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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-0454**

State of Minnesota,  
Respondent,

vs.

Gary L. Underdahl,  
Appellant.

**Filed August 5, 2008  
Affirmed in part, reversed in part, and remanded  
Wright, Judge**

Polk County District Court  
File No. CR-06-5343

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Considered and decided by Minge, Presiding Judge; Klaphake, Judge; and Wright, Judge.

## UNPUBLISHED OPINION

**WRIGHT**, Judge

Appellant challenges the district court's decision to depart durationally from the presumptive guidelines sentence, arguing that the aggravating factors submitted to the jury are not appropriate bases for departure. Appellant also challenges his underlying felon-in-possession-of-a-firearm conviction, arguing that the district court committed reversible error by (1) ordering a unitary trial on the issue of guilt and the existence of aggravating factors for sentencing; (2) improperly admitting certain unobjected-to evidence; and (3) depriving him of the right to counsel with respect to his new-trial motion. In a pro se supplemental brief, appellant challenges the sufficiency of the evidence. We affirm the conviction, reverse the sentence, and remand.

### FACTS

In the late 1990s, appellant Gary Underdahl was convicted of several offenses, a number of which were "crime[s] of violence" prohibiting him from possessing a firearm. *See* Minn. Stat. § 624.713, subd. 1(b) (2004). After serving nine years in prison for these offenses, Underdahl was released on April 13, 2006. Shortly after his release, Underdahl was charged with two counts of possession of a firearm by a prohibited person, a violation of Minn. Stat. §§ 609.165, subd. 1b(a), 624.713, subds. 1(b), 2(b) (2004). In addition, the state sought an upward durational departure from the presumptive guidelines sentence based on four aggravating factors. During a unitary jury trial, the state presented evidence of these aggravating factors along with evidence of Underdahl's guilt.

After his release from prison, Underdahl moved in with his mother, whose residence had been inspected by Department of Corrections agents and determined to be clear of firearms. Shortly thereafter, S.T., a long-time casual acquaintance, approached Underdahl to discuss animal trapping. According to S.T.'s testimony, Underdahl asked whether S.T. was interested in purchasing traps or guns that belonged to Underdahl's brother. After expressing his interest to Underdahl, S.T. reported the conversation to the Polk County Sheriff's Department and subsequently volunteered to work as a confidential informant.

Sometime during the next two weeks, Underdahl discovered a rusty but operable .22 caliber pistol while moving items out of a shed on his mother's property. Helping Underdahl were R.B. and J.A., who was on probation after being convicted of burglary. Based on this conviction, J.A. also was prohibited from possessing firearms. According to J.A.'s testimony, Underdahl picked up the pistol, placed it in a plastic bag, and directed J.A. to hide the pistol in a ditch near a particular road sign near Underdahl's mother's property. J.A. complied with Underdahl's request. J.A. also testified that Underdahl directed him to refrain from discussing the pistol with anyone else. But J.A. reported the incident to his probation officer.

On April 26, 2006, S.T. met Underdahl to conduct a controlled buy. Shortly after S.T. arrived at Underdahl's property, Underdahl indicated that he had a .22 pistol

available for sale and drew a map depicting its location.<sup>1</sup> Underdahl and S.T. agreed that S.T. would find the pistol, determine its worth, rehide it, and quote Underdahl a price on his return. After some initial confusion, S.T. found the pistol in the location where Underdahl had directed J.A. to hide it. After a brief negotiation, Underdahl and S.T. agreed on a price for the pistol, which S.T. paid using prerecorded currency. Underdahl subsequently was arrested on May 2, 2006.

While in custody and after being advised of his constitutional rights, Underdahl was interviewed two times by law enforcement officers. During the first interview, an officer asked Underdahl whether he had sold anything. Underdahl replied that he had sold some traps but denied having sold anything else. He also denied having been involved with any firearms since his release from prison. During the second interview, however, Underdahl acknowledged that the pistol had been found while moving items out of the shed but denied that he ever touched it. He claimed that he told J.A., “You got to get this out of here. I’m a convicted felon.”

Trial was scheduled to begin on October 17, 2006. During the final round of pretrial motions before jury selection, Underdahl moved for a bifurcated trial, arguing that the aggravating-factors evidence would prejudice the jury in determining the question of guilt. The district court denied the motion and ordered a unitary trial.

After the trial, the jury returned a special verdict finding Underdahl guilty of all charges and finding that the state proved each of the aggravating factors submitted.

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<sup>1</sup> Although the conversation was recorded, much of Underdahl’s communication regarding the sale was written in a notepad because Underdahl “was under the impression that [corrections agents] could listen in on his [supervised-release] monitoring device.”

