STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2074

State of Minnesota,
Respondent,

vs.

James Al Burr,
Appellant.

Filed October 5, 2010
Affirmed
Kalitowski, Judge

St. Louis County District Court
File No. 69DU-CR-09-2313

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

Melanie S. Ford, St. Louis County Attorney, Jessica J. Smith, Assistant County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Bjorkman, Judge; and Muehlberg, Judge.*

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

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

KALITOWSKI, Judge

Appellant James Al Burr challenges his convictions of false imprisonment, domestic assault, fifth-degree assault, and terroristic threats, arguing that the district court: (1) erred by admitting relationship evidence; (2) plainly erred by giving a no-adverse-inference jury instruction without appellant's personal, on-the-record consent; (3) erred by sentencing appellant for false imprisonment and assault because the offenses were part of the same behavioral incident; and (4) abused its discretion in determining appellant's criminal-history score. We affirm.

D E C I S I O N

I.

Appellant and T.W. dated for about two and one-half months, sharing an apartment until T.W. ended the relationship and moved in with a neighbor in the same apartment building in April 2009. In May 2009, appellant was charged with kidnapping, domestic assault, fifth-degree assault, terroristic threats, and fourth-degree arson stemming from events that occurred after T.W. followed her kitten into appellant's apartment.

Before trial, the state asked the district court to allow testimony from T.W. regarding an April 2009 incident that resulted in T.W. moving out of the apartment that she shared with appellant. The district court stated that Minn. Stat. § 634.20 (2008) allows "that sort of relationship evidence to put things into context," but stated that the evidence would "have to be fairly brief" to prevent jury confusion. The district court

instructed appellant to object to testimony that went beyond the limited purpose of relationship evidence.

At trial, appellant did not object to any of T.W.'s testimony. In addition, the record indicates that appellant elicited prejudicial statements on cross-examination of T.W. On appeal, appellant argues that (1) the district court abused its discretion by granting the state's pretrial request to present limited relationship testimony regarding the April 2009 incident, and (2) the district court plainly erred by allowing T.W. to make extensive, vague references to appellant drinking too much and repeatedly abusing T.W. that went beyond the scope of the April 2009 incident.

We review a district court's decision to admit relationship evidence under section 634.20 for an abuse of discretion. *State v. Lindsey*, 755 N.W.2d 752, 755 (Minn. App. 2008), *review denied* (Minn. Oct. 29, 2008). Appellant has the burden to establish that the district court abused its discretion and that admission of the relationship evidence prejudiced appellant. *See id*. But because appellant failed to object to the admission of relationship testimony that exceeded the scope of the district court's pretrial ruling, we review admission of this testimony only for plain error. *See State v. Word*, 755 N.W.2d 776, 781 (Minn. App. 2008).

In general, evidence of prior crimes or bad acts, known as *Spreigl* evidence, is not admissible as character evidence to show that the person acted in conformity with that character. Minn. R. Evid. 404(b). *See generally State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965). But section 634.20 provides:

> 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.

Such evidence is admissible to "demonstrate the history of the relationship between the accused and the victim of domestic abuse" and to place the offense in the appropriate context. *Word*, 755 N.W.2d at 784.

In *State v. McCoy*, the supreme court reasoned that relationship evidence is treated differently than *Spreigl* evidence because of the nature of domestic abuse and the difficulty of prosecuting domestic-abuse crimes: "Domestic abuse is unique in that it typically occurs in the privacy of the home, it frequently involves a pattern of activity that may escalate over time, and it is often underreported." 682 N.W.2d 153, 161 (Minn. 2004). In the context of domestic-violence prosecutions, evidence of prior domestic abuse is particularly probative because it allows the fact-finder to "better judge the credibility of the principals in the relationship."

In addition, unlike *Spreigl* evidence, the state is not required to provide notice of relationship evidence or to prove the similar conduct by clear and convincing evidence. *Id.* at 159-60. "[T]he admissibility of evidence under Minn. Stat. § 634.20 depends only on (1) whether the offered evidence is evidence of similar conduct; and (2) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *Id*. at 159. For purposes of determining whether the probative value is outweighed by the danger of unfair prejudice, unfair prejudice "is not merely damaging

evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted).

Throughout T.W.'s testimony regarding the May 2009 incident, T.W. made numerous statements regarding her relationship with appellant and prior abuse by appellant. For example, T.W. testified that appellant had locked her in the apartment or bedroom many times before. T.W. explained that in the past, she was only able to leave when appellant got so drunk that he passed out. T.W. also testified that she covered her face during the May 2009 assault because she was tired of having black eyes.

