STATE OF MINNESOTA
IN COURT OF APPEALS
A11-0358
A12-1600

State of Minnesota,
Respondent,

vs.

Thol Thim,
Appellant.

Filed May 13, 2013
Affirmed
Connolly, Judge

Olmsted County District Court
File No. 55-CR-10-712

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

Mark A. Ostrem, Olmsted County Attorney, Eric M. Woodford, Assistant County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Charles F. Clippert, Assistant Public Defenders, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Connolly, Judge; and Stauber, Judge.

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

CONNOLLY, Judge

On appeal from his convictions of first-degree criminal sexual conduct and furnishing alcohol to a minor, appellant argues (1) the district court deprived him of his right to testify by ruling that the state could cross-examine him about a pending allegation; (2) cumulative error, including the admission of *Spreigl* evidence and other prejudicial evidentiary rulings, deprived him of a fair trial; (3) his sentence, a double upward departure, was disproportionate to the severity of the offense; (4) this court should review the *Spreigl* witness's counseling records submitted to the court for in camera review; and (5) he is entitled to a new trial based on newly discovered falsified testimony of the *Spreigl* witness. Because appellant was not deprived of his constitutional right to testify, received a fair trial and sentence, and did not meet his burden of establishing that the *Spreigl* testimony was false, we affirm.

FACTS

Appellant Thol Thim was charged by complaint with one count of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(e)(i) (2008) and one count of furnishing alcohol to a minor in violation of Minn. Stat. § 340A.503, subd. 2(1) (2008), in connection with an incident that occurred on January 29, 2010. According to the complaint, 25-year-old appellant gave alcohol to 16-year-old C.P. and forcibly raped her at his apartment.

Pretrial

Before trial, the state filed a motion to introduce *Spreigl* evidence that appellant also committed criminal sexual conduct against T.A.[1] At the pretrial hearing, T.A. testified that she met appellant in August 2009 when she was 15 years old and just out of chemical-dependency treatment. She began spending time at appellant's house several days per week, and while there, would drink alcohol and use drugs. T.A. reentered a treatment program in October 2009, but spent time at appellant's apartment after completing her program in November 2009. About a week after her treatment, she went to appellant's apartment and got "very, very, very intoxicated." She went into appellant's room and went to sleep, but does not clearly remember what occurred next. She thought appellant tried to remove her pants, but she told him that she did not want to do anything with him. When she awoke, her clothes were not on right and appellant was pulling down her pants. Several days later, T.A. told appellant that she did not want to have sexual contact with him in the future. But, she had sex with appellant about a dozen times from early December 2009 to late January 2010. Her recollection of those encounters was spotty because she was blacking out, but she did not remember consenting to the encounters.

The state argued that T.A.'s evidence was admissible to prove motive, intent, lack of mistake, and plan. The state argued that the offenses were similar because of the age of the victims, location, lack of a condom, and the use of chemicals to facilitate the

[1] Although the alleged incidents with T.A. predate the incidents involving C.P., the state did not file a complaint in connection with T.A.'s matter until after the charges involving C.P. were filed.

sexual assaults. Over appellant's objection, the district court ruled that T.A.'s testimony proved, by clear and convincing evidence, that appellant had committed the alleged prior bad acts, that those acts were similar to the conduct alleged in the pending complaint, and that this evidence was not more prejudicial than probative, and therefore admissible under Minn. R. Evid. 404(b). Before T.A.'s trial testimony, the district court instructed the jury that T.A.'s testimony was only to be used as evidence of appellant's motive, intent, plan, or as evidence of the absence of mistake or accident. T.A.'s trial testimony was largely consistent with her pretrial testimony.

Trial Testimony

At trial, C.P. testified about the alleged offense. She testified that on January 29, 2010, she called her friend M.S., appellant's girlfriend, to get together. C.P. met M.S. at appellant's apartment. The three of them watched a movie, and then M.S. left for work. C.P. and appellant walked to a nearby liquor store to purchase some alcohol, and C.P.'s friend D.K. picked them up and drove them back to appellant's apartment. The three of them drank alcohol and played drinking games. Appellant was touching C.P.'s legs and giving her a back rub.

