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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2393

State of Minnesota,
Respondent,

vs.

Michael Fiorito,
Appellant.

Filed April 21, 2009
Affirmed in part, reversed in part, and remanded; motion denied
Johnson, Judge

Dakota County District Court
File No. KX-06-95

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Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

JOHNSON, Judge

A Dakota County jury found Michael Fiorito guilty of engaging in a pattern of harassing conduct based on evidence that he repeatedly made harassing telephone calls to his former girlfriend and her family. On appeal, Fiorito argues that (1) the evidence is insufficient to sustain the conviction, (2) the district court erroneously admitted *Spreigl* evidence, (3) the district court erroneously denied him discovery of evidence that might have impeached one of the state's witnesses and erroneously limited his cross-examination of the witness, (4) a police officer testifying for the state impermissibly vouched for the credibility of a state's witness, and (5) the district court erred by imposing a sentence with a greater-than-double upward departure. For the reasons stated below, we affirm the conviction but remand for recalculation of Fiorito's criminal-history score and resentencing.

FACTS

In the spring of 2005, Michael Fiorito and 19-year-old K.L. worked at a mortgage company. He was a loan officer, and she was a temporary telemarketer. K.L. later joined her sister's credit-repair business, doing bookkeeping and website design. Fiorito then developed a business relationship with K.L.'s sister, S.P., and maintained contact with K.L.

Soon after he met K.L., Fiorito expressed interest in dating her, but she was dating someone else and declined his advances. In April 2005, however, K.L. went on several dates with Fiorito after breaking up with her boyfriend. In mid-April 2005, K.L. and Fiorito were injured in a car accident. They retained a lawyer to represent both of them, and they grew closer in the process. Fiorito then began taking K.L. to restaurants, movies, and

vacations, and he bought her jewelry and gave her money. K.L. lived with Fiorito in May and June of 2005.

In July 2005, the relationship soured. K.L. learned that Fiorito was married. She also learned that he was 37 years old even though he had told her that he was only 28. K.L. stopped talking to Fiorito, but Fiorito refused to "take no for an answer" and began making threatening phone calls to her. On one day, he called her between 20 and 30 times and berated her for refusing to talk to him, accused her of being unfaithful, and threatened her. K.L. testified that Fiorito threatened her by saying, among other things, that he would "blow up" her car, that he knew of "lots of good ditches to throw [her] body," and that one of K.L.'s friends might get "raped and murdered."

In late July 2005, Fiorito also made repeated telephone calls to K.L.'s family. In calls to S.P., he threatened S.P., her family, and K.L. S.P. testified that Fiorito threatened to "chop [K.L's] body parts off and throw her in a ditch, [and] burn [S.P's] house down." On one day, Fiorito called S.P. "about every 15 minutes for about probably four to six hours." The calls continued until August 6, 2005, the date of S.P.'s own wedding reception. Fiorito threatened to have people watching the site of the reception, and he actually hired private investigators to do so. Fiorito also made repeated threatening phone calls to K.L.'s mother. K.L.'s mother testified that, in one telephone call, Fiorito threatened to "cut [K.L's] head off, cut off her limbs, [and] throw her on the side of the ditch on the way out to my house" so that "nobody would find the body." On some days, Fiorito called K.L.'s mother more than 15 times.

In January 2006, the state charged Fiorito with engaging in a pattern of harassing conduct in violation of Minn. Stat. § 609.749, subd. 5 (2004). The state later amended the complaint to include three counts of making terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2004). Fiorito was tried on six days in July 2007. The jury found Fiorito guilty of engaging in a pattern of harassing conduct but not guilty of the three other charges. At the sentencing trial that followed, the jury found three aggravating factors: multiple victims, multiple acts, and a high degree of sophistication. The district court sentenced Fiorito to 120 months, an upward departure from the presumptive guidelines sentence. Fiorito appeals.

D E C I S I O N

I. Sufficiency of the Evidence

Fiorito first argues that the evidence is insufficient to support the jury's verdict that he is guilty of a pattern of harassing conduct. Upon a challenge to the sufficiency of the evidence, our review consists of "a painstaking analysis 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 their verdict." *State v. Clark*, 755 N.W.2d 241, 267 (Minn. 2008) (quotation omitted). To the extent that Fiorito's arguments implicate issues of statutory interpretation, our standard of review is *de novo*. *State v. Tomlin*, 622 N.W.2d 546, 548 (Minn. 2001).

