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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0502

State of Minnesota,
Respondent,

vs.

Alfredo Jesse Rosillo,
Appellant.

Filed April 28, 2014
Affirmed
Ross, Judge

Mower County District Court
File No. 50-CR-11-1563

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Kristen Nelsen, Mower County Attorney, Austin, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Charles F. Clippert, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

ROSS, Judge

Police found Alfredo Rosillo hiding in a slough after he assaulted his girlfriend, broke into her home, assaulted her again and stole money from her purse, and fled on foot

while tossing bags of methamphetamine into a neighbor's yard. During Rosillo's trial, the state introduced evidence of five of his prior felony convictions. The jury found him guilty of first-degree burglary, first-degree aggravated robbery, fifth-degree possession of methamphetamine, and domestic assault. After a *Blakely* hearing during which a probation officer testified about Rosillo's criminal history, including incidents that did not result in convictions, the jury found Rosillo to be a danger to public safety. The district court sentenced Rosillo under the dangerous-offender statute to 240 months' imprisonment, the statutory maximum sentence for his burglary and robbery convictions. Because the district court did not err by admitting the evidence of Rosillo's prior convictions, allowing the probation officer to present Rosillo's criminal history, and imposing the 240-month prison sentence, we affirm.

FACTS

A jury heard evidence of the following episode. In June 2011, Alfredo Rosillo and his girlfriend A.A. were at A.A.'s rental home in Austin with two of Rosillo's friends. Rosillo was holding A.A.'s cell phone while she mowed the lawn. He noticed that A.A.'s former boyfriend had been sending her text messages. This made Rosillo angry. He and his friends decided to leave, but their vehicle got stuck in a large hole left by a construction crew. A.A. made a "smart remark" to Rosillo, and Rosillo became angry again. He chased her around the yard, "freaking out" and throwing things, and they had a "scuffle" inside. A.A. then asked a neighbor to help free the vehicle. This also upset Rosillo. He and A.A. had another scuffle, and he took $50 from her purse.

A.A. attempted to put her car in the garage. She said that Rosillo stopped her and fired three shots from a .22-caliber handgun into the floorboard behind the driver's seat. The two went back inside the house, and A.A. made another remark that offended Rosillo. A.A. testified that Rosillo struck her, cornered her in her bedroom, put his gun to her head, and choked her. He ran away when A.A.'s friend pulled into the driveway.

Rosillo soon returned. He ran toward the house, and A.A. fled inside and locked the door. Rosillo argued with A.A. through the door. A.A. testified that he put his gun to her friend's head and told her to let him in. She refused, and Rosillo kicked the door until it broke, reached inside, and unlocked it. Rosillo threw her against a couch. A.A. testified that he fired a shot next to her, and he pistol-whipped her. She fell to the floor and wet herself. A.A.'s friend testified that Rosillo pointed the gun at him and said, "[I]t wouldn't kill you but it would bounce around inside you." Rosillo saw police cars coming and fled again. Police officers found him lying in tall marshy grass nearby. They also found cash and bags of methamphetamine in the yard of a neighbor who had seen a man throw something there while running.

Mower County charged Rosillo with two counts of first-degree burglary, two counts of second-degree assault with a dangerous weapon, and one count of first-degree aggravated robbery, possession of a firearm by a convicted violent felon, fifth-degree possession of methamphetamine, and domestic assault. During trial, the state introduced evidence of five of Rosillo's prior felony convictions—two for controlled-substance crimes involving methamphetamine, two for terroristic threats, and one for domestic assault. The prosecutor presented certified copies of the convictions and read to the jury

the portions of the plea transcripts that supported the terroristic threats and domestic assault convictions. The district court instructed the jury that it could consider the prior drug convictions "for the limited purpose of establishing [Rosillo's] familiarity with methamphetamine" and the other convictions as relationship evidence and "part of the elements of the current charge of felony domestic assault," but not as character evidence.

The jury found Rosillo guilty of one count of first-degree burglary, first-degree aggravated robbery, fifth-degree possession of methamphetamine, and domestic assault. It acquitted him of the remaining counts. The district court held a *Blakely* sentencing hearing to determine whether Rosillo was a danger to public safety under Minnesota Statutes section 609.1095, subdivision 2 (2010). A probation officer testified about Rosillo's extensive criminal history and disciplinary record. The jury found Rosillo to be a danger to public safety, and the district court sentenced him to 240 months' imprisonment. Rosillo appeals.

D E C I S I O N

I

Rosillo first claims that he was unfairly tried. He argues that the district court erred by admitting evidence of his felony convictions. He initially contends that the district court improperly admitted his convictions of terroristic threats and domestic assault as relationship evidence under Minnesota Statutes section 634.20 (2012). We review the district court's admission of evidence under section 634.20 for an abuse of discretion. *State v. Matthews*, 779 N.W.2d 543, 553 (Minn. 2010). Section 634.20 provides the framework in which evidence of prior abuse may be admissible:

> Evidence of similar conduct by the accused against the victim of domestic abuse, or against other family or household members, 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.