Specifically, the jury found that Underdahl (1) committed the offense within two weeks after his release from prison, (2) sold the firearm to another, (3) lied to one or more law enforcement officers during the investigation, and (4) attempted to falsely shift blame to another. Based on the jury's findings, the district court sentenced Underdahl to ten years' imprisonment, an upward durational departure from the presumptive guidelines sentence of five years' imprisonment. This appeal followed.

## DECISION

### I.

Underdahl challenges the district court's upward durational departure from the presumptive guidelines sentence. Under the Minnesota Sentencing Guidelines, the sentencing judge must impose the presumptive guidelines sentence "unless the individual case involves 'substantial and compelling circumstances'" justifying departure. *State v. Shattuck*, 704 N.W.2d 131, 139 (Minn. 2005) (quoting Minn. Sent. Guidelines II.D). If such circumstances are present, we review the district court's decision to depart from the presumptive guidelines sentence for an abuse of discretion. *Id.* at 140. If such circumstances are not present, the district court has no discretion to depart. *Id.*

The sentencing guidelines are designed to ensure rational, consistent sentences. *State v. Herrmann*, 479 N.W.2d 724, 727 (Minn. App. 1992), *review denied* (Minn. Mar. 19, 1992). These purposes cannot be achieved unless district courts generally adhere to the guidelines sentences, which are "presumed to be appropriate for every case." *Id.*; Minn. Sent. Guidelines II.D & cmt. II.D.01. But the sentencing guidelines recognize that there will be a small number of cases when a defendant's atypically serious conduct

makes a longer sentence more appropriate. *State v. Collins*, 580 N.W.2d 36, 45 (Minn. App. 1998), *review denied* (Minn. July 16, 1998); Minn. Sent. Guidelines cmt. II.D.01. To support an upward durational departure, the district court must provide written reasons that specify the substantial and compelling nature of the aggravating circumstances and that “make the departure more appropriate than the presumptive sentence.” Minn. Sent. Guidelines II.D; *accord Herrmann*, 479 N.W.2d at 727 (quoting prior version of Minn. Sent. Guidelines II.D).<sup>2</sup>

According to the sentencing grid, the presumptive guidelines sentence for Underdahl’s offense was 57 months’ imprisonment based on his criminal-history score of 19. Minn. Sent. Guidelines IV (sentencing grid), V (ranking offense severity level of possession of firearm by prohibited person as six). This is slightly less than the statutory mandatory minimum sentence of 60 months’ imprisonment. Minn. Stat. § 609.11, subd. 5(b) (2004) (providing five-year minimum sentence for possession of firearm after having been previously convicted of crime of violence). But because the presumptive duration in such situations is the longer of the two, the presumptive guidelines sentence for Underdahl’s offense was 60 months’ imprisonment. Minn. Sent. Guidelines II.E & cmt. II.E.03. Thus, to impose 120 months’ imprisonment, the district court was required to identify what made Underdahl’s conduct significantly more serious than the typical case of possession of a firearm by a prohibited person.

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<sup>2</sup> Although the district court did not provide written reasons for the upward departure, Underdahl does not challenge this on appeal.

The facts underlying an aggravating factor must be found by a jury. *Shattuck*, 704 N.W.2d at 141-42 (construing sentencing guidelines in light of requirements of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004)). Here, each factor was individually listed in a special-verdict form submitted to the jury, and the jury found each factor to be proven beyond a reasonable doubt. Thus, Underdahl’s sentence satisfies *Blakely*. But he argues that the jury’s findings are not proper “aggravating factors” under the sentencing guidelines. The district court concluded that Underdahl’s conduct was more serious because the jury found that Underdahl (1) committed the offense within two weeks after being released from prison, (2) sold the firearm to another, (3) lied to the police, and (4) falsely shifted blame to another. Underdahl argues that these are not proper grounds for an upward departure.

#### A.

The state argues that the district court properly concluded that the recency of Underdahl’s release from prison was an aggravating factor. The state cites without discussion *United States v. Walker* for the proposition that, “[w]hen a defendant responds to lenient treatment by committing crimes as soon as he is released, the implication is that a severe sentence is necessary to prevent him from continuing to engage in criminal activity.” 98 F.3d 944, 947 (7th Cir. 1996). Under Minnesota sentencing law, however, “[a]n upward durational departure must focus only on offense-related factors and may not consider offender-related factors.” *Black v. State*, 725 N.W.2d 772, 777 (Minn. App. 2007) (citing *State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995)). Offender-related factors, such as lack of remorse or amenability to treatment, are reserved for dispositional

departures. *Chaklos*, 528 N.W.2d at 228. Thus, although the recency of Underdahl's release would have been a proper basis to depart from a presumptive disposition of probation by ordering imprisonment, it was an improper basis to depart durationally.