We conclude that the district court did not abuse its discretion by granting the state's pretrial request to admit testimony regarding the April 2009 incident. The record indicates that evidence of the April 2009 incident was evidence of similar conduct under section 634.20, offered to provide the context of T.W. and appellant's relationship. *See McCoy*, 682 N.W.2d at 159 (discussing admissibility requirements for relationship evidence). Furthermore, the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice. *See id*. The district court's order to limit the testimony so that it was "fairly brief" was reasonable and addressed the potential for unfair prejudice.

We further conclude that the district court did not plainly err by allowing T.W.'s statements regarding her relationship with appellant that appellant alleges went beyond the scope of the April 2009 incident. First, appellant failed to object to the testimony. In addition, the record indicates that the statements were relevant and probative in light of

the conflicting testimony. Specifically, appellant's friend testified that when she walked into the living room and saw T.W. and appellant, T.W. appeared at ease, sitting on the couch. Conversely, T.W. testified that when the friend walked into the room, appellant was pinning T.W. down on a love seat with his knees. Thus, the relationship testimony allowed the jury to "better judge the credibility of the principals in the relationship." *See id.* at 161 (discussing the purpose of relationship evidence). And although the relationship testimony may have been "severely damaging" to appellant's defense, it did not "persuade[] by illegitimate means" or confuse the jury. *See Bell*, 719 N.W.2d at 641. In reviewing T.W.'s testimony, it is clear that she is describing events that occurred weeks before the May 2009 incident.

In conclusion, the district court did not abuse its discretion by granting the state's initial request to elicit relationship testimony from T.W., and the district court did not plainly err by admitting T.W.'s statements regarding past abuse by appellant.

II.

Appellant argues that it was plain error for the district court to provide a no-adverse-inference instruction to the jury without obtaining appellant's personal, on-the-record consent. Although the district court's failure to elicit appellant's personal consent was error, we conclude that such error did not affect appellant's substantial rights.

If no objection is made to the district court's giving a no-adverse-inference instruction, review is for plain error. *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006). The plain-error standard requires a defendant to show (1) error; (2) that was plain; and (3) that affected defendant's substantial rights. *Id.* To satisfy the third prong, appellant

must show that the error was prejudicial and affected the outcome of the case. *See id*. at 881-82.

Before giving a jury instruction on a defendant's right not to testify, the district court must elicit the defendant's personal permission to do so on the record. *State v. Thompson*, 430 N.W.2d 151, 153 (Minn. 1988); *see also* Minn. Stat. § 611.11 (2008) ("[F]ailure to testify shall not create any presumption against the defendant, nor shall it be alluded to by the prosecuting attorney or by the court.").

Here, at the end of trial, the district court gave appellant the option of instructing the jury not to draw any adverse inferences from appellant's decision not to testify. Appellant's attorney stated, "I would like it read," but appellant did not personally consent to the instruction on the record. The district court plainly erred by giving the no-adverse-inference instruction to the jury without first eliciting appellant's personal, on-the-record consent. But appellant fails to meet the "heavy burden" of showing that the error prejudiced him and affected the outcome of the case. *See Gomez*, 721 N.W.2d at 880; *see also State v. Darris*, 648 N.W.2d 232, 240 (Minn. 2002) (determining that such error was harmless where the defendant failed to show that the facts made the error prejudicial or that there was a reasonable likelihood that giving the instruction had a significant effect on the verdict). Because appellant fails to show that the district court's error affected his substantial rights, we decline to grant appellant a new trial.

III.

Appellant argues that the district court erred by sentencing appellant for false imprisonment and fifth-degree assault because the offenses were part of a single behavioral incident. We disagree.

A district court's single-behavioral-incident determination is a question of fact that we review for clear error. *State v. Carr*, 692 N.W.2d 98, 101 (Minn. App. 2005). But when the facts are not in dispute, whether multiple offenses are part of a single behavioral incident is a question of law, which we review de novo. *State v. Bauer*, 776 N.W.2d 462, 477 (Minn. App. 2009).

Minn. Stat. § 609.035, subd. 1 (2008), provides that "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them." *See also State v. Suhon*, 742 N.W.2d 16, 24 (Minn. App. 2007) ("When a single behavioral incident results in the violation of multiple criminal statutes, the offender may be punished only for the most severe offense."), *review denied* (Minn. Feb. 19, 2008). Section 609.035 is intended to protect against exaggerating the criminality of a defendant's conduct and to make punishment proportional to culpability. *State v. Heath*, 685 N.W.2d 48, 61 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

The test for analyzing whether multiple offenses arise from a single behavioral incident depends on whether the offenses are intentional. *Bauer*, 776 N.W.2d at 478. When analyzing whether multiple intentional offenses arise from a single behavioral

incident, this court must consider whether the conduct (1) shares a unity of time and place and (2) was motivated by a single criminal objective. *Id.* "The determination of whether multiple offenses are part of a single behavioral act under section 609.035 is not a mechanical test, but involves an examination of all the facts and circumstances." *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997).