Eventually, appellant told C.P. he wanted to talk to her in his bedroom, where they briefly kissed before returning to the living room. Later, they returned to his bedroom, where appellant repeatedly asked C.P. if she wanted to have sex. C.P. testified that she replied "no," and D.K. faintly heard C.P. say "no" through the door to the bedroom. C.P. further testified that appellant pushed her down onto the bed, held her down by the neck, and removed her pants. Appellant sexually penetrated C.P. for five to ten minutes. C.P.

could not tell whether appellant wore a condom. C.P. did not consent to the sexual intercourse.

D.K. texted C.P. to come out to the living room, and C.P. came out wrapped in a blue blanket. Initially, appellant would not leave the two girls alone. Once they were alone, C.P. told D.K. that something was "seriously wrong; we need to get out of here." C.P. was in such a hurry to leave the apartment that she and D.K. left behind their belongings. While D.K. went back inside to retrieve their belongings, C.P. called and texted her friend I.S., asking I.S. to pick her up "real quick." C.P. waited outside for I.S. to arrive, and was crying. Appellant came outside to speak with C.P., and asked her not to tell anybody what happened. When I.S. arrived, C.P. walked quickly or ran toward I.S.'s car and got in. C.P. was very upset, was crying, and stated "that was messed up."

I.S. dropped her boyfriend, J.P., and another friend off at J.P.'s house and took C.P. for a ride around the block. I.S. asked C.P. what happened, and C.P. indicated that appellant raped her. When they returned to J.P.'s house, C.P. was crying. C.P. reported to J.P.'s mother that she had been raped and asked J.P.'s mother to call the police. Rochester police officer Samuel Higgins was the first to arrive. C.P. reported to Higgins that appellant encouraged her to drink alcohol, then took her to his bedroom and asked her if she wanted to have sex. She stated that she replied "no," but that appellant pushed her down, took off her pants, said "we're gonna do this," held her by the throat, and sexually penetrated her. A preliminary breath test of C.P. showed an alcohol concentration of 0.03.

D.K. spoke with appellant several times that evening. During one conversation, appellant stated "you've got to be kidding me; I'm in jail forever," and "my life is ruined; it's over." Appellant was arrested later that evening.

C.P. was taken to the hospital where nurse examiner Cheryl Darsow conducted a sexual-assault examination. C.P. was withdrawn and crying. Darsow documented reddened areas she identified as abrasions on both sides of C.P.'s neck. She did not notice any vaginal injuries, but Darsow testified that this was not unusual because of the elastic and regenerative nature of vaginal tissue. On cross-examination, defense counsel asked Darsow if she was familiar with Linda Ledray, and Darsow indicated that she was her mentor. Counsel asked whether Darsow would tend to respect an article written by Ledray, and Darsow indicated that she would. Counsel then attempted to impeach Darsow by reading from the article, but the state objected on grounds that the defense failed to disclose the article. As an offer of proof, counsel claimed the article would state that 68% of sexual-assault victims suffer genital trauma. The district court sustained the objection "as to disclosure."

C.P. testified that appellant's girlfriend M.S. asked C.P. to drop the charges and told her, "if [appellant] is convicted, he will kill himself." The defense objected to this testimony on the grounds of hearsay, but the district court overruled the objection. Later, the state sought to admit into evidence a letter written by appellant to M.S., asking her to pressure C.P. to change her story. The letter was redacted, and appellant sought to include his statement "the things I say probably will get over looked." The district court

denied his motion because the statement was irrelevant, confusing, and self-serving hearsay.

Just before the close of the state's evidence, defense counsel informed the district court and the state that if appellant testified, he did "not intend to inquire of [appellant] on direct examination about anything concerning [T.A]." He then made a motion in limine to preclude the state from cross-examining appellant regarding T.A.'s rape allegations as beyond the scope of direct examination. He argued that, because T.A.'s allegations were the subject of pending criminal charges, such questioning would impermissibly force appellant to choose between incriminating himself in that matter, or not testifying in this matter. The state opposed the motion and argued that if appellant voluntarily took the stand, he would waive the privilege as to all matters relevant to this case.

