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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0853**

State of Minnesota,
Respondent,

vs.

Luke Brandon Scott,
Appellant.

**Filed May 12, 2014
Affirmed
Worke, Judge**

Ramsey County District Court
File No. 62-CR-10-8293

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Daniel L. Gerds, Special Assistant Public Defender, Minneapolis, Minnesota (for
appellant)

Considered and decided by Kirk, Presiding Judge; Worke, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

Following this court's remand for a retrial, appellant was found guilty of first- and second-degree assault, false imprisonment, and terroristic threats. Appellant now argues

that the district court abused its discretion by admitting evidence of his post-offense conduct during the guilt phase of his trial and by imposing an upward durational departure from the presumptive sentence for first-degree assault. We affirm.

FACTS

Appellant Luke Brandon Scott challenges his convictions of first- and second-degree assault, terroristic threats, and false imprisonment stemming from an altercation he had with C.H. on September 26 and 27, 2010.¹ C.H. testified that she and Scott had been drinking buddies and friends with a sexual relationship. But while spending the evening at Scott's house on September 26 after a night of drinking alcohol with Scott and others, C.H. told Scott that she wanted to end their sexual relationship. Scott, enraged, prevented C.H. from leaving the house by taking her cell phone and car keys, locking the front door, and engaging in a lengthy argument interspersed with a variety of physical attacks. Scott's assaultive conduct toward C.H. included grabbing, shoving, punching, tackling, locking her in a dog kennel, forcibly wiping up spilled beer with her hair, dragging her into the house from the back yard in a headlock position while pulling her hair, kicking her in the head, biting her on the face and body, holding a knife to her throat, holding a pellet gun within inches of her eye, threatening to hang her from the basement ceiling and slit her throat, striking her with a riding crop, and striking her in the mouth with a wine bottle. From this assault, C.H. sustained injuries that included a lost

¹ On his first direct appeal, this court reversed and remanded for retrial because of plain error in the jury instructions that affected Scott's substantial rights and the fairness of his trial. *State v. Scott*, No. A11-1674 (Minn. App. July 30, 2012), *review denied* (Minn. Oct. 16, 2012).

tooth, bite marks, and bruises. C.H. eventually escaped from the house and ran barefoot to a nearby gas station. C.H.'s testimony was corroborated by the testimony of a neighbor who heard screams during the night, police, and medical personnel.

Scott and A.J., his roommate, also testified at trial. Scott stated that C.H., who was drunk, became argumentative and began yelling and screaming when he restrained her from attempting to drive while intoxicated, and that she instigated physical contact and he merely responded or attempted to restrain her for her own safety. He also said that she had the opportunity to leave with A.J. but chose not to go. He further testified that she injured herself by falling and that she wanted to sleep in the dog kennel. A.J. also portrayed C.H. as a belligerent drunk who Scott attempted to prevent from driving.

The state sought an upward durational sentencing departure upon a jury finding of guilt. The district court ordered a unified trial and permitted the jury to hear evidence pertaining to aggravating sentencing factors during the guilt phase of Scott's trial. Before admitting the evidence, the district court instructed the jury that the evidence was "being offered for the limited purpose of assisting [them] in assessing the credibility of witnesses" and was not to be used to prove Scott's character or to prove other uncharged conduct.

After returning a guilty verdict, the jury found that aggravating sentencing factors existed, including that Scott "inflicted injuries on [C.H.] by biting her[,] " "inflicted injuries to [C.H.] by striking her with a bottle[,] " and that he lacked remorse, as evidenced by "his offering to pay [C.H.] not to testify against him[,] " "his written communications to [C.H.] for the purpose of changing her testimony against him[,] " and

“his verbal communications with [C.H.] for the purpose of changing her testimony against him.” The district court imposed a 210-month sentence on the first-degree-assault conviction, which constituted an upward durational departure from the presumptive sentence, and a stayed 15-month sentence on the false-imprisonment conviction.