Rosillo asserts that the relationship evidence admitted in his trial had "absolutely no probative value" because the incidents involved others, not A.A., and no evidence indicated that A.A. knew about them. His position is contrary to *State v. Valentine*, 787 N.W.2d 630 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010).

In *Valentine*, we held that section 634.20 permits "the admission of similar-conduct evidence against the accused's (not the victim's) family or household members." *Id.* at 637. This evidence "illuminate[s] the relationship between the defendant and the alleged victim and . . . put[s] the alleged crime in the context of that relationship." *Id.* For example, evidence that shows how a defendant treated his former girlfriends "sheds light on how the defendant interacts with those close to him, which in turn suggests how the defendant may interact with the victim." *Id.* The evidence of Rosillo's past domestic abuse therefore had probative value regardless of whether A.A. was involved in or aware of it. The statute does not require the family or household member to have been the victim of the charged offense or require the victim of the charged offense to have been aware of the conduct. *See* Minn. Stat. § 634.20.

Rosillo contends that *Valentine* is wrong, pointing to Minnesota Rule of Evidence 404(a), which generally prohibits character evidence. But published decisions of this court are precedential, *State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *review*

denied (Minn. Sept. 21, 2010), and evidence admitted under section 634.20 is treated differently from other bad-act evidence, *State v. Word*, 755 N.W.2d 776, 783–84 (Minn. App. 2008); *see also State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004) (stating that Minnesota courts treat evidence offered under section 634.20 differently from "other, 'collateral' *Spreigl* evidence"). Rosillo's reliance on Rule 404 is misplaced.

Rosillo also asserts that the relationship evidence posed a substantial risk of unfair prejudice by improperly influencing the jury to convict him because of his prior domestic-related offenses involving third parties, not because the state proved him guilty of the charged crimes. He complains about the use of relationship evidence generally but offers no reason that the relationship evidence admitted here risked unfair prejudice. His argument therefore fails.

Rosillo next argues that the district court erred by admitting his two controlled-substance convictions as *Spreigl* evidence. We review the district court's admission of *Spreigl* evidence for an abuse of discretion. *State v. Scruggs*, 822 N.W.2d 631, 643 (Minn. 2012). "Evidence of another crime . . . is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). It is admissible, however, "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

Rosillo argues that the conviction evidence was irrelevant and unfairly prejudicial. "Relevant evidence" is evidence that tends to make a material fact more or less probable. Minn. R. Evid. 401. Rosillo insists that his prior drug convictions were irrelevant because they say nothing about whether the methamphetamine found in the neighbor's yard was

put there by him. But one element of the charged crime of controlled-substance possession is that the defendant knew he possessed a controlled substance. *State v. Ali*, 775 N.W.2d 914, 918 (Minn. App. 2009), *review denied* (Minn. Feb. 16, 2010). The district court admitted Rosillo's prior convictions "for the limited purpose of establishing [his] familiarity with methamphetamine." The evidence made it more likely that, if Rosillo tossed the bags as he fled, he knew the substance in them was methamphetamine. Rosillo has not established that the evidence is irrelevant.

Rosillo also fails to show how admitting his prior drug convictions unfairly prejudiced him. The district court gave a limiting instruction before the prosecutor read the convictions to the jury, and the prosecutor afterward mentioned the convictions only briefly. Because the evidence was relevant and not unfairly prejudicial, the district court did not abuse its discretion by admitting it.

Rosillo finally argues that the cumulative effect of admitting five prior felony convictions deprived him of his right to a fair trial. But because we have concluded that the district court acted within its discretion by admitting these convictions as relationship and *Spreigl* evidence, the argument fails. The cumulative effect of admitting the evidence therefore cannot warrant reversing Rosillo's convictions. *See State v. Davis*, 820 N.W.2d 525, 538 (Minn. 2012) ("[I]n rare cases . . . the cumulative effect of trial *errors* can deprive a defendant of his constitutional right to a fair trial." (emphasis added)).

II

Rosillo argues next that we must vacate the jury's finding that he is a danger to public safety because the state elicited improper testimony during the *Blakely* hearing.

Rosillo did not object to the testimony in the district court. We therefore review only for plain error. *See* Minn. R. Crim. P. 31.02; *State v. Dao Xiong*, 829 N.W.2d 391, 395 (Minn. 2013). Rosillo fails to identify an error.

A district court may depart upward from the presumptive sentence if, among other things, the offender is a danger to public safety. Minn. Stat. § 609.1095, subd. 2 (2010). To determine whether an offender is a danger to public safety, the fact finder may consider "the offender's past criminal behavior, such as the offender's high frequency rate of criminal activity." *Id.*, subd. 2(2)(i).