The district court denied appellant's motion without qualification, concluding that T.A.'s allegations were relevant *Spreigl* evidence and that appellant would not be denied the privilege against self-incrimination because "it's clear that it's the defendant's choice. The Court can't compel him to testify." According to the district court, a defendant facing this decision, must "tak[e] into account many factors, one being this *Spreigl* evidence," just as he or she must consider the effect of prior convictions for impeachment. The district court concluded by saying, "I find it a legitimate inquiry for cross examination, relevant to the jury. How much, I don't know. I don't know exactly what questions would be asked. But I think [appellant] will have to make his decision knowing he could be cross examined about the *Spreigl* evidence."

In response to the district court's ruling, appellant waived his right to testify. Defense counsel asked appellant whether it was "fair to say that the decision made regarding the [state's cross-examination] played a significant factor in your decision whether you testify or not," and appellant responded that it was.

Procedural History

Appellant was convicted of first-degree criminal sexual conduct and furnishing alcohol to a minor. He was sentenced to 360 months' imprisonment, a double upward departure from the presumptive sentence based on a prior criminal-sexual-conduct conviction. He appealed, arguing that (1) the district court deprived him of his right to testify by ruling that the state could cross-examine him about a similar pending allegation and, in order to testify at this trial, appellant would have to waive his Fifth Amendment right to remain silent with regard to the pending charge; (2) cumulative error, including the admission of *Spreigl* evidence that ultimately kept appellant from testifying, and other prejudicial evidentiary rulings deprived him of a fair trial; (3) his sentence, a double upward departure, was disproportionate to the severity of the offense because there was nothing about the commission of this offense that rendered it more serious than the typical first-degree criminal sexual conduct. Appellant also requested that this court review T.A.'s counseling records, which were submitted to the district court for in camera review, and disclose to counsel any material that might be relevant to the defense. The case was docketed as A11-0358.

While the appeal was pending, the state brought charges against appellant for the incidents involving T.A. The district court conducted an in camera review of T.A.'s

medical records. Portions of T.A.'s records were forwarded to T.A.'s defense counsel, who in turn alerted appellant about inconsistent statements in T.A.'s medical records. The medical records indicate that T.A. was diagnosed with a sexually transmitted disease on January 29, 2010, that she told her medical provider she had not been sexually active from October 10, 2009 to January 29, 2010, and that she did not know from whom she had contracted the sexually transmitted disease. The latter two statements were inconsistent with T.A.'s *Spreigl* testimony in this case. A police officer interviewed T.A. about the information and statements in the medical records. T.A. did not recant her trial testimony and explained to the officer that she had not been entirely truthful with the medical provider because she had been uncomfortable discussing the matter in front of her mother. Based on these newly discovered statements, which appellant believed demonstrated that T.A.'s trial testimony was false, appellant moved for a stay of appeal. This court granted the stay on January 18, 2012.

On February 21, 2012, appellant filed a petition for postconviction relief with the district court. The district court issued an order denying postconviction relief, and appellant filed a notice of appeal challenging the order. The case was docketed as A12-1600 and consolidated with appellant's stayed appeal, A11-0358.

D E C I S I O N

I. Constitutional Right to Testify

Appellant argues that the district court's ruling that the state could cross-examine him regarding T.A.'s *Spreigl* testimony if he took the stand deprived him of his

constitutional right to testify in his own defense in this case in order to exercise his right against self-incrimination as to the pending charges involving T.A.

We review constitutional issues de novo. *See Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984). The United States and Minnesota Constitutions and Minnesota state law afford a criminal defendant the right to testify on his or her own behalf. *State v. Ihnot*, 575 N.W.2d 581, 587 (Minn. 1998); *see also* Minn. Stat. § 611.11 (2010) ("The defendant in the trial of an indictment, complaint, or other criminal proceeding shall, at the defendant's own request and not otherwise, be allowed to testify."). In addition, both constitutions afford a criminal defendant the right against self-incrimination at trial. U.S. Const. amend. V; Minn. Const. art. I, § 7.