Moreover, a fact relied on in determining the presumptive guidelines sentence for an offense generally is not an appropriate basis for departure. *State v. Brusven*, 327 N.W.2d 591, 593 (Minn. 1982). If the district court has already considered a fact when determining the presumptive guidelines sentence, that fact may not be considered a second time when deciding whether to impose an upward departure. *Id.* Underdahl was in the first phase of intensive supervised release when he committed the instant offense, which by definition means he had been released from prison relatively recently. *Cf.* Minn. Stat. § 244.05, subd. 1 (2004) (stating that maximum duration of supervised release generally is time remaining on inmate's executed sentence). And as required by the sentencing guidelines, this recency was taken into account when calculating Underdahl's criminal-history score. Minn. Sent. Guidelines II.B.2.a (assigning additional point if offense being sentenced was committed while defendant was on supervised release). It, therefore, was an inappropriate basis for departure. *See Herrmann*, 479 N.W.2d at 729 (holding that DWI defendant's prior history of alcohol-related offenses, which included one custody point, was improper basis for departure).

The state also argues that Underdahl's criminal history was not utilized to determine the presumptive guidelines sentence because the statutory minimum sentence ensured that Underdahl would receive the same sentence even if his criminal-history



score were negligible.<sup>3</sup> It contends that Underdahl's criminal-history score of 19 was "significantly underrepresented" because any criminal-history points beyond six failed to provide a marginal increase in punishment, rendering the remaining 13 criminal-history points as "freebies." Although the state's concerns are valid, the sentencing guidelines commission considered and rejected the state's proposed approach to punishment:

The most problematic consequence of a criminal history score in excess of the maximum points differentiated by the Sentencing Guidelines Grids is that no additional penalty accrues for engaging in felonious behavior while under custody supervision. For example, if an offender has a criminal history score of seven and is released pending sentencing for a severity level three offense, and he or she commits another severity level three offense while awaiting sentencing, the presumptive sentence for the most recent offense is the same as for the prior offense. There is a presumption against consecutive sentences for property offenses, and therefore no additional penalty is provided when this type of situation occurs. The addition of three months to the cell duration provides a uniform presumptive standard for dealing with this situation.

While the Commission believes that the impact of the custody status provision should be maintained for all cases, *incrementing the sanction for each criminal history point above that displayed by the Sentencing Guidelines Grids is deemed inappropriate.* The primary determinant of the sentence is the seriousness of the current offense of conviction. Criminal history is of secondary importance and the Commission believes that proportionality in sentencing is served sufficiently with the criminal history differentiations incorporated in the Sentencing Guidelines Grids and with the special provision for maintaining the impact of the custody

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<sup>3</sup> We observe that, although the state uses a criminal-history score of zero as an example, a defendant cannot be prohibited from possessing a firearm based on a prior felony conviction occurring fewer than 15 years earlier without accumulating at least one-half criminal-history point. See Minn. Sent. Guidelines II.B.1.a, f.

status provision. Further differentiation is deemed unnecessary to achieve proportionality in sentencing.

Minn. Sent. Guidelines cmt. II.B.203 (emphasis added). The state's arguments, therefore, are unavailing.

## **B.**

The state next argues that Underdahl's sale of the firearm was an appropriate basis for an upward durational departure. In light of the particular facts of this case, we disagree.

When an aggravating fact is an element of the substantive offense itself, it may not be used as a basis for an upward durational departure from the presumptive guidelines sentence for that offense. *Herrmann*, 479 N.W.2d at 730. Ordinarily, sale is not an element of the instant offense, which requires the state to prove only that the defendant (1) had been convicted of a crime of violence and (2) possessed a firearm. Minn. Stat. § 624.713, subds. 1(b), 2(b) (2004). But the state offered several alternative theories of possession, one of which was that Underdahl constructively possessed the pistol by concealing it for subsequent sale.

Possession does not require actual or physical control over the firearm. *State v. Willis*, 320 N.W.2d 726, 728-29 (Minn. 1982). Constructive possession is sufficient. *State v. Porter*, 674 N.W.2d 424, 427 (Minn. App. 2004). In a constructive-possession case, the state must prove that the defendant maintained a possessory interest in the firearm. *See State v. Florine*, 303 Minn. 103, 104-05, 226 N.W.2d 609, 610-11 (1975) (discussing policy underlying constructive-possession doctrine). To establish a

defendant's constructive possession of a firearm found in a location where others had access, the state must prove a strong probability that the defendant was "consciously exercising dominion and control over it." *Porter*, 674 N.W.2d at 427 (citing *Florine*, 303 Minn. at 105, 226 N.W.2d at 611).

