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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A13-1247**

State of Minnesota,  
Respondent,

vs.

Rosvan Barnes,  
Appellant.

**Filed June 23, 2014  
Affirmed in part, reversed in part, and remanded  
Ross, Judge**

Ramsey County District Court  
File No. 62-CR-12-8061

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

John J. Choi, Ramsey County Attorney, Adam E. Petras, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

**UNPUBLISHED OPINION**

**ROSS, Judge**

The district court convicted appellant Rosvan Barnes of breaking into his former girlfriend's apartment, assaulting her, and violating a domestic-abuse no-contact order.

On appeal, Barnes challenges the district court's decisions (1) denying his claim that a 64-day delay in bringing his case to trial violated his speedy-trial right, (2) admitting as relationship evidence testimony about a separate incident involving the same victim, (3) finding that no substantial and compelling reason justified a sentencing departure, and (4) applying the *Hernandez* sentencing method. Because the district court did not err by rejecting Barnes's speedy-trial claim, by admitting the relationship evidence, and by refusing to depart from the presumptive sentence, we affirm in part. But because the case did not call for the *Hernandez* sentencing method, we reverse and remand for resentencing.

## FACTS

Early one morning in October 2012, Rosvan Barnes broke in through his former girlfriend's apartment window and assaulted her. The state charged Barnes with first-degree burglary in violation of Minnesota Statutes section 609.582, subdivision 1(c) (2012), felony domestic assault in violation of Minnesota Statutes section 609.2242, subdivision 4 (2012), and violation of a domestic-abuse no-contact order in violation of Minnesota Statutes section 629.75, subdivision 2(d)(1) (2012).

Barnes soon demanded a speedy trial. Two months after the demand, he moved the district court to dismiss the charges or release him from jail, arguing that his speedy-trial right had been violated. The district court concluded that Barnes had suffered no prejudice and denied the motion. The case proceeded to a bench trial. The state moved to introduce evidence of an incident from November 2011 involving Barnes and his former girlfriend. In that case, the state had charged Barnes with assault and violating an order

for protection, and Barnes pleaded guilty to the latter. The district court in this case held that this relationship evidence was admissible under Minnesota Statutes section 634.20 (2012). It found Barnes guilty on all three counts.

Barnes moved for a downward durational departure from the presumptive sentence under the guidelines. The district court denied the motion, finding no substantial and compelling circumstances to support it. The district court applied the *Hernandez* sentencing method to calculate the criminal history score and sentenced Barnes to prison for 88 months for the burglary, 27 months for violating the no-contact order, and 30 months for the domestic assault, with the presumptive terms to be served concurrently. This appeal follows.

## D E C I S I O N

### I

Barnes first argues that the delay in bringing him to trial violated his speedy-trial right. The state and federal constitutions afford criminal defendants the right to a speedy trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6. We review de novo Barnes's claim that his speedy-trial right was violated. *See State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004), *review denied* (Minn. July 20, 2004).

Not all delays are constitutionally significant, and not all constitutionally significant delays require reversal. We generally consider the delay's length and its reason and whether the defendant asserted his speedy-trial right and suffered any prejudice. *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999) (citing *Barker v. Wingo*, 407 U.S. 514, 530–33, 92 S. Ct. 2182, 2192–93 (1972)). Delays greater than 60 days are

presumptively prejudicial. *State v. Friberg*, 435 N.W.2d 509, 512 (Minn. 1989). The district court commenced Barnes's trial 64 days after he demanded a speedy trial. Although the 64-day length triggers the presumption of a constitutional violation, his claim for reversal is not compelling. Barnes was substantially responsible. His attorney was unavailable during the district court's original trial block, and Barnes himself was unavailable the week before his trial began because he was defending himself against different burglary charges in a separate case. *See State v. Johnson*, 811 N.W.2d 136, 145 (Minn. App. 2012) (concluding that defendant bore responsibility for delay caused by defense counsel's unavailability), *review denied* (Minn. Mar. 28, 2012). In addition to Barnes's unavailability being partly responsible for the delay, he does not persuasively point to any delay-related prejudice. The delay did not violate his speedy-trial right.

## II

Barnes argues second that the district court improperly admitted testimony about a November 2011 incident as relationship evidence under Minnesota Statutes section 634.20 (2012). We review the district court's evidentiary decision for an abuse of discretion. *State v. Matthews*, 779 N.W.2d 543, 553 (Minn. 2010). The district court may admit "[e]vidence of similar conduct by the accused against the victim of domestic abuse . . . unless the probative value is substantially outweighed by the danger of unfair prejudice." Minn. Stat. § 634.20. Barnes supports his contention that the evidence's danger of unfair prejudice substantially outweighed its probative value with only theoretical concerns about relationship evidence generally, identifying no prejudice in *this* case. This failure to support his argument defeats his claim on appeal, but we add that

we see no risk of unfair prejudice. Barnes was being tried for violating a domestic-abuse no-contact order, so the district court as fact-finder necessarily already knew that Barnes had previously engaged in domestic abuse. Any additional, incremental prejudice that Barnes might have suffered from the victim's brief testimony about the November 2011 incident poses no apparent danger of unfair prejudice.

### III

Barnes argues third that the district court erred by denying his motion for a downward durational departure. The district court must impose the presumptive guidelines sentence unless substantial and compelling circumstances justify a departure. Minn. Sent. Guidelines 2.D.1 (2012). The district court found no substantial and compelling circumstances to durationally depart. The record reflects that the district court carefully considered the evidence and arguments before it. Barnes presents no persuasive argument for reversing the district court's widely discretionary decision to impose presumptive sentences.

### IV

Barnes's final argument leads us to reverse in part. He contends that the district court erred by using the sentencing method described in *State v. Hernandez* to increase his criminal history score. *See* 311 N.W.2d 478 (Minn. 1981). We will reverse a sentence if the district court did not properly exercise its discretion or the sentence is not authorized by law. *State v. Noggle*, 657 N.W.2d 890, 893 (Minn. App. 2003); *see also* Minn. R. Crim. P. 27.03, subd. 9.

The *Hernandez* sentencing method, in which the defendant's criminal history score is calculated not only based on prior convictions but also on all but the last of the felony offenses for which the district court is imposing concurrent sentences, is inappropriate if the offenses arose out of the same course of conduct. *State v. Hartfield*, 459 N.W.2d 668, 670 (Minn. 1990). The district court applied the *Hernandez* method by assigning four criminal history points to Barnes's burglary, five to his violation of the no-contact order, and six to his domestic assault. The state agrees with Barnes that this approach was improper because Barnes's convictions arose out of a single course of conduct. Given the state's concession and the controlling law, we reverse that element of the sentence and remand for the district court to resentence Barnes.

**Affirmed in part, reversed in part, and remanded.**