"The privilege against self-incrimination is implicated by prosecutorial questioning whenever the questioning requires answers that would in themselves support a conviction or furnish a link in the chain of evidence needed to prosecute the accused." *State v. Brown*, 500 N.W.2d 784, 787 (Minn. 1993). But even where implicated, "a person may waive her Fifth Amendment privilege." *In re Contempt of Ecklund*, 636 N.W.2d 585, 588 (Minn. App. 2001) (citing *Rogers v. United States*, 340 U.S. 367, 372-73, 71 S. Ct. 438, 442 (1951)). In a criminal trial where the defendant takes the stand, "[t]he interests of [the state] and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination." *Brown v. United States*, 356 U.S. 148, 156, 78 S. Ct. 622, 627 (1958). When a defendant takes the witness stand, "his credibility may be impeached and his testimony assailed like that of any other witness,

and the breadth of his waiver is determined by the scope of relevant cross-examination." *Id.* at 154-55, 78 S. Ct. at 626; *see also* Minn. R. Evid. 611(b) ("An accused who testifies in a criminal case may be cross-examined on any matter relevant to any issue in the case, including credibility.").

Appellant argues that "Minnesota case law is silent on the issue of whether a defendant's Fifth Amendment right to remain silent is violated when the state is permitted to cross-examine the defendant on collateral, pending charges." But Minnesota has addressed this issue in at least two cases. In 1964, the Minnesota Supreme Court held that a defendant, "by taking the stand, waive[s] his privilege concerning all questions bearing on the crime charged, and he also thereby surrender[s] his privilege of not testifying about other crimes relevant to those elements." *State v. Hines*, 270 Minn. 30, 38, 133 N.W.2d 371, 377 (1964). And in 1926, the Minnesota Supreme Court held that "[w]here a defendant in a criminal prosecution takes the stand as a witness in his own behalf, he thereby waives his privilege, and may be cross-examined concerning any matters pertinent to the issue even if tending to show the commission of another crime." *State v. Wood*, 169 Minn. 349, 352-53, 211 N.W.2d 305, 306 (1926). Because there are Minnesota cases on point, there is no need to consider the three foreign-jurisdiction cases that appellant cites and urges this court to follow.

In *Hines*, the defendant was charged with robbery after he forced the victim from his car on the highway and drove off with the car. 270 Minn. at 32-33, 133 N.W.2d at 373-74. At trial, the defendant testified that he did not intend to steal the car, he merely intended to hitchhike and that the car began moving once he got in it. *Id.* at 34, 133

N.W.2d at 374. Based on this testimony, the district court permitted the state to cross-examine the defendant about a nearly identical incident that occurred just prior to the charged incident. *Id.* The Minnesota Supreme Court affirmed, reasoning that questions regarding the previous robbery were "relevant to the issues tried, namely, guilty knowledge and criminal intent." *Id.* at 38, 133 N.W.2d at 376-77. Similarly, if appellant had taken the stand in this case, questions regarding his conduct with T.A. would have been relevant to his intent to get underage girls intoxicated and then sexually assault them without their consent.

Under this binding caselaw, the district court correctly ruled that appellant could be cross-examined about T.A. even if he did not testify about T.A. on direct examination.[2] Under *Hines* and *Wood*, if appellant had taken the stand in his defense and denied the allegation of criminal sexual conduct, the state could properly have inquired as to his conduct with T.A. because T.A.'s allegations were "relevant" and "pertinent" to appellant's defense, namely that his intercourse with C.P. was consensual. Although appellant did not make a specific offer of proof regarding topics to be covered on direct