To satisfy this burden, the state relied on the evidence of a sale and argued that Underdahl consciously maintained dominion over the pistol despite directing J.A. to hide it in a ditch because, the state argues, "[y]ou can't sell something if you don't possess it." See *Florine*, 303 Minn. at 105, 226 N.W.2d at 610 (suggesting that constructive possession is a function of whether defendant intended to abandon or maintain an interest in item). Because the sale was a means by which Underdahl possessed the firearm, increasing his punishment for that possession was improper.

### C.

The state next argues that the district court's reliance on the finding that Underdahl "lie[d] to one or more law enforcement officers during the course of the investigation" was a proper basis for an upward departure. Thus, the relevant question is whether this factor makes Underdahl's possession of the pistol *substantially* more serious than the typical case of firearm possession by a prohibited person. Minn. Sent. Guidelines II.D.

Neither party has cited, nor has our research produced, any caselaw in which lying to the police, by itself, was sufficient to justify a departure from the presumptive guidelines sentence. The state cites strong language in federal caselaw condemning those

who lie to law enforcement authorities, including that of the United States Supreme Court.

We cannot imagine how it could be true that falsely denying guilt in a Government investigation does not pervert a governmental function. Certainly the investigation of wrongdoing is a proper governmental function; and since it is the very *purpose* of an investigation to uncover the truth, any falsehood relating to the subject of the investigation perverts that function.

*Brogan v. United States*, 522 U.S. 398, 402, 118 S. Ct. 805, 808-09 (1998). But the *Brogan* Court's language must be considered in light of the issue presented, namely, whether the federal perjury statute contained an exception for false statements consisting of the mere denial of wrongdoing. *Id.* at 399, 118 S. Ct. at 807. Thus, unlike this case, lying to law enforcement authorities was an element of the substantive offense at issue in *Brogan*. The state also quotes the following passage from *United States v. Buckley*:

The purpose of punishing obstruction of justice is not just to prevent miscarriages of justice but also to reduce the burden on the justice system. If a defendant throws a monkey wrench into it the system is damaged even if the only cost is that of removing the monkey wrench before it can wreck the system. Which is what happened here.

192 F.3d 708, 710 (7th Cir. 1999) (citations omitted). But rather than addressing an upward departure from the federal sentencing guidelines, the *Buckley* court addressed a specific provision of the United States Sentencing Guidelines that enhanced the defendant's sentence. *Id.* at 709; U.S. Sentencing Guidelines Manual § 3C1.1 (2005) (increasing offense level by two when defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the

investigation, prosecution, or sentencing of the instant offense of conviction”). Contrary to factors in the instant case, the aggravating factor in *Buckley* was part of a coherent sentencing scheme and applied to all similarly situated offenders. It was not a departure factor.

One of the major goals of the Minnesota Sentencing Guidelines is to achieve consistency, which “cannot be achieved unless the presumptive sentences are applied with a high degree of regularity.” Minn. Sent. Guidelines cmt. II.D.03. Thus, the sentencing guidelines envision an upward departure as the exception, reserved for “a small number of cases where substantial and compelling aggravating . . . factors” overcome the presumption that the sentencing guidelines’ grid-based sentence is appropriate. Minn. Sent. Guidelines II.D & cmts. II.D.01, .03. Underdahl’s statements denying his guilt do not fall within this narrow exception.

#### **D.**

Finally, the state argues that the upward durational departure was justified based on Underdahl’s attempt to blame J.A. for possessing the pistol because blame shifting is a legally recognized ground for an upward durational departure. Indeed, the Minnesota Supreme Court has recognized that the district court may depart durationally from the presumptive guidelines sentence based on “the offense-related conduct of trying to pin the blame for the offense on someone else.” *Chaklos*, 528 N.W.2d at 228. But that factor does not apply here.

As Underdahl correctly observes, in each of the cases in which blame shifting justifies an upward durational departure, the defendant was affirmatively blaming an

innocent third party for his offense. This is because an upward durational departure, as opposed to an upward dispositional departure, “must focus only on offense-related factors and may not consider offender-related factors.” *Black*, 725 N.W.2d at 777. To be offense related, rather than offender related, an aggravating factor must “make[ the] defendant’s conduct significantly more serious than that typically involved in the commission of the offense in question.” *Chaklos*, 528 N.W.2d at 228. Thus, it is not the defendant’s refusal to accept responsibility for his own actions; rather, it is the defendant’s additional bad conduct of implicating an innocent person in the underlying offense that makes blame shifting offense related. *See State v. Elkins*, 346 N.W.2d 116, 119 (Minn. 1984) (“Defendant did not simply deny the offense but also participated in the reprehensible scheme of trying to pin the blame on a completely innocent man, who was questioned by the police and otherwise seriously inconvenienced.”); *cf. State v. McGee*, 347 N.W.2d 802, 806 n.1 (Minn. 1984) (observing that lack of remorse generally is not offense-related factor but in some cases may be considered as evidence of cruelty or seriousness of conduct).