The criminal statute under which Fiorito was convicted provides as follows:

> (a) A person who engages in a pattern of harassing conduct with respect to a single victim or one or more members of a single household which the actor knows or has reason to

> know would cause the victim under the circumstances to feel terrorized or to fear bodily harm and which does cause this reaction on the part of the victim, is guilty of a felony and may be sentenced to imprisonment for not more than ten years . . . .
>
> (b) For purposes of this subdivision, a "pattern of harassing conduct" means *two or more acts* within a five-year period that violate or attempt to violate the provisions of any of the following . . . :
>
> (1) this section; [or]
>
> (2) section 609.713 [prohibiting terroristic threats]; . . . .

Minn. Stat. § 609.749, subd. 5 (emphasis added). The state sought to establish a pattern of harassing conduct by proving that Fiorito had committed "two or more acts" in violation of any of the following three statutes: Minn. Stat. § 609.749, subd. 2(a)(4)-(5) (2004) (harassing phone calls); Minn. Stat. § 609.749, subd. 2(a)(2) (2004) (stalking); and Minn. Stat. § 609.713, subd. 1 (terroristic threats). The harassing-phone-calls statute provides, in part:

> A person who harasses another by committing any of the following acts is guilty of a gross misdemeanor:
>
> . . . .
>
> (4) repeatedly makes telephone calls, or induces a victim to make telephone calls to the actor, whether or not conversation ensues;
>
> (5) makes or causes the telephone of another repeatedly or continuously to ring; . . . .

Minn. Stat. § 609.749, subd. 2(a)(4)-(5). For the purposes of Minn. Stat. § 609.749, subd. 2, "'repeatedly' means 'more than once.'" *State v. Collins*, 580 N.W.2d 36, 42 (Minn. App.

1998) (holding that defendant engaged in harassment "repeatedly" by sending more than one letter to victim), *review denied* (Minn. July 16, 1998).

Fiorito concedes that the numerous telephone calls in July 2005 and August 2005 constitute "repeated" calls. But he argues that the series of telephone calls in July and August 2005 constitutes a single "act." He further argues that the state failed to prove either of the other two types of predicate acts -- stalking and terroristic threats. Fiorito's interpretation of the statute is incorrect. It is not necessary that the state prove two different *types* of acts listed in subdivision 5(b). As the statute states, it is necessary only to prove two different "acts," and there is nothing in the statute precluding a conviction if the state proves two acts of the same type.

The record contains evidence that Fiorito engaged in "two or more acts" of making harassing telephone calls in violation of section 609.749, subdivision 2(4) and (5), because he harassed three persons by repeatedly making telephone calls to them. K.L. testified that Fiorito called her on several days in late July and early August 2005. S.P. testified that Fiorito called her on multiple days in late July 2005. K.L.'s mother testified that Fiorito called her several times in late July and August 2005. Thus, the evidence is sufficient to prove that Fiorito engaged in a pattern of harassing conduct in violation of section 609.749, subdivision 5.

II. Admission of *Spreigl* Evidence

Fiorito next argues that the district court erred by admitting evidence that he engaged in harassing conduct toward another woman. Fiorito's argument is governed by a rule of evidence that states, in relevant part:

> Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In a criminal prosecution, such evidence shall not be admitted unless . . . the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence[. . . .]

Minn. R. Evid. 404(b). Evidence of other crimes or bad acts is known in Minnesota as "*Spreigl* evidence." *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998) (citing *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965)). The supreme court has adopted a five-part test to determine whether *Spreigl* evidence is admissible:

> (1) the state must give notice of its intent to admit the evidence; (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and convincing evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material to the state's case; and (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

State v. Ness, 707 N.W.2d 676, 686 (Minn. 2006). Fiorito challenges the admission of the *Spreigl* evidence under the first, fourth, and fifth parts of the test. The admission of *Spreigl* evidence is reviewed for abuse of discretion. *State v. Clark*, 738 N.W.2d 316, 345 (Minn. 2007).