[2] Moreover, we have reviewed the cases cited by appellant and do not find them to be contrary to the result reached in this case. *See People v. Skufca*, 176 P.3d 83, 90 (Colo. 2008) (holding that, if the defendant chose to testify, the state could cross-examine him with respect to pending federal charges "to the extent that Skufca opened the door to [that topic]"); *People v. Betts*, 514 N.E.2d 865, 867 (N.Y. 1987) (holding that a defendant could not be cross-examined regarding collateral criminal conduct involving a drug charge when the questioning pertained to a completely unrelated burglary offense and went only to the defendant's credibility); *State v. Tuell*, 541 P.2d 1142, 1148 (Ariz. 1975) (holding that the district court's ruling that defendant could be questioned about a subsequent bad act precluded defendant from exercising his right to testify where the subsequent bad act was inadmissible 404(b) evidence, notwithstanding the constitutional violation).

examination, this court assumes that he would have refuted C.P.'s testimony that the sexual contact was nonconsensual. *See Ihnot*, 575 N.W.2d at 587 ("Because Ihnot did not make an offer of proof as to what his testimony would have been had he testified, this court is left to assume that the thrust of his testimony would have been to deny the allegations of criminal sexual conduct.").

II. Cumulative Error

Appellant also argues that the district court made several erroneous evidentiary rulings and that the cumulative effect of these errors deprived appellant of a fair trial.

Spreigl evidence

First, appellant argues that the district court abused its discretion by allowing the state to introduce evidence of appellant's sexual conduct with T.A. as *Spreigl* evidence. The district court's decision to admit *Spreigl* evidence will not be reversed absent a clear abuse of discretion. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). The five steps for admitting *Spreigl* evidence are:

> (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.

Id. at 685-86.

Appellant takes issue with steps two, four, and five. First, he contends that the state and the district court failed to identify any "precise disputed fact" that made T.A.'s testimony relevant. The issue in dispute at trial was not whether appellant had

intercourse with C.P., but whether appellant penetrated C.P. by force or with consent. The state clearly indicated that T.A.'s testimony was relevant because it went to the disputed issue of consent. At the motion hearing, the prosecutor stated that in this case "the testimony of the [*Spreigl*] witness would go to similar behavior of the defendant in the past that involved a lack of consent, whether because of physical incapacitation or by the use of force or coercion." Later, the prosecutor listed the permissible grounds for admitting *Spreigl* evidence and asked for "permission to present [T.A.'s testimony] on any of those factors." The prosecutor also stated that the evidence was being offered to rebut the claim of consent by establishing appellant's "intent, his lack of mistake, and the plan that would be involved" in committing a sexual assault against an intoxicated underage female. The state clearly indicated what the *Spreigl* evidence was being offered to prove.

Next, appellant claims that the *Spreigl* incidents were not similar enough to the charged crime to be relevant. This argument also fails. The district court concluded that the assaults were "similar opportunistic acts against those that are vulnerable." The district court cited the victims' age, gender, the location of the assaults, the timing, and the "use of chemicals . . . to facilitate the sexual intercourse." These findings are supported by the record and support the district court's conclusion that the incidents are sufficiently similar. Although appellant is correct that T.A.'s assaults involved lack of consent by incapacitation and that C.P.'s involved lack of consent by force, this

difference is insignificant in light of the overall similarity of the offenses.[3] The district court concluded that "the amount of alcohol or chemicals seemed to be the only dividing line here regarding force or being helpless," but even this distinction was undermined by T.A.'s testimony that appellant assaulted her on one occasion "with force as well."

Finally, appellant argues that the probative value of the *Spreigl* evidence was outweighed by its prejudice because the evidence regarding C.P.'s consent was not weak. *State v. Scruggs*, 822 N.W.2d 631, 644 (Minn. 2012) ("When examining whether the probative value of *Spreigl* evidence outweighs its potential for unfair prejudice to a defendant, we balance the relevance of the bad acts, the risk of the evidence being used as propensity evidence, and the State's need to strengthen weak or inadequate proof in the case.") (quotation omitted). But T.A.'s testimony was probative of a highly-contested issue, because appellant's defense focused largely on the issue of consent. C.P. was the state's only witness who could testify directly on that issue. And the prejudicial effect of T.A.'s testimony was limited by the strength of the state's evidence. The state offered numerous other witnesses who supported C.P.'s testimony with circumstantial evidence, including C.P.'s emotional reaction immediately after the assault, her largely consistent rendering of the event, and the injury to her neck. Moreover, the district court twice instructed the jury as to the proper use of T.A.'s testimony.