Here, J.A. admitted possessing the firearm. J.A. testified about his role in hiding the firearm at Underdahl’s direction despite protesting that he was prohibited from possessing a firearm. Moreover, J.A. volunteered this information to his probation

officer before Underdahl was even in custody. Thus, Underdahl did not *falsely* implicate an *innocent* person.<sup>4</sup>

We conclude that this factor is not a proper ground for an upward durational departure. Because the district court abused its discretion by relying on the foregoing grounds for an upward durational departure, we remand for imposition of the presumptive guidelines sentence.<sup>5</sup>

## II.

Underdahl also challenges the district court's decision to order a unitary trial rather than a bifurcated trial. The parties disagree about both the governing legal standard for a district court's decision whether to bifurcate and the propriety of the district court's decision here. We address each in turn.

### A.

Underdahl argues that the district court should have applied Minn. R. Crim. P. 11.04 rather than Minn. Stat. § 244.10, subd. 5 (Supp. 2005), in determining whether to

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<sup>4</sup> We also observe that the state's closing argument with respect to blame shifting treats blame shifting as an offender-related, rather than an offense-related, factor. The state argued:

And finally, did [Underdahl] attempt to falsely shift blame to another for the offense. Look at what [Underdahl] said about [J.A.]. [Underdahl]'s trying to put this all off on him. It's all [J.A.'s] fault and [Underdahl] has absolutely no responsibility whatsoever in any way, shape, or form. It isn't [Underdahl's] fault. The whole thing's a misunderstanding. It's [J.A.]'s fault.

Although Underdahl's attempt to minimize his role in the offense indicates that he has not accepted personal responsibility for it, it is not additional offense-related conduct.

<sup>5</sup> Because we are remanding for imposition of the presumptive guidelines sentence, we need not address Underdahl's claim that the state committed prosecutorial misconduct by attempting to bias the district court against him at sentencing.

bifurcate Underdahl's trial. Ascertaining the governing legal standard presents an issue of law, which we review de novo. *See State v. Azure*, 621 N.W.2d 721, 723 (Minn. 2001) (stating that deciding between statute and rule involves construction of statutes and rules).

Following the *Blakely* decision, the legislature amended section 244.10 to authorize bifurcated trial proceedings when the state intends to seek an upward departure. *See* 2005 Minn. Laws ch. 136, art. 16, § 4, at 1115 (enacting subdivision 5); *see also Shattuck*, 704 N.W.2d at 141-42 (applying *Blakely* to Minnesota Sentencing Guidelines). As amended, Minn. Stat. § 244.10, subd. 5, provided<sup>6</sup>:

(a) When the prosecutor provides reasonable notice under subdivision 4, the district court shall allow the state to prove beyond a reasonable doubt to a jury of 12 members the factors in support of the state's request for an aggravated departure from the Sentencing Guidelines as provided in paragraph (b) or (c).

(b) The district court shall allow a unitary trial and final argument to a jury regarding both evidence in support of the elements of the offense and evidence in support of aggravating factors when the evidence in support of the aggravating factors:

(1) would be admissible as part of the trial on the elements of the offense; or

(2) would not result in unfair prejudice to the defendant.

The existence of each aggravating factor shall be determined by use of a special verdict form.

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<sup>6</sup> Although the legislature amended the language of section 244.10, subdivision 5(a), in 2006, 2006 Minn. Laws ch. 260, art. 1, § 1, at 708, we observe that the amendment is not material to the outcome of this case. We, therefore, limit our analysis to the 2005 version of the statute, which was the version at issue during Underdahl's trial.



Upon the request of the prosecutor, the court shall allow bifurcated argument and jury deliberations.

(c) The district court shall bifurcate the proceedings, or impanel a resentencing jury, to allow for the production of evidence, argument, and deliberations on the existence of factors in support of an aggravated departure after the return of a guilty verdict when the evidence in support of an aggravated departure:

- (1) includes evidence that is otherwise inadmissible at a trial on the elements of the offense; and
- (2) would result in unfair prejudice to the defendant.

Partially in response to the legislature, the supreme court amended the rules of criminal procedure to include formal procedures for an upward departure, including the decision whether to bifurcate a trial. *Promulgation of Amendments to the Minn. Rules of Criminal Procedure*, No. C1-84-2137 (Minn. Aug. 17, 2006) (order), available at <http://macsnc.courts.state.mn.us/pubdocs/SC/Storage/orc1842137-0817.pdf> (*Promulgation of Amendments*). As a result, rule 11.04 was amended to provide, in relevant part:

If the prosecutor has given notice under Rule 7.03 or 19.04, subd. 6(3) of intent to seek an aggravated sentence, a hearing shall be held to determine whether the law and proffered evidence support an aggravated sentence. If so, the court shall determine whether the issues will be presented to the jury in a unitary or bifurcated trial.