A. Notice

Fiorito argues that the state did not give timely notice of its intent to offer *Spreigl* evidence. In a felony trial, notice of intent to offer *Spreigl* evidence "shall be given at or before the Omnibus Hearing under Rule 11 or as soon after the Omnibus Hearing as the

offenses become known to the prosecuting attorney." Minn. R. Crim. P. 7.02, *cited in State v. Fields*, 730 N.W.2d 777, 784 n.4 (Minn. 2007).

On July 10, 2007, one week before trial was scheduled to begin, the prosecutor learned in a conversation with the Lakeville city attorney that Fiorito had been convicted the previous month of harassing K.H. The next day, the prosecutor faxed to defense counsel all of the evidence regarding the K.H. case that the prosecutor had in his possession. Because the prosecutor gave Fiorito's counsel notice "as the offenses bec[a]me known to the prosecuting attorney," the notice was timely. Minn. R. Crim. P. 7.02.

B. Relevance

Fiorito argues that the *Spreigl* evidence was not relevant and material to the state's case. Although evidence of a defendant's prior convictions or bad acts generally is inadmissible to prove the defendant's character, such evidence may be admissible for limited purposes, such as to show intent, common plan, or scheme. *See Kennedy*, 585 N.W.2d at 389. The common-plan-or-scheme purpose "embrace[s] evidence of offenses which, because of their marked similarity in modus operandi to the charged offense, tend to corroborate evidence of the latter." *Ness*, 707 N.W.2d at 687-88 (quotation omitted). "'*Spreigl* evidence need not be identical in every way to the charged crime, but must instead be sufficiently or *substantially similar* to the charged offense -- determined by time, place and modus operandi.'" *Id.* at 688 (quoting *Kennedy*, 585 N.W.2d at 391).

Here, the circumstances of the two incidents are remarkably similar. K.H. and K.L. were 17 and 19 years old respectively. Fiorito became acquainted with both women through his work as a mortgage broker. He told both women that he was 28 years old even though

he was in his late 30s. Both women declined his initial advances, but Fiorito eventually persuaded both women to date him after giving them gifts of jewelry and cash. Fiorito showed rage toward both women after learning that they had spent time with other men. Both women testified that, over a period of several weeks, Fiorito made dozens of threatening and harassing phone calls. Both women testified that Fiorito also made harassing and threatening phone calls to members of their families. Fiorito used third persons to harass and monitor both women and their families. The *Spreigl* evidence was relevant and material because it bore "marked similarity in modus operandi to the charged offense," thus tending to corroborate evidence of the crime charged. *Ness*, 707 N.W.2d at 688 (quotation omitted).

C. Unfair Prejudice

Fiorito argues that the danger of unfair prejudice outweighed the probative value of the *Spreigl* evidence. Evidence produces "unfair prejudice" if it "lure[s] the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *State v. Smith*, 749 N.W.2d 88, 95 (Minn. App. 2008) (quotation omitted). The prosecution's need for other-acts evidence is a factor in balancing probative value against potential prejudice, but there is no "independent necessity requirement." *Ness*, 707 N.W.2d at 690.

The significant similarities between the *Spreigl* incident and the allegations in this case made the *Spreigl* evidence highly probative on the question of modus operandi and specific intent to threaten, the latter of which was relevant to the terroristic-threats charges. *See* Minn. Stat. § 609.713, subd. 1 (defining terroristic threats as "threaten[ing], directly or indirectly, to commit any crime of violence with *purpose* to terrorize another" (emphasis

added)). Thus, probative value was high. There is no doubt that the *Spreigl* evidence cast Fiorito in a negative light. The district court, however, gave a limiting instruction to the jury that it should not convict Fiorito on the basis of the *Spreigl* evidence, which reduced the risk of undue prejudice. *See State v. Tscheu*, 758 N.W.2d 849, 862 (Minn. 2008) (reasoning that prejudice was minimized by instruction to jury regarding use of prior convictions). Thus, the probative value of the *Spreigl* evidence outweighed the danger of unfair prejudice. *See* Minn. R. Evid. 404(b); *State v. Ross*, 732 N.W.2d 274, 282 (Minn. 2007). Therefore, the district court did not abuse its discretion in admitting *Spreigl* evidence.

