STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1324

State of Minnesota,
Respondent,

vs.

George Cornelius Watkins,
Appellant.

Filed August 6, 2012
Affirmed as modified
Worke, Judge

Hennepin County District Court
File No. 27-CR-10-48562

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Bjorkman, Judge.

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

WORKE, Judge

Appellant challenges his domestic-assault conviction, arguing that various trial errors mandate reversal, and that the district court erroneously calculated his criminal

history score and erroneously imposed a domestic-abuse no-contact order (DANCO). We vacate the DANCO, but otherwise affirm.

D E C I S I O N

Stipulation on enhancement element of offense

Appellant George Cornelius Watkins first argues that because he did not personally waive the right to a jury determination on the enhancement element of the charged offense, his conviction must be reversed or reduced to a misdemeanor offense. *See* U.S. Const. amend. VI (stating that a criminal defendant has the right to a jury trial for any offense that is punishable by incarceration); Minn. Const. art. I, § 6 (same); *see also State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004) ("A defendant's right to a jury trial includes the right to be tried on each and every element of the charged offense."), *review denied* (Minn. June 29, 2004); Minn. R. Crim. P. 26.01, subd. 1(2)(a) (mandating that a defendant waive the right to a jury trial "personally, in writing or on the record in open court, after being advised by the court of the right to trial by jury, and after having had an opportunity to consult with counsel").

In *State v. Kuhlmann*, the supreme court rejected the state's arguments that a stipulation to a prior conviction "implies a waiver of the right to a jury trial with respect to the stipulated element[,]" that a personal waiver is unnecessary when the trial record includes sufficient evidence to demonstrate that the defendant made a voluntary and intelligent waiver, and that vindication of the right is unnecessary when the defendant "acquiesce[s] to [] counsel's strategy to concede guilt" without a valid waiver of the

right. 806 N.W.2d 844, 849-50 (Minn. 2011). The supreme court held that the district court failed to elicit a valid waiver from the defendant. *Id.* at 850.

But the court also held that the plain-error rule applies when a defendant fails to object to the district court's failure to obtain a valid waiver of the defendant's right to a jury trial on the previous-conviction element of the charged offense. *Id.* at 852. After conducting a plain-error analysis, the court concluded that the error did not affect Kuhlmann's substantial rights. *Id.* at 853. The court noted that the district court's failure to obtain the personal waiver did not prejudice the defendant because the stipulation benefitted him by preventing the jury from improperly using the prior convictions as evidence that he committed the current offense. *Id.* Further, the failure to obtain the waiver did not affect the outcome because the defendant never challenged the existence of his previous convictions; instead, he personally admitted on the record that he had the requisite previous convictions for each charged offense. *Id.*

This case involves a factual scenario similar to that in *Kuhlmann*. Although appellant was not asked to personally waive the enhancement element of his domestic-assault offense, he did not object to the district court's failure to obtain his waiver. Prior to trial, appellant stipulated through counsel that the state did not have to prove the two underlying domestic-assault convictions that enhanced his current domestic-assault charge to a felony.[1] Appellant benefitted from that stipulation because it prevented the jury from improperly using his two prior domestic-assault convictions from April 2010.

[1] Under Minn. Stat. § 609.2242, subd. 4 (2011), a current domestic-assault charge is enhanced to a felony if the offender has "two or more [] qualified domestic violence-related offense convictions" within ten years of the current offense.

And the court's failure to obtain the personal waiver did not affect the outcome of appellant's case. As in *Kuhlmann*, appellant did not challenge the validity or admissibility of his stipulations, and the state could readily have proved the conviction-based elements[2] of his current offense. *Id*. Under these circumstances, we conclude that the district court's failure to obtain appellant's personal waiver of his right to a jury trial on the enhancement element of his domestic-assault charge did not affect appellant's substantial rights and does not provide a basis for reversal of his conviction or posttrial reduction to a misdemeanor conviction.

Admission of prior acts of domestic abuse

Appellant next claims that the district court abused its discretion by admitting at trial evidence of appellant's two prior domestic-assault convictions and a domestic-assault charge that was dismissed as part of a plea bargain. "Evidentiary rulings rest within the discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006).

Minn. Stat. § 634.20 (2010), permits evidence of prior acts of domestic abuse to be admitted in domestic-assault trials:

> Evidence of similar conduct by the accused against the victim of domestic abuse . . . is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. 'Similar

[2] The convictions were received into evidence, consistent with Minn. Stat. § 634.20 (2010), which permits admission of evidence of prior similar conduct by the accused against the same victim in domestic-abuse cases.

> conduct' includes, but is not limited to, evidence of domestic abuse[.]