In deciding whether to bifurcate the trial, the court shall consider whether the evidence in support of an aggravated sentence is otherwise admissible in the guilt phase of the trial and whether unfair prejudice would result to the defendant in a unitary trial. A bifurcated trial shall be ordered where evidence in support of an aggravated sentence includes evidence that is inadmissible during the guilt phase of the trial or would result in unfair prejudice to the defendant. If the court orders a unitary trial the court may still order separate

final arguments on the issues of guilt and the aggravated sentence.

Minn. R. Crim. P. 11.04.

Underdahl argues that the district court should have applied Minn. R. Crim. P. 11.04 rather than Minn. Stat. § 244.10, subd. 5, when determining whether to bifurcate his trial. As a general matter, the Minnesota Rules of Criminal Procedure take precedence over any inconsistencies in the statutes on matters of procedure. *State v. Johnson*, 514 N.W.2d 551, 554 (Minn. 1994); *see also* Minn. Const. art. III, § 1 (Separation of Powers Clause). Here, both rule 11.04 and section 244.10, subdivision 5, direct the district court to consider the same basic factors—the admissibility of aggravating-factors evidence to determine guilt and the potential for unfair prejudice resulting from its admission. But the rule and the statute produce logically inverse outcomes when applied to those factors. Under section 244.10, subdivision 5, a district court must bifurcate the trial only if the aggravating-factors evidence is *both* inadmissible to establish guilt and unfairly prejudicial. By contrast, rule 11.04 requires the district court to bifurcate the trial if the aggravating-factors evidence is *either* inadmissible or unfairly prejudicial. The amendments to rule 11.04 were not in effect when Underdahl was arrested and charged in early May 2006. The order promulgating the amendments states that they “shall govern all criminal actions commenced or arrests made after 12 o’clock midnight October 1, 2006.” *Promulgation of Amendments*, at 1. Therefore, the amended version of rule 11.04 did not govern the district court’s decision.

When it argues that the statute mandated a unitary trial, the state overstates the extent to which section 244.10, subdivision 5, was binding on the district court before the amended rule became effective. Although the legislature has authority over the substantive law, *Azure*, 621 N.W.2d at 723, the mode of presenting aggravating-factors evidence to a sentencing jury is a purely procedural matter, *State v. Chauvin*, 723 N.W.2d 20, 25 (Minn. 2006) (holding that *Blakely* “merely changed the steps that the court took in arriving at a sentence already authorized by the legislature”). As such, it fell squarely within the scope of the district court’s inherent judicial power. *In re Clerk of Lyon County Courts’ Comp.*, 308 Minn. 172, 180, 241 N.W.2d 781, 786 (1976) (stating that inherent judicial power is “available to courts on all levels to be used consistent with [their] respective jurisdictions and functions” and that the power’s scope “comprehends all authority necessary to preserve and improve the fundamental judicial function of deciding cases”); *accord Chauvin*, 723 N.W.2d at 27 (holding that improvised use of sentencing jury to conform to *Blakely* was authorized by district court’s inherent judicial authority). But because a procedural statute is voidable rather than void and may be deferred to as a matter of comity “if the legislature passes a statute in an area not already governed by a rule,” the district court was free to apply section 244.10, subdivision 5, as a matter of comity when exercising its inherent judicial authority to control the presentation of evidence at trial. *Johnson*, 514 N.W.2d at 554 n.5. The district court’s decision to do so here was not erroneous.

## **B.**

Under section 244.10, subdivision 5, the district court's decision regarding bifurcation turns on whether (1) the aggravating-factors evidence would be inadmissible with respect to the guilt phase and (2) whether its admission would result in unfair prejudice to the defendant. Both of these determinations are equivalent to a pretrial evidentiary ruling, which we review for an abuse of discretion. *Cf. State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (reviewing district court's rulings on admissibility of evidence, which included ruling on evidence's potential for unfair prejudice, for abuse of discretion).

Underdahl argues that the evidence presented regarding his prior convictions and recent release from prison was both irrelevant to the issue of guilt and unfairly prejudicial. Evidence is not admissible unless it is relevant. Minn. R. Evid. 402. Evidence is relevant if it affects the probability that a fact "of consequence to the determination of the action" exists. Minn. R. Evid. 401. Because Underdahl stipulated to the fact that he had previously been convicted of a crime of violence, the only remaining element for the state to prove during the guilt phase of the trial was whether Underdahl possessed the firearm. Underdahl argues that evidence relating to his prior crimes and consequent punishment was inadmissible because (1) it was not probative of whether he possessed the firearm and (2) it posed a grave risk of unfair prejudice.