III. Impeachment Evidence

Fiorito argues that the district court erred in two respects concerning information about one of the state's witnesses, S.J., who was one of Fiorito's co-workers at the mortgage company. S.J. testified that she worked for Fiorito and that when Fiorito's relationship with K.H. soured, he "made it part of [her] job" to call K.H. S.J. also testified that when she could not get through to K.H., Fiorito instructed her to call K.H.'s parents. S.J. further testified that Fiorito told her that he had had similar difficulties in his relationship with K.L.

A. Evidentiary Ruling

Fiorito argues that the district court erred by not allowing him to cross examine S.J. regarding pending criminal charges against her for identity theft. Evidentiary rulings are reviewed for abuse of discretion. *State v. Evans*, 756 N.W.2d 854, 881 (Minn. 2008).

Fiorito first contends that evidence of S.J.'s alleged identity theft was admissible under Minn. R. Evid. 608. Although specific instances of a witness's conduct may not be "proved by extrinsic evidence," they may be inquired into on cross-examination subject to

"the discretion of the court" so long as they concern the witness's "character for truthfulness or untruthfulness." Minn. R. Evid. 608(b). In exercising its discretion under rule 608, a district court may consider the probative value and the danger of confusing the jury posed by admission of the evidence. *Evans*, 756 N.W.2d at 881. The identity-theft charge would have been probative of S.J.'s "character for truthfulness or untruthfulness." Minn. R. Evid. 608(b). But reviewing courts generally defer to a district court's exercise of discretion in refusing to permit cross-examination of a witness regarding bad acts. *See Evans*, 756 N.W.2d at 881 (affirming prohibition on cross-examination of state's witness regarding prior statement tending to show that witness would testify untruthfully); *see also State v. Martinez*, 657 N.W.2d 600, 603 (Minn. App. 2003), *review denied* (Minn. Apr. 29, 2003); *State v. Hatton*, 396 N.W.2d 63, 67 (Minn. App. 1986), *review denied* (Minn. Jan. 16, 1987); *Hansen by Hansen v. Smith*, 373 N.W.2d 349, 352 (Minn. App. 1985); *State v. Sands*, 365 N.W.2d 391, 393 (Minn. App. 1985). Here, the district court reasoned that admitting evidence of the pending charges would have put S.J. to the choice of invoking or waiving her Fifth Amendment right against self-incrimination. We conclude that excluding the evidence on that ground was not an abuse of discretion.

Fiorito also argues that S.J.'s bad acts were admissible under Minn. R. Evid. 609. "Although prior convictions are regularly used to impeach a witness on cross-examination, Minn. R. Evid. 609 and Minn. R. Evid. 404(b) preclude the introduction of pending charges to impeach." *State v. Hathaway*, 379 N.W.2d 498, 506 (Minn. 1985). The district court permitted Fiorito to examine S.J. concerning any convictions within the previous ten years

but not concerning any arrests or pending charges. Thus, the district court's evidentiary ruling was not an abuse of its discretion. *See Hathaway*, 379 N.W.2d at 506.[1]

B. Discovery Ruling

Fiorito argues that the district court erred by denying his request that the state be required to disclose information concerning pending identity-theft charges against S.J. "Whether a discovery violation occurred presents a question of law, which we review de novo." *State v. Colbert*, 716 N.W.2d 647, 654 (Minn. 2006).

A prosecutor is obligated to "disclose all exculpatory evidence, including impeachment evidence." *State v. Miller*, 754 N.W.2d 686, 706 (Minn. 2008) (citing *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963)); *see also* Minn. R. Crim. P. 9.01, subd. 1(1)(a), (c), (6). To show a *Brady* violation, a defendant must demonstrate that (1) the evidence was "favorable to the accused, either because it is exculpatory or it is impeaching," (2) the evidence was willfully or inadvertently suppressed by the state, and (3) the suppression of the evidence prejudiced the defendant. *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005). In order to obtain a new trial for a *Brady* violation, there must be "'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* at 460 (quoting *U.S. v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985)).