Rosillo argues without legal support that the terms "criminal activity" and "criminal behavior" mean only criminal convictions. He maintains that the probation officer's testimony about dismissed charges, probation and parole violations, missed court appearances, and his prison disciplinary record was therefore improper. The controlling statute belies Rosillo's argument. Section 609.1095 does not define "criminal activity" or "criminal behavior," but it does define "conviction" and "prior conviction" and uses those terms numerous times. It also refers to "juvenile adjudication." That the legislature distinguished between convictions, adjudications, and other criminal incidents informs us that it knew how to direct courts to base dangerous-offender findings solely on criminal "convictions," if it wanted to. The terms "criminal behavior" and "criminal activity" have a broader scope than "conviction." *Cf. State v. Gorman*, 546 N.W.2d 5, 9 (Minn. 1996) (defining "pattern of criminal conduct" under the career-offender statute and recognizing that "[n]othing in the statute limits the sentencing court's consideration

to prior felony convictions, nor even to convictions at all"). Rosillo does not show that the district court committed any error applying the statute.

III

Rosillo also argues that his sentence must be reduced because the district court erred by imposing the statutory maximum prison term, a near double departure from the presumed sentence. When a district court departs from the presumptive guidelines sentence, we review for an abuse of discretion. *Vickla v. State*, 793 N.W.2d 265, 269 (Minn. 2011). We will affirm the departure if the district court's reasons for departing are "legally permissible and factually supported in the record." *Id.* (quotation omitted).

The district court imposed separate 240-month prison sentences for Rosillo's aggravated robbery and burglary convictions to be served concurrently. The court considered these sentences to be double departures. They were also statutory maximums. *See* Minn. Stat. §§ 609.245, subd. 1, 609.582, subd. 1 (2010). Rosillo contends that the district court erred because his offenses did not involve aggravating factors, his sentence exaggerates the severity of his crimes, and his criminal history was already factored into the guidelines calculation of the presumptive sentence. We are not persuaded.

Rosillo relies primarily on *Neal v. State*, 658 N.W.2d 536 (Minn. 2003). In *Neal*, the supreme court held that "a finding of severe aggravating factors is not required for a district court to impose more than a double durational departure under the dangerous-offender statute." *Id.* at 546. It added, however, that "courts should use caution when imposing sentences that approach or reach the statutory maximum sentence" to avoid disproportionate sentences. *Id.* It reasoned that "when severe aggravating circumstances

are not present, imposing more than a double durational departure under the dangerous-offender statute may artificially exaggerate the defendant's criminality because the defendant's criminal record is considered twice." *Id.*

The district court appropriately accounted for *Neal*'s concerns. It explained its rationale for not imposing consecutive sentences for Rosillo's aggravated robbery and burglary convictions even though the guidelines permitted it. It stated, "A durational departure is more appropriate [because] full consecutive sentencing overly exaggerates the criminality of the offenses and any sentence mixing and matching consecutive and concurrent sentences is essentially arbitrary." The district court expressly relied on the jury's finding that Rosillo is a danger to public safety and on his criminal record. It explained that Rosillo's six previous felonies "involve personal violence or the threat of violence and/or sale of controlled substances," that Rosillo maintained only about 12 months of freedom in the 11 years since he turned 21, and that he committed the underlying felonies only three months after his last release from prison. The district court observed that Rosillo is a "self-proclaimed member of the 'Mexican mafia'" and has chosen prison over rehabilitative treatment.

It is true that the district court relied on Rosillo's criminal history, which already somewhat factored into his guidelines calculation of the presumptive sentence. But Rosillo's claim that the district court overemphasized his prior convictions is unconvincing. Rosillo's initial seven-point criminal history score was based on six prior felony convictions. But because the guidelines grid contemplates a maximum of six criminal history points, at least one of those prior felonies was a nonfactor when

calculating his presumptive sentence. Furthermore, Rosillo's initial criminal history score did not include his four felony convictions from the present case. It also did not include his five felony convictions for violating a domestic-abuse no-contact order with the purpose of intimidating A.A. into changing her testimony. Nor did it include a pending charge for felony possession of a firearm. These incidents were, however, considered during the sentencing process. So while the convictions used to calculate Rosillo's criminal history score were also partly considered in the decision to depart, the district court based its decision on circumstances beyond the previously applied convictions.

Once the jury found Rosillo to be a danger to public safety, Rosillo qualified as a dangerous offender. *See* Minn. Stat. § 609.1095, subd. 2. The district court could therefore depart from the presumptive sentence up to the statutory maximum. *Id.*; *Neal*, 658 N.W.2d at 545 ("[Section 609.1095] authorizes the court to impose a durational departure of any length, up to the statutory maximum, in all cases where the offender satisfies the statute's criteria."). Because the district court's reasons for departing were legally permissible and supported by the record, it did not abuse its sentencing discretion.

IV

Rosillo presents additional arguments in his pro se supplemental brief but fails to cite any facts from the record or legal authority in support. Arguments in supplemental briefs unsupported by legal authority are waived. *State v. Palmer*, 803 N.W.2d 727, 741 (Minn. 2011). Rosillo's separate arguments are waived.

Affirmed.