D E C I S I O N

Admission of post-crime evidence

Scott argues that he did not receive a fair trial because the district court permitted the jury to hear post-crime evidence during the guilt phase of his unitary trial that was relevant only to sentencing. This included evidence that he contacted C.H. on several occasions to encourage her to change her testimony, and that he arranged for a third party to bribe C.H. to change her testimony. The district court also admitted evidence that Scott had implicitly threatened C.H. and had violated a DANCO and no-contact order by contacting her.

Factors used to enhance a sentence must either be found by a jury or admitted by the defendant. *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 2537 (2004); *State v. Shattuck*, 704 N.W.2d 131, 141 (Minn. 2005). When the state seeks an aggravated sentence, the district court must decide whether to permit a unitary or bifurcated trial. Minn. R. Crim. P. 11.04, subd. 2. Scott’s Sixth Amendment right to have a jury decide the facts supporting an upward durational departure was vindicated in this case, but he argues that the district court abused its discretion by admitting highly prejudicial evidence that was irrelevant to his guilt. Generally, evidentiary rulings “rest within the sound discretion of the [district] court and will not be reversed absent a clear

abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citations omitted).

“[E]vidence must be relevant to be admissible.” *State v. Steward*, 645 N.W.2d 115, 120 (Minn. 2002). Relevant evidence makes the existence of a material fact “more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401. But relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. Minn. R. Evid. 403. “When an error implicates a constitutional right, [an appellate court] will award a new trial unless the error is harmless beyond a reasonable doubt.” *State v. Davis*, 820 N.W.2d 525, 533 (Minn. 2012). The harmless-error standard is met “if the jury’s verdict was surely unattributable to the error.” *Id.* (quotation omitted). “An error is not harmless if there is a reasonable possibility that the verdict might have been different if the error were not committed.” *State v. Ferguson*, 804 N.W.2d 586, 592 (Minn. 2011) (quotation omitted).

The district court’s decision to hold a unitary trial was inadvisable because the evidence for sentencing purposes was only marginally relevant to Scott’s credibility, his lack of credibility was demonstrated by inconsistencies and contradictions in his testimony, and the evidence was highly prejudicial. *See State v. Strommen*, 648 N.W.2d 681, 687 (Minn. 2002) (ruling that highly prejudicial evidence portraying defendant as a “person of bad character” should have been excluded under rule 403); *State v. Morgan*, 310 Minn. 88, 92, 246 N.W.2d 165, 167 (1976) (stating that “[t]his court has on numerous occasions recognized the highly prejudicial nature of evidence linking a

defendant to other crimes for which he is not on trial and the need to exclude such evidence”).

However, we conclude that any error in admitting this evidence was harmless. C.H. gave detailed testimony about her assault, which was corroborated by her injuries, the testimony of a neighbor who heard her screaming for help, the testimony of other witnesses, and, to a certain degree, by the testimony of Scott and A.J. In addition, Scott’s testimony about C.H. injuring herself, in light of the type and variety of her injuries, including two bites to her face, was highly improbable. We also note, as the state argued, that the cautionary jury instruction weakened the inflammatory nature of the evidence, the state did not rely on the evidence during closing argument, the jury’s failure to find facts supporting two of the claimed sentence-aggravating factors suggests that the jury was not inflamed by the evidence, and Scott’s testimony explaining his post-offense conduct supports upholding admission of the evidence. Given this, we conclude that the error was harmless and decline to reverse Scott’s convictions.

Sentencing departure

Scott argues that the district court erred by relying on improper grounds in imposing the upward durational sentencing departure. First, he asserts that the jury was not properly instructed on the standard of proof or the requirement of unanimity. *See 10 Minnesota Practice, CRIMJIGs 3.03, .04 (2006)* (setting forth jury instructions on requisite standard of proof and requirement of unanimous verdict). We disagree. While the district court did not issue separate instructions for this part of the trial, the trial was unitary, and the jury had been instructed on the proper standard of proof, the requirement

of jury unanimity, and that it was the jury's exclusive function to decide questions of fact. *See* 10 *Minnesota Practice*, CRIMJIG 8.01 (2006) (setting forth recommended jury instructions for sentencing juries).