In an unlawful-firearm-possession case, the potential for unfair prejudice arising from the evidence offered to prove that the defendant is a convicted felon may "clearly outweigh[ ] its probative value." *State v. Davidson*, 351 N.W.2d 8, 11 (Minn. 1984); *cf.*

Minn. R. Evid. 403 (requiring exclusion of otherwise admissible evidence when potential for unfair prejudice substantially outweighs probative value). Thus, the defendant usually is permitted to remove the issue from the jury's consideration by stipulating to the conviction. *Davidson*, 351 N.W.2d at 11. But a stipulation does not automatically render evidence related to the subject of the stipulation inadmissible. *Id.* The district court still must assess the potential for prejudicial impact from the evidence in light of its "relevance . . . to additional issues that would be addressed by admitting the evidence." *State v. Greenfield*, 622 N.W.2d 403, 408 (Minn. App. 2001), *review denied* (Minn. May 15, 2001). Because, as discussed above in section I.A., Underdahl's recent release from prison was an improper basis for an upward durational departure, we consider its relevance only as to issues of guilt.

Our review of the record establishes that evidence addressing Underdahl's prior convictions and subsequent release from prison was relevant to whether he possessed a firearm. Indeed, Underdahl's recent release from prison was part of the core theory of his defense at trial. According to his defense theory, after spending nine years in prison, Underdahl would not jeopardize his newfound freedom by possessing a rusty pistol. Underdahl used evidence of his prior conviction and recent release from prison to obtain a strategic advantage on the central issue in dispute. He, therefore, waived any objection to its admission. *Cf. Davidson*, 351 N.W.2d at 11 (recognizing admission of prior conviction in felon-in-possession case may be appropriate despite high potential for prejudice when "the facts underlying the prior conviction are relevant to some disputed issue"). Moreover, the jury never learned the nature of his previous offenses. And the

district court specifically instructed the jury that it could not consider evidence of Underdahl's prior convictions as evidence of his guilt, thereby addressing the potential for unfair prejudice. *State v. Pendleton*, 725 N.W.2d 717, 729 (Minn. 2007).

The other aggravating-factors evidence also was neither inadmissible nor unfairly prejudicial. Evidence that Underdahl sold a firearm was properly admitted as probative evidence of his guilt for the same reason it was an improper basis for departure. The sale to S.T. was one way that Underdahl constructively possessed the pistol. As such, it was probative evidence of an essential element of the offense. The evidence that Underdahl lied to the police or attempted to shift responsibility for possessing a firearm not only contextualized the testimony of S.T. and J.A. but also was admissible as a party-opponent's admission. Minn. R. Evid. 801(d)(2); *cf. State v. Lee*, 645 N.W.2d 459, 467 (Minn. 2002) (upholding admission of murder defendant's prior threats to kill his wife).

Because the district court did not abuse its discretion by concluding that this evidence was neither inadmissible nor unfairly prejudicial evidence of guilt, its decision to order a unitary trial was proper.

### **III.**

Underdahl argues for the first time on appeal that the admission of certain evidence was erroneous. Because Underdahl did not object at trial, we first must determine whether admitting this evidence constitutes plain error affecting Underdahl's substantial rights. Minn. R. Crim. P. 31.02 (permitting review of unobjected-to plain error that affects criminal defendant's substantial rights). To establish plain error, the defendant must demonstrate that (1) an error occurred; (2) the error was plain; and (3) it

affected the defendant's substantial rights. *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007). If all three factors are satisfied, we also consider whether the error should be addressed "to ensure fairness and the integrity of the judicial proceedings." *Id.* (quotation omitted).

Underdahl first argues that it was plain error to admit evidence that he had recently been released from prison after having been convicted of a crime of violence as well as the "gory details" of his recent release. But as discussed in section II.B, this evidence directly addressed the central theme of Underdahl's defense and was used by defense counsel to obtain a strategic advantage. The district court did not err by admitting it.

Underdahl also argues that it was plain error to receive S.T.'s testimony that people were scared of Underdahl. Specifically, he argues that this statement was inadmissible hearsay and character evidence. The challenged statement occurred in the context of eliciting S.T.'s motivation for acting as a confidential informant:

Q: You hadn't been convicted of any crime that you're trying to work off?

A: No, sir.

Q: Were you doing this for money?

A: No, sir.

Q: Were you offered money?

A: No, sir.

Q: Did you ask for money?

A: No, sir.

Q: You just were doing this because you volunteered?

A: I did this because people in Polk County—in my opinion, the people [who] talked to me were scared of him and if I didn't do it nobody would.