Such evidence "illuminate[s] the history of the relationship . . . to put the crime charged in the context of the relationship between the two." *State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004).

B.T., the victim of the current offense and the three prior incidents of domestic abuse, was permitted to testify about the prior incidents. She stated that on April 2, 2010, appellant was upset because she did not wire him money, and he assaulted her by "hitting me in my face, punching me, [and] pouring beer on me." She also testified that on April 18, 2010, she came home from being out with friends and appellant again assaulted her, "punching me in my face, hitting me, [and] choking me." B.T. further testified that a third incident was charged but was dismissed as part of a plea bargain. According to B.T., during that incident appellant was upset because B.T. did not have her cash card and he wanted money, so he "began to pull my hair and hit me numerous [sic] times."

We observe no abuse of discretion in the district court's admission of this evidence. The district court considered each factor required by Minn. Stat. § 634.20, conducted the balancing test required by the statute, and reached a result that is consistent with caselaw. *See, e.g.*, *Bell*, 719 N.W.2d at 641 (concluding that district court did not abuse its discretion by admitting evidence of domestic assault against same victim that consisted of prior order-for-protection violations); *McCoy*, 682 N.W.2d at 161 (concluding that district court did not abuse its discretion by admitting evidence of domestic assault against same victim that consisted of a prior assault).

Prosecutorial misconduct

Appellant next claims that the prosecutor committed misconduct by referring to earlier-dismissed terroristic-threats and false-imprisonment charges. For less serious objected-to misconduct, this court asks "whether the misconduct likely played a substantial part in influencing the jury to convict." *State v. Nissalke*, 801 N.W.2d 82, 105 (Minn. 2011) (quotation omitted).

The references to the dismissed charges occurred after appellant attempted to minimize his culpability when he was asked to concede that he had two prior domestic-assault offenses against B.T., as well as the incident that was charged but later dismissed as part of a plea bargain. During his testimony as to the dismissed offense, appellant portrayed B.T. as the aggressor, stating that "she punched me in the face and I punched her back." The prosecutor then pointed out that appellant was charged with all three offenses and that when he pleaded guilty to the two offenses, he received a "benefit from that deal." Appellant stated that "I really didn't get anything out of pleading guilty[,]" and the prosecutor responded by asking whether one charge was dismissed as the result of the plea bargain and whether another case that involved "terroristic threats [and] false imprisonment . . . was dismissed[.]"

Appellant argues that the prosecutor's questions amounted to prosecutorial misconduct. Generally, evidence of a defendant's past crimes, wrongs, or bad acts may not be admitted into evidence to prove the defendant's character for committing crimes. Minn. R. Evid. 404(b); *State v. Burrell*, 772 N.W.2d 459, 465 (Minn. 2009). A prosecutor may not intentionally elicit inadmissible character evidence at trial. *State v.*

Harris, 521 N.W.2d 348, 354 (Minn. 1994). But otherwise inadmissible evidence may be introduced to counter evidence that the defense presents that inaccurately represents facts. *State v. Goar*, 295 N.W.2d 633, 634-35 (Minn. 1980); *see State v. Bailey*, 732 N.W.2d 612, 622-23 (Minn. 2007) (permitting the state to introduce DNA evidence showing that defendant could not be excluded as a suspect when his testimony implied that DNA evidence would have exonerated him); *State v. Haynes*, 725 N.W.2d 524, 531-32 (Minn. 2007) (permitting the state to offer evidence that police had several contacts with defendant in a particular area after defendant testified that he was unfamiliar with the area).

Here, appellant opened the door to admission of the dismissed charges on terroristic threats and false imprisonment by stating that he received no benefit by entering into a plea agreement on the three domestic-abuse charges. The state responded by referencing other dismissed charges. Under these circumstances, the district court did not err by concluding that the prosecutor did not commit misconduct. Further, even if the prosecutor's reference to dismissed terroristic-threats and false-imprisonment charges constituted misconduct, the isolated references were harmless; any error did not play a substantial part in influencing the outcome because the evidence of appellant's guilt was strong. *See Nissalke*, 801 N.W.2d at 105.

Sentencing issues

Appellant claims that the district court erroneously calculated his criminal history score and improperly imposed a DANCO as part of his sentence. An appellate court reviews a criminal sentence "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." Minn. Stat. § 244.11, subd. 2(b) (2010); *State v. Pugh*, 753 N.W.2d 308, 310 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008). A court may "correct a sentence not authorized by law" at any time. Minn. R. Crim. P. 27.03, subd. 9. Interpretation of the sentencing guidelines is a question of law subject to de novo review. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009).