Here, the district court stated that "the Fifth Degree Assault seems . . . to be all part of one kind of continuous course of action that all happened inside the apartment. And, therefore, wouldn't be sentenced separately." But without further explanation, the district court sentenced appellant to 19 months for false imprisonment and 19 months for fifth-degree assault.

We conclude that on these undisputed facts, the false imprisonment and fifth-degree assault did not constitute a single behavioral incident, and thus the district court properly sentenced appellant on both. The false imprisonment and fifth-degree assault did not share a unity of time and place. The record shows that although appellant assaulted T.W. during the false imprisonment in his apartment, he also assaulted her on the lawn after T.W. was able to leave the apartment. The record also shows that appellant was motivated by two criminal objectives. Initially, appellant's objective was to confine T.W. in the apartment, threaten her, and assault her. But when T.W.'s friend arrived to help T.W., appellant's objective was to assault the friend, and to assault T.W. after she followed appellant outside and attempted to intervene.

Moreover, the false imprisonment was not merely incidental to the assault. *See State v. Smith*, 669 N.W.2d 19, 32 (Minn. 2003) (providing that it does not constitute

kidnapping where the confinement or removal of the victim is "completely incidental to the perpetration of a separate felony."), *overruled on other grounds by State v. Leake*, 699 N.W.2d 312 (Minn. 2005). The record indicates that appellant confined T.W. for about an hour. During this time, he also threatened to kill T.W., threatened to burn down the apartment, and lit a sweatshirt on fire. *See Turnage v. State*, 708 N.W.2d 535, 546 (Minn. 2006) (determining that confinement and removal were "criminally significant," and not merely incidental to the murder where the defendant drove the victim across St. Paul before the assault began).

We conclude that the district court did not err by sentencing appellant for false imprisonment and fifth-degree assault because the two offenses do not constitute a single behavioral incident.

IV.

Appellant argues that the district court erred by assigning a custody-status point to his criminal-history score. We disagree.

We will not reverse the district court's determination of a defendant's criminal-history score absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). But construction of the sentencing guidelines is a question of law, which we review de novo. *State v. Maurstad*, 733 N.W.2d 141, 148 (Minn. 2007).

Minn. Sent. Guidelines II.B.2.c (2008) provides that the district court shall assign a custody-status point if the offender "committed the current offense within the period of the initial probationary sentence." Section II.B.2.c further provides that this policy "does

not apply if the probationary sentence for the prior offense is revoked, and the offender serves an executed sentence."

In addition, "[o]ffenders who are initially given probation for a period of years, but are subsequently discharged early from probation (before the time period initially pronounced by the court has run out), will receive a custody status point if the offender commits a new offense during the pronounced original period of probation." *Maurstad*, 733 N.W.2d at 149 (emphasis omitted) (quotation omitted).

In July 2007, appellant was convicted of fifth-degree assault and sentenced to 18 months' incarceration, execution stayed, and 3 years' probation. The record indicates that appellant served nine months upon being sentenced, and after he violated probation in January 2008, he served another nine months in jail. His probation was discharged on July 28, 2008. Citing section II.B.2.c, appellant argues on appeal that the district court erred by assigning a custody-status point because appellant served an executed 18-month sentence for the prior felony in question. But the record indicates that appellant's probation was not revoked, and his sentence was never executed. Rather, appellant was "discharged early" from probation in July 2008 after being ordered to serve a total of 18 months in jail during his probationary sentence. *See id.* Therefore, because appellant committed the current offense within the initial term of his probation, and because appellant's probation was not revoked and his sentence not executed, we conclude that the district court properly assigned the custody-status point.

V.

Appellant argues in a pro se brief that this court should grant a new trial because one of the officers who testified stated that he had a conversation with a juror while at lunch. We disagree.

The record shows that the officer disclosed to the district court that he had briefly talked to one of the jurors, an acquaintance, before he had been contacted to testify as a rebuttal witness in appellant's case. But appellant failed to request a *Schwartz* hearing to determine whether there was juror misconduct. *See Pomani by Pomani v. Underwood*, 365 N.W.2d 286, 290 (Minn. App. 1985) (providing that failure to request a *Schwartz* hearing after becoming aware of facts indicating potential misconduct waives the issue). Moreover, appellant's attorney agreed that "the jury was sufficiently voir dired regarding contact" and stated that she had no concerns. And appellant fails to show any facts indicating that the officer's encounter with the juror was prejudicial.

Appellant also contends that T.W. was required to testify regarding her inconsistent statements. But the record indicates that T.W.'s account of the May 2009 incident has been consistent throughout the investigation and proceedings. We conclude that the arguments set forth in appellant's pro se brief are without merit.

Affirmed.