[1]The state moved to strike from Fiorito's appendix a copy of the criminal complaint against S.J., as well as references to the criminal complaint in Fiorito's brief, on the grounds that it was not a part of the record. The trial transcript indicates that the criminal complaint against S.J. was marked as an exhibit and admitted into evidence. Thus, the motion is denied.

Fiorito's discovery argument fails because, as established above, the district court was within its discretion in ruling that Fiorito could not cross-examine S.J. regarding the pending charges against her. Even if Fiorito should have been permitted to cross-examine S.J., he was not prejudiced because S.J.'s testimony simply corroborated K.H.'s testimony. Furthermore, the verdict is amply supported by the testimony of the state's primary witnesses, K.L., S.P., and K.L.'s mother, which means that there is not a "reasonable probability" that the outcome of the proceeding would have been different. *Pederson*, 692 N.W.2d at 460.

IV. Vouching by Police Officer

Fiorito next argues that Deputy David Sjogren impermissibly vouched for the credibility of the victims in his testimony. The relevant portion of the transcript reads as follows:

> [PROSECUTOR]: Now, when you interviewed these women, did you – did you get any impressions about the impact this had on them?
>
> [DEFENSE COUNSEL]: Objection, Your Honor. Beyond the scope of this witness's – no foundation for it. It's hearsay and it's a month after these supposed phone calls were made, Your Honor.
>
> THE COURT: All objections overruled. You may answer.
>
> [SJOGREN]: Yes, absolutely. I mean I have been a cop a long time --
>
> [DEFENSE COUNSEL]: Objection, Your Honor. He is giving his opinions. He is not an expert in this area. We know he's been a cop a long time.
>
> THE COURT: Overruled. Answer may stand. You may answer.

> [SJOGREN]: I mean this wasn't your typical harassment case.
>
> [DEFENSE COUNSEL]: Objection, Your Honor. Characterization.
>
> THE COURT: Overruled.
>
> [SJOGREN]: I just felt the fact that three independent people, although they are family members, all were consistent, all telling the same thing, they all had the same fear.
>
> [DEFENSE COUNSEL]: Objection, Your Honor. He is vouching for the witnesses on questioning by the prosecution.
>
> THE COURT: Overruled.

"It is well settled that one witness may not 'vouch for or against the credibility of another witness.'" *State v. Vick*, 632 N.W.2d 676, 689 (Minn. 2001) (quoting *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998)). But the statements made by Officer Sjogren do not pertain to the credibility of the witnesses. The officer was testifying to his perception of the effect that Fiorito's actions had on the witnesses. This testimony relates directly to the element of engaging in a pattern of harassing conduct, which requires that the actor's conduct cause terror or fear of bodily harm on the part of the victim. *See* Minn. Stat. § 609.749, subd. 5(a). Thus, the district court did not err by overruling Fiorito's objections to the testimony.

V. Sentencing

Fiorito last argues that the district court erred by imposing a sentence of 120 months of imprisonment. He first contends that the district court used an incorrect criminal-history score. He also contends that the district court improperly relied on three aggravating factors as grounds for the upward durational departure. He further contends that the upward

departure is more than twice the presumptive sentence and is not supported by any findings of severe aggravating factors.

A. Criminal-History Score

Fiorito contends that the district court used an incorrect criminal-history score. The state argued to the district court that Fiorito's criminal-history score is 8. Fiorito objected to the PSI's calculation, arguing that his criminal-history score actually is 3.5. The district court did not expressly rule on Fiorito's objections.

The state has the burden of proving "the facts necessary to justify consideration of out-of-state convictions in determining a defendant's criminal history score." *State v. Outlaw*, 748 N.W.2d 349, 355 (Minn. App. 2008) (quotation omitted), *review denied* (Minn. July 15, 2008). "[I]t is the trial court's role to resolve any factual dispute bearing on the defendant's criminal history score." *State v. Oberg*, 627 N.W.2d 721, 723 (Minn. App. 2001) (citing *State v. McAdoo*, 330 N.W.2d 104, 109 (Minn. 1983)), *review denied* (Minn. Aug. 22, 2001).