Appellant asserts that his sentence was erroneously calculated by using a criminal history score of four, rather than three. Appellant was properly assigned one point for being in custody at the time of the current offense. *See* Minn. Sent. Guidelines II.B(2) (2010). Appellant was also convicted of three separate offenses for conduct that occurred on March 18, 2001. *See State v. Watkins*, 650 N.W.2d 738, 740 (Minn. App. 2002). Those offenses included aggravated robbery, fleeing a peace officer in a motor vehicle resulting in substantial bodily harm, and possession of a firearm with the serial number removed. *Id*. The district court assigned appellant 1.5 points for the robbery offense, 1.5 points for the fleeing-a-police-officer offense, and .5 point for the removing-a-serial-number-from-a-firearm offense. The district court determined that appellant could be assigned criminal history points for each of the offenses consistent with Minn. Sent. Guidelines II.B.1(d) (2010), which states that "[o]nly the two offenses at the highest severity levels are considered for prior multiple sentences arising out of a single course of conduct in which there were multiple victims[.]"

The parties agree that the district court erroneously assigned one criminal history point to the fleeing-a-police-officer offense, because that offense was premised on causing "substantial bodily harm," a severity level IV offense, rather than on the more serious crime premised on causing "great bodily harm," which is a severity level VI offense. *See* Minn. Sent. Guidelines V (2010) (offense severity tables IV, VI); Minn. Stat. § 609.487, subd. 4 (2010) (defining fleeing-police-officer offense resulting in bodily injury).

The firearm offense was not part of the same course of conduct as the other two offenses, even though appellant may have carried the weapon during the robbery and subsequent police chase. Because appellant's possession of a weapon with a removed serial number was an ongoing offense, he could be assigned a point for that offense. In *State v. Banks*, 331 N.W.2d 491, 494 (Minn. 1983), the supreme court concluded that the offenses of unlawful possession of a pistol and fleeing a police officer in a motor vehicle were not part of the same behavioral incident for purposes of assigning criminal history points, because the "possessory offense was a continuing offense," which could "be explained without necessary reference to the offense of fleeing the officer." Likewise here, the removal of the serial number from a firearm was an offense independent of appellant's other offenses committed on the same day. Appellant should thus receive a criminal history point for the firearms offense.

As to the remaining two offenses, the sentencing guidelines permit assignment of criminal history points for each because it allows the court to "consider[]" "the two offenses at the highest severity levels" when the offenses involved multiple sentences and

multiple victims. Minn. Sent. Guidelines II.B.1(d). The two most severe prior offenses are the aggravated-robbery offense and the fleeing-a-police-officer offense. The district court stated: "The [c]ourt considers both the aggravated-robbery and the fleeing-a-peace-officer conviction when calculating [appellant's] criminal history points because the two convictions arose out of a single course of conduct in which there were multiple victims."[3]

As to the imposition of a DANCO, we conclude that *Pugh* is controlling. In *Pugh*, this court vacated a no-contact order imposed as part of a sentence for a first-degree criminal-sexual-conduct conviction, because the no-contact order was not authorized by statute, and "a district court may not impose a no-contact order as part of an executed sentence unless the order is expressly authorized by statute." 753 N.W.2d at 311.

As in *Pugh*, the DANCO included in appellant's sentence was not authorized by statute. Under Minn. Stat. § 609.2242, subd. 4, a sentence for felony-level domestic assault is "imprisonment for not more than five years or payment of a fine and not more than $10,000, or both." This is similar to the permissible sentence for first-degree criminal sexual conduct in *Pugh*, which included "imprisonment for not more than 30 years or to a payment of a fine of not more than $40,000, or both." 753 N.W.2d at 311

[3] The district court erroneously assigned 3 points to these offenses, rather than 2.5 (1.5 points for the aggravated robbery, and 1 point for the fleeing-a-police-officer offense). This error does not make a difference in the ultimate assignment of criminal history points to appellant, however, because the sentencing guidelines do not assign partial points and require "rounding down" to the nearest whole number when point fractions occur. *See* Minn. Sent. Guidelines cmt. II.B.101 (2010) ("No partial points are given—thus, a person with less than a full point is not given that point. For example, an offender with a total weight of 2-1/2 would have 2 felony points").

(quotation omitted). In *Pugh*, this court noted that the legislature has exclusive authority to define sentences for crimes, *see* Minn. Stat. § 609.095(a) (2010), and that courts "do not have inherent authority to impose terms or conditions of sentences for criminal acts and must act within the limits of their statutory authority when imposing sentences." *Id.* While *Pugh* also notes that no-contact orders are permissible under the law, they are not included in the range of permissible punishments for domestic assault. Thus, we vacate the portion of appellant's sentence that imposed a DANCO.

Affirmed as modified.