On this record, the district court did not abuse its discretion by admitting T.A.'s testimony as *Spreigl* evidence.

[3] We also note that in T.A.'s case, she was 15 and legally under the age of consent.

Probation reference

Next, appellant contends that a fleeting reference to his probation status during the testimony of Officer Sylvia Quirk prejudiced him. Eliciting an officer's testimony that the defendant has had previous contact with law enforcement is error. *State v. Valentine*, 787 N.W.2d 630, 641 (Minn. App. 2010).

Officer Quirk testified that while investigating this crime, she learned of appellant's address and "contacted a probation officer." The district court acknowledged that Officer Quirk's testimony was error, but concluded that it did not warrant a mistrial. Appellant specifically asked that the district court *not* give a curative instruction. Because this error was so fleeting and unconnected to any other testimony regarding appellant's prior criminal acts, its prejudice was minimal and does not warrant reversal.

Exclusion of learned treatise

Appellant also argues that the district court abused its discretion when it precluded him from confronting the state's medical witness with a learned treatise by Linda Ledray on the likelihood that nonconsensual sexual intercourse would lead to vaginal injury. Cheryl Darsow, a registered nurse in the Mayo Clinic's emergency room testified that she observed no vaginal injuries on C.P. during the sexual-assault exam she completed shortly after the assault. Responding to a question of how often she observes vaginal injuries in sexual-assault cases involving physically-mature victims, Darsow testified, "In my experience, I would say that we don't often see vaginal injuries in cases of assault." Darsow explained that this is "because of the elasticity and . . . rapid regeneration of cells."

On cross-examination, appellant sought to challenge this testimony by reading from an article that appellant proffered stating that vaginal injuries occur in 68% of sexual-assault cases. Citing Minn. R. Crim. P. 9.02, subd. 1, which states that, in felony cases the defendant must disclose all "books, papers, [and] documents" that "the defense intends to introduce at trial," the state objected and the district court sustained the objection for lack of disclosure.

Appellant contends that he was under no obligation to disclose the article because he sought to use it for impeachment on cross-examination, not to admit it into evidence on direct. Appellant is correct. Minn. R. Evid. 803(18) provides:

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

Appellant attempted to read into the record a portion of an article published by Ledray for the Minnesota Center Against Violence and Abuse, in which she estimated that there is genital trauma in 68% of cases of nonconsensual intercourse. Appellant confirmed that Ledray was an expert in the area of sexual-assault examination. Darsow confirmed that Ledray was a "guru and a leader" in the field of sexual-assault examinations. Because appellant satisfied the requirements of Minn. R. Evid. 803(18), the district court erred by excluding the article.

We do not reverse evidentiary errors absent a clear abuse of discretion. *State v. Richardson*, 670 N.W.2d 267, 277 (Minn. 2003). Under this standard of review,

"reversal is warranted only when the error substantially influences the jury's decision." *Id.* (quotation omitted). If the evidentiary ruling is an error, "and the error reaches the level of a constitutional error, such as denying the defendant the right to present a defense, our standard of review is whether the exclusion of evidence was harmless beyond a reasonable doubt." *Id.* (quotation omitted).

Here, the state's evidence with respect to C.P.'s lack of consent was very strong, even without Darsow's testimony. The state offered numerous other witnesses who supported C.P.'s testimony with circumstantial evidence, especially regarding C.P.'s emotional reaction immediately after the assault. The state also offered the *Spreigl* testimony of T.A. on the issue of consent, and presented evidence of an injury to C.P.'s neck. Finally, it is not clear that Ledray's article would have diminished the impact of Darsow's testimony. Ledray's article would support Darsow's testimony that it is not uncommon for victims of nonconsensual intercourse to display no signs of vaginal trauma, because Ledray's article would suggest no trauma in 32% of victims.