Fiorito contends that his criminal history was incorrectly calculated in two respects. First, he contends that three prior federal convictions that were counted separately actually arose from the same behavioral incident. In calculating a criminal-history score, "the offender is assigned a particular weight . . . for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing or for which a stay of imposition of sentence was given before the current sentencing." Minn. Sent. Guidelines II.B.1. "In cases of multiple offenses occurring in a single behavioral incident in which state law prohibits the offender being sentenced on more than one offense, only the offense

at the highest severity level should be considered." Minn. Sent. Guidelines cmt. II.B.101. The same principle applies to prior foreign convictions because "[t]he designation of out-of-state convictions . . . shall be governed by the offense definitions and sentences provided in Minnesota law," Minn. Sent. Guidelines II.B.5., and "[o]ut-of-state convictions include convictions under the laws of . . . the federal government," Minn. Sent. Guidelines cmt. II.B.501. Thus, where multiple federal offenses arise from the same behavioral incident, only the most severe offense may be counted. In this case, 3.5 points were assigned to three federal offenses that appear to arise from the same incident in June 1989. In addition, 2 points were assigned to two federal offenses that appear to arise from the same incident in November 1997. It appears that only 2.5, not 5 points, should have been assigned to the offenses arising from those two incidents.

Second, Fiorito contends that two points were assigned to incidents that were not criminal offenses but, rather, violations of supervised release. At the sentencing hearing, Fiorito's counsel presented argument to this effect. In response, a probation officer provided the district court with his general view that the calculations that had been prepared by a different probation officer (who did not testify) were thorough and accurate. The testifying probation officer noted that the calculations were based on records received from DuPage County, Illinois; Cook County, Illinois; the Illinois Department of Corrections; the United States Probation Office; and several counties within Minnesota. But none of those documents are included in the record, and no certified copies of Fiorito's prior convictions were admitted into evidence. The prosecutor endorsed the probation officer's statement but did not provide any specific argument or evidence that addressed Fiorito's objection.

The appellate record is inconclusive as to whether the criminal-history score was properly calculated. Fiorito urges this court to remand the case to the district court for findings on his objections to the criminal-history score stated in the PSI. We conclude that such a remand is necessary and appropriate to allow an accurate calculation of Fiorito's criminal-history score.

B. Aggravating Factors

Fiorito contends that the district court improperly relied on three aggravating factors as grounds for the upward durational departure. The sentencing jury returned a special verdict finding the aggravating factors of (1) multiple victims, (2) multiple incidents per victim, and (3) a high degree of sophistication. Based on these aggravating factors, the district court departed upward to an executed sentence of 120 months, which is the statutory maximum. *See* Minn. Stat. § 609.749, subd. 5(a).

A sentencing jury's findings are reviewed for sufficiency of the evidence. *See State v. Rodriguez*, 738 N.W.2d 422, 433 (Minn. App. 2007), *aff'd*, 754 N.W.2d 672 (Minn. 2008). A review for sufficiency of the evidence consists of "a painstaking analysis 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 their verdict." *Clark*, 755 N.W.2d at 267 (quotation omitted). A district court's decision to depart from the presumptive sentence is reviewed for an abuse of discretion. *Rodriguez*, 754 N.W.2d at 685.

1. Multiple Victims

Fiorito argues that this aggravating factor is impermissible in this case because it is an element of his offense. In *State v. Jones*, 745 N.W.2d 845 (Minn. 2008), the supreme

court stated that, to be a "proper departure," "'[t]he reasons used for departing must not themselves be elements of the underlying crime.'" *Id.* at 849 (quoting *State v. Blanche*, 696 N.W.2d 351, 378-79 (Minn. 2005)); *see also State v. Abrahamson*, 758 N.W.2d 332, 338 (Minn. App. 2008), *review denied* (Minn. Mar. 31, 2009). The offense of a pattern of harassing conduct does not require proof of multiple victims; it requires proof only of harassing conduct toward a "single victim or one or more members of a single household." Minn. Stat. § 609.749, subd. 5. Thus, the existence of multiple victims is not an element of the offense. Accordingly, multiple victims is a permissible aggravating factor in this case.