Scott also argues that the facts as found by the jury do not provide a valid reason for the district court to impose an upward durational sentencing departure. Upon conviction of a crime, a presumptive sentence must be imposed unless "identifiable, substantial, and compelling circumstances" warrant an upward departure. Minn. Sent. Guidelines 2.D.1 (2012). Substantial and compelling circumstances are those showing that the defendant's conduct was significantly more serious than that typically involved in the offense. *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). A court may not consider for sentencing departure purposes "elements of the underlying crime, . . . uncharged or dismissed offenses, . . . conduct for which the defendant was acquitted, or . . . conduct for which the defendant was separately convicted." *State v. Robideau*, 817 N.W.2d 180, 185 (Minn. App. 2012). However, the district court has discretion to depart when aggravating circumstances are present, *State v. Stanke*, 764 N.W.2d 824, 827 (Minn. 2009), and this court reviews a district court's departure decision for an abuse of that discretion. *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001). This court reviews de novo whether a proper departure reason is present. *State v. Grampre*, 766 N.W.2d 347, 350 (Minn. App. 2009), *review denied* (Minn. Aug. 26, 2009).

The jury answered special interrogatories affirmatively regarding whether Scott lacked remorse by offering to pay C.H. not to testify against him and by contacting her

orally and in writing to convince her to change her testimony, and the district court found that these facts showed a lack of remorse that was a proper reason to depart.

The aggravating factor of lack of remorse “has received somewhat conflicting treatment in the caselaw[,]” but it may intertwine with a defendant’s shifting of blame for a crime to others, which is an offense-related factor that properly supports a sentencing departure. *Dillon v. State*, 781 N.W.2d 588, 599-600 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). “As a general rule, a defendant’s remorse bears only on a decision whether or not to depart dispositionally, not on a decision to depart durationally” *State v. Yang*, 774 N.W.2d 539, 564 (Minn. 2009) (quotation omitted); *see State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995) (stating that, generally, offense-related aggravated factors may be used to support a durational departure, but offender-related factors may be used only to support a dispositional departure). But a district court may impose a durational departure for an offender’s lack of remorse when the offender’s conduct demonstrates particular cruelty or emphasizes the seriousness of the offense. *State v. Folkers*, 581 N.W.2d 321, 327 (Minn. 1998); *see State v. Griller*, 583 N.W.2d 736, 744 (Minn. 1998) (ruling that, among other factors, chilling lack of remorse demonstrated severity of attack and supported durational sentencing departure).

Here, Scott violated court orders that prohibited him from having contact with C.H. for the purpose of pressuring C.H. not to testify; he did so by various methods and through various individuals. Scott’s lack of remorse thus related back to and shows the seriousness of his assault. *See State v. VanZee*, 547 N.W.2d 387, 391 n.1, 392-93 (Minn. App. 1996) (upholding proper consideration of lack of remorse as aggravating sentencing

factor when defendant ignored underage victim's parents' instructions to have no contact with victim, violated a restraining order and no-contact order, and pressured the victim not to cooperate with the prosecution), *review denied* (Minn. July 10, 1996).²

Finally, errors in *Blakely* proceedings are also subject to the harmless-error test. *State v. Essex*, 838 N.W.2d 805, 813 (Minn. App. 2013). "A *Blakely* error is harmless if the reviewing court can say with certainty that a jury would have found the aggravating factors used to enhance the defendant's sentence had those factors been submitted to a jury in compliance with *Blakely*." *Id.* (quotation omitted). We conclude that any error is harmless in this case.

For all of these reasons, the district court's decision to impose a durational departure from the presumptive sentence was not an abuse of discretion.

Affirmed.

² The jury also found that Scott "inflicted injuries" on C.H. by "biting her" and by "striking her with a bottle." Because we conclude that the facts were sufficient to support a departure because of lack of remorse, we do not address this issue.