20. We review for an abuse of discretion the district court's decision to admit relationship evidence. *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006).

Appellant asserts that the relationship evidence admitted here was unduly prejudicial because it was so similar to the charged offenses that there was a risk of jury confusion and because the sheer number of convictions presented to the jury made this an

examination of his character. Appellant relies heavily on a *Spreigl*-type² analysis, but the supreme court has determined that section 634.20 evidence is different from *Spreigl* evidence because it serves a different purpose. *State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004). The supreme court noted that *Spreigl* evidence often involves an unrelated crime against another person and is used to establish identity, opportunity, motive, intent, or modus operandi. *Id.* Section 634.20 evidence, on the other hand, is offered to “illuminate the history of the relationship, that is, to put the crime charged in the context of the relationship between [the accused and the victim].” *Id.* The supreme court made clear that section 634.20 evidence is not *Spreigl* evidence and does not require the same procedural safeguards. *Id.* at 159-60.

In *Bell*, the supreme court considered an allegation similar to the one that appellant makes here: that the prejudicial effect of the section 634.20 evidence outweighs its probative value. 719 N.W.2d at 641. The supreme court stated: “When balancing the probative value against the potential prejudice, unfair prejudice is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage.” *Id.* (quotation omitted). The supreme court concluded that the district court in *Bell* had not abused its discretion: the evidence illuminated the relationship between the defendant and the victim and there was “nothing particularly inflammatory or unfairly prejudicial in the evidence that was admitted.” *Id.*

² *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965) (placing limitations on the prosecution’s use of evidence at trial of a defendant’s prior bad acts).

Here, the district court gave a thorough cautionary instruction. *Cf. State v. Meyer*, 749 N.W.2d 844, 850 (Minn. App. 2008) (affirming district court’s decision to admit relationship evidence despite failure to give cautionary instruction). The section 634.20 evidence was presented briefly and in a summary fashion. *Cf. State v. Valentine*, 787 N.W.2d 630, 635 (Minn. App. 2010) (affirming district court’s decision to admit graphic photographs of prior assault victim), *review denied* (Minn. Nov. 16, 2010). Finally, the section 634.20 evidence consisted of a list of convictions, not testimony; the jury was not provided with potentially inflammatory details of prior abuse, and appellant had pleaded guilty to the charges or had been convicted on proof beyond a reasonable doubt. *Cf. id.* (affirming admission of photographs of victim for prior uncharged assault). Notably, the jury, despite having heard the relationship evidence, nevertheless acquitted appellant on two of the eight charges. Under these circumstances, we conclude that the district court did not abuse its discretion by admitting the relationship evidence.

III. The district court did not abuse its discretion by sentencing appellant to a double upward durational departure on his conviction of a pattern of harassing conduct.

Appellant contends that the district court abused its discretion by sentencing him to 120 months for the pattern-of-harassing-conduct conviction based on the dangerous-offender statute, Minn. Stat. § 609.1095, subd. 2, because the multiple uses of his convictions unfairly exaggerates the criminality of his conduct.³

³ Appellant also argues, and the state concedes, that the district court sentenced him in the wrong order by imposing sentences for domestic assault against A.T. and false imprisonment against M.T. before sentencing him for a pattern of harassing conduct against H.G. Ultimately, we conclude that this would not change appellant’s sentences

We review the district court’s decision to depart from the presumptive sentence for an abuse of discretion. *Tucker v. State*, 799 N.W.2d 583, 585-86 (Minn. 2011). A reviewing court will reverse a sentence if the district court’s reasons for departure are “improper or inadequate,” if the evidence is not sufficient to justify the departure, *id.* at 586 (quotation omitted), or if the sentence is disproportionate or unfairly exaggerates the criminality of the defendant’s conduct. *State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007).

“The dangerous-offender statute is a sentencing statute that permits durational departures not otherwise authorized by the sentencing guidelines.” *Neal v. State*, 658 N.W.2d 536, 545 (Minn. 2003). If the requirements of Minn. Stat. § 609.1095, subd. 2, are met, the district court may impose an upward durational departure up to the statutory maximum, even in the absence of severe aggravating factors. *Id.* The statutory requirements are: (1) the offender was at least 18 years old at the time the felony was committed; (2) the offender had two or more prior convictions for violent crimes; and (3) the fact-finder determines that the offender is a danger to public safety. Minn. Stat. § 609.1095, subd. 2; *Neal*, 658 N.W.2d at 543. The fact-finder may base a finding of danger to public safety on the “offender’s past criminal behavior, such as the offender’s high frequency rate of criminal activity . . . or long involvement in criminal activity.” *Id.*

Had appellant’s sentences been imposed in the proper order, the presumptive sentence for the pattern-of-harassing-conduct conviction would have been 48 months,

for the reasons set forth above and because appellant’s criminal-history score of six, after sentencing on the pattern-of-harassing-conduct charge, places him at the far end of the sentencing grid. Minn. Sent. Guidelines IV.

with a range of 41 to 57 months.⁴ The district court imposed a 120-month sentence, which is the statutory maximum, Minn. Stat. § 609.749, subd. 5(a) (2008), and which represents more than an upward double durational departure from the presumptive sentence. Appellant was 34 years old when the offense was committed and had four prior felony convictions of violent crimes, including two third-degree assault convictions, and convictions of fourth-degree criminal sexual conduct and terroristic threats. The sentencing jury had been provided with a stipulation listing appellant's 16 misdemeanor, gross misdemeanor, and felony convictions and had been instructed to consider whether appellant was a danger to public safety with regard to the pattern-of-harassing-conduct conviction. The sentencing jury found that he is a danger to public safety as to that charge. Thus, the statutory requirements of the dangerous-offender statute were met.

An appellate court has the authority to modify a sentence that is unreasonable, excessive, or unfair. *Neal*, 658 N.W.2d at 546. But the mere fact that the sentence imposed is more than double the presumptive sentence does not show that the sentence is improper. *See id.* (affirming that severe aggravating factors are not necessary to support more than double durational departure).

Appellant contends that the criminality of his conduct was unfairly exaggerated by the multiple uses of his convictions for different purposes: for impeachment, as relationship evidence, as substantive evidence to prove the pattern-of-harassing-conduct charge, and for aggravation of his sentence as a dangerous offender. There is no specific

⁴ The presumptive sentence is “any sentence within the presumptive range for the convicted offense.” *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

prohibition against such multiple uses, other than the general prohibition against exaggerating criminality. *See id.* Although no Minnesota case directly addresses this issue, in *Williams*, the district court permitted the state to impeach the defendant with his prior convictions, after which the defendant chose not to testify. 777 N.W.2d at 517. One of the charges in that case was ineligible person in possession of a firearm, which was based on prior convictions; and the sentence on this charge was used to enhance the defendant's sentence on the first-degree assault charge because of the increased criminal-history score. *Id.* at 517. The supreme court affirmed defendant's sentence, despite the multiple uses of convictions, without, however, commenting on whether this exaggerated his criminality. *Id.* at 520-24.

Appellant had 16 convictions before those here. Six of the 16 convictions were felonies, and four of those were for violent behavior. Several of his misdemeanor convictions involved violent behavior: fifth-degree assault and violation of orders for protection. The jury's finding that he is a danger to public safety is based on substantial evidence. On the record before us, we find no abuse of the district court's discretion.

Affirmed.