2. Multiple Incidents Per Victim

Fiorito argues that this aggravating factor is impermissible in this case because it too is an element of his offense. The statute setting forth the offense provides that "a 'pattern of harassing conduct' means two or more acts within a five-year period." Minn. Stat. § 609.749, subd. 5(b). The state was not required to prove more than two discrete acts, yet the state did so by introducing evidence of numerous instances of harassing conduct toward several victims. Thus, the existence of multiple incidents per victim is not an element of the offense. Accordingly, multiple incidents per victim is a permissible aggravating factor in this case.

3. High Degree of Sophistication

Fiorito argues that a high degree of sophistication is not a valid aggravating factor for two reasons. First, he contends that it does not apply because it is not among the aggravating factors listed in the sentencing guidelines for this type of case. High degree of sophistication is included in the list of aggravating factors in the sentencing guidelines with

respect to "major economic offense[s]" and "major controlled substance offense[s]." Minn. Sent. Guidelines II.D.2.b.(4), (5). But the factors listed in the guidelines are part of "a *nonexclusive* list of factors which may be used as reasons for departure." Minn. Sent. Guidelines II.D.2. Because a high degree of sophistication made Fiorito's offense more serious, we conclude that the district court did not err in considering a high degree of sophistication as an aggravating factor. *See Collins*, 580 N.W.2d at 45-46 (noting that list of aggravating factors in guidelines is not exhaustive and affirming reliance on factor not listed).

Second, Fiorito contends that the evidence does not support the jury's finding that the offense was committed with a high degree of sophistication. But the evidence shows that Fiorito hired two private investigators to conduct surveillance on K.L. He obtained addresses and phone numbers for the purpose of locating and contacting K.L. through "information brokers over the internet." He also disguised the source of his telephone calls so that recipients would not know that he was the caller. When viewed in the light most favorable to the jury's verdict, the evidence is sufficient to support the jury's findings. *See Clark*, 755 N.W.2d at 267.

Thus, the district court properly relied on the aggravating factors of multiple victims, multiple incidents per victim, and a high degree of sophistication.

C. Greater-than-Double Departure

Fiorito argues that the extent of the district court's departure is disproportionate to his offense and the presumptive sentence. Fiorito contends that the 120-month sentence was more than a double departure from the presumptive sentence. Fiorito further contends that

such a departure is improper because the district court did not find severe aggravating factors. *See State v. Shattuck*, 704 N.W.2d 131, 140 (Minn. 2005); *State v. Leonard*, 400 N.W.2d 206, 209 (Minn. App. 1987). Fiorito is correct that the district court did not find severe aggravating factors. The state argues in response that the 120-month sentence is not a greater-than-double departure because the upper end of the presumptive guidelines range is 60 months. The state's position is based on a criminal-history score of 8. As discussed above in part V.A., additional fact-finding is necessary to determine Fiorito's criminal-history score. Because we are remanding the case for recalculation of Fiorito's criminal-history score, appellate review of the extent of the upward departure is premature at this time.

D. Summary

On remand, the district court should apply the sentencing guidelines in effect at the time Fiorito's criminal conduct occurred. *State v. DeRosier*, 719 N.W.2d 900, 903 (Minn. 2006). The parties assume that the 2005 version of the sentencing guidelines applies to this case; those guidelines prescribe a sentencing range of 41-57 months for the level V offense of pattern of harassing conduct if Fiorito's criminal-history score is found to be 6 or higher. Minn. Sent. Guidelines IV (2005). But the 2004 version of the guidelines prescribes a sentencing range of 46-50 months for the same offense given a criminal-history score of 6 or higher. Minn. Sent. Guidelines IV (2004). Which version of the guidelines applies depends on when Fiorito's criminal conduct occurred. "If the determination of which presumptive sentence applies depends on a fact issue, *Blakely* . . . suggest[s] that such an issue is for the jury to decide." *DeRosier*, 719 N.W.2d at 903. Absent a proper finding that

Fiorito engaged in a pattern of harassing conduct after August 1, 2005, the district court must rely on the 2004 version of the sentencing guidelines. We leave it to the district court's discretion whether to permit additional factfinding, if requested.

Therefore, the case is reversed and remanded for a determination of Fiorito's criminal-history score and the applicable presumptive guidelines range and for resentencing based on any or all of the three aggravating factors found by the sentencing jury.

Affirmed in part, reversed in part, and remanded; motion denied.