C.P.'s testimony/redaction of letter

Appellant also argues that the district court abused its discretion when it admitted C.P.'s testimony that appellant's girlfriend, M.S., pressured C.P. to drop the charges against appellant because the statement was inadmissible hearsay. This argument fails. M.S.'s statement was not offered for the truth of the matter asserted. Minn. R. Evid. 801(c). Instead, the statement was offered to show that M.S. had pressured C.P. In conjunction with a letter introduced by the state and written by appellant to M.S., in

which appellant asked M.S. to pressure C.P., this evidence was used to demonstrate appellant's guilty mind.

Appellant also objects to the letter as introduced because he contends the district court abused its discretion by redacting exculpatory statements from the letter in violation of the "rule of completeness." This argument also fails. Although it appears that the portion appellant requested be included may have related to C.P., and could have been construed as blunting the letter's tendency to show appellant's guilty mind, this portion was taken out of context and was so vague as to be irrelevant. *See State v. Mills*, 562 N.W.2d 276, 287 (Minn. 1997) (holding that Minn. R. Evid. 106 does not require the admission of irrelevant portions of documents or self-serving hearsay). On this record, the district court did not abuse its discretion.

Cumulative error

"Cumulative error exists when the cumulative effect of the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant's prejudice by producing a biased jury." *State v. Penkaty*, 708 N.W.2d 185, 200 (Minn. 2006) (quotation omitted). As discussed above, it was not error for the district court to allow the admittance of T.A.'s *Spreigl* testimony. While it was error for the testifying police officer to mention appellant's probation officer, the error was harmless due to the fleeting nature of the remark and appellant's own request that no curative instruction be given. The most serious error was the district court's evidentiary ruling that denied appellant the right to impeach the state's expert witness by reading from a learned treatise. But, as previously discussed, the state's other evidence on the

issue of consent was very strong and we cannot say that this error alone deprived appellant of a fair trial.

III. Double Upward Departure

Appellant contends that his crime was no more serious than a typical first-degree criminal-sexual-conduct charge, and therefore the district court erred by imposing a double-upward-durational departure from the guidelines sentence.

A district court must order the presumptive sentence specified in the sentencing guidelines unless there are "identifiable, substantial, and compelling circumstances" to warrant an upward departure from the presumptive sentence. Minn. Sent. Guidelines II.D. "'Substantial and compelling' circumstances are those showing that the defendant's conduct was significantly more or less serious than that typically involved in the commission of the offense in question." *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). The sentencing guidelines provide a nonexclusive list of aggravating factors that may justify a departure. Minn. Sent. Guidelines II.D.2.b. Whether a particular reason for an upward departure is permissible is a question of law, which is subject to de novo review. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). A district court's decision to depart from the sentencing guidelines based on permissible grounds is reviewed for an abuse of discretion. *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001); *Dillon*, 781 N.W.2d at 595-96.

The presumptive sentence for first-degree criminal sexual conduct in light of appellant's criminal history score of three was 180 months. The district court imposed a sentence of 360 months after finding that appellant had previously been convicted of a

criminal-sexual-conduct crime. S*ee* Minn. Sent. Guidelines II.D.2.b.(3) (providing a nonexclusive list of aggravating factors that may be used as a reason for departure, including, where "the current conviction is for a Criminal Sexual Conduct offense . . . and there is a prior felony conviction for a Criminal Sexual Conduct offense . . . .").

Appellant contends that because C.P. suffered only minor abrasions on her neck, his crime is no more serious than a typical first-degree criminal-sexual-conduct crime, and thus the district court abused its discretion by departing from the presumptive sentence. But appellant's prior conviction alone is sufficient to support the departure. *See State v. O'Brien*, 369 N.W.2d 525, 527 (Minn. 1985) (noting that defendant's prior conviction of assault involving substantial bodily harm constituted an aggravating factor with respect to his first-degree criminal-sexual-conduct conviction and holding that the presence of this aggravating factor alone was sufficient to warrant a double-upward-durational departure notwithstanding the seriousness of the defendant's crime). Therefore, the district court did not abuse its discretion in sentencing appellant to a double upward departure. *See Dillon*, 781 N.W.2d at 596 (noting extreme deference allowed district court's decision to depart when adequate grounds exist).

IV