This statement was not hearsay. Hearsay is an out-of-court statement offered for the truth of the matter asserted. Minn. R. Evid. 801(c). Had S.T.'s testimony included

what others said, those out-of-court statements would be hearsay. But S.T.'s statement that he believed those people were scared is a conclusion that S.T. drew as to their state of mind. In addition, this testimony was not offered for the truth of the matter asserted, but rather for its effect on S.T., namely, motivating him to volunteer as a confidential informant. Similarly, S.T.'s statement is not inadmissible character evidence. Evidence of a person's character generally is inadmissible "for the purpose of proving action in conformity therewith." Minn. R. Evid. 404(a). But S.T.'s testimony was not offered to prove that Underdahl performed any action in conformity with his character. Such testimony was offered to explain why S.T. volunteered to be an informant. Therefore, the admission of neither statement constitutes plain error.

#### IV.

Underdahl also contends that the district court deprived him of the Sixth Amendment right to counsel by requiring him to litigate his new-trial motion pro se. A criminal defendant has a constitutional right to be represented by counsel. U.S. Const. amend. VI; Minn. Const. art I, § 6. The defendant may waive this right, however, if the waiver is competently and intelligently made. *State v. Worthy*, 583 N.W.2d 270, 275 (Minn. 1998). Whether a waiver is valid depends on the particular facts and circumstances of a case, including the defendant's conduct. *Id.* at 275-76 (citing *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019 (1938)). We will not disturb a district court's finding on waiver unless it is clearly erroneous. *Id.* at 276.

The right to counsel includes the right to a fair opportunity to secure counsel of one's choice. *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006). But an indigent's right



to choose a public defender is not unlimited, and a district court “will grant an indigent’s request for different counsel only if exceptional circumstances exist and the demand is timely and reasonably made.” *Worthy*, 583 N.W.2d at 278 (quotation omitted). Moreover, when a defendant is provided with counsel and informed that a replacement public defender will not be forthcoming, a defendant’s conduct in unequivocally discharging counsel demonstrates waiver of the right to counsel. *Id.* at 276.

Underdahl was initially appointed counsel through the public defender’s office, but Underdahl later fired this counsel and represented himself for part of the pretrial proceedings. At Underdahl’s request, however, the district court reappointed his counsel who represented Underdahl until Underdahl discharged him again. Underdahl then retained private counsel who represented him at trial. After the verdict and while still represented by private counsel, Underdahl filed a pro se motion for a new trial. When his attorney refused to represent him on this motion, which lacked merit, Underdahl moved to dismiss his counsel in order to litigate his new-trial motion. Following the sentencing, the district court granted Underdahl’s motion to dismiss his attorney.

In denying Underdahl’s motion for a new trial, the district court found that

[Underdahl] was previously warned by the Court at his sentencing hearing on December 13, 2006 that it was likely that the Polk County Public Defender’s office would refuse to represent him given the fact [that] he previously fired and made disparaging remarks towards at least one of their attorneys. [Underdahl] delayed seeking counsel and attempted to use his lack of counsel as a means of delaying his motion for a new trial. However, this Court finds that [Underdahl] was made well aware of the situation and refused to take action and thus waived his right to counsel at his motion for new trial hearing.

On this record, we conclude that the district court's findings on waiver are not clearly erroneous.

## V.

In a pro se supplemental brief, Underdahl challenges the sufficiency of the evidence. When reviewing a challenge to the sufficiency of the evidence, we conduct a painstaking analysis of the record to determine whether the jury reasonably could find the defendant guilty of the charged offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999); *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988). In doing so, we view the evidence in the light most favorable to the verdict and assume that the jury believed the evidence supporting the verdict and disbelieved any contrary evidence. *Chambers*, 589 N.W.2d at 477. We 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, reasonably could conclude that the defendant was guilty of the charged offense. *Alton*, 432 N.W.2d at 756.

Underdahl does not dispute that S.T. and J.A. testified that he actually or constructively possessed a firearm. But he argues that the state failed to prove beyond a reasonable doubt that he possessed the firearm because the evidence against him rests on the credibility of S.T. and J.A., who “should not be entitled to any credibility whatsoever.” This argument is without merit. Assessing witness credibility is the exclusive province of the jury, and the jury's determination in this regard will not be

disturbed on appeal. *State v. Landa*, 642 N.W.2d 720, 725 (Minn. 2002). Because we assume that the jury believed the evidence supporting the verdict, we also assume that the jury credited the testimony of S.T. and J.A., which is more than sufficient to support the guilty verdict.<sup>7</sup>

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

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<sup>7</sup> Underdahl's pro se supplemental brief raises several other issues. Because the allegations of error are not supported by any legal argument or citation to legal authority, we deem them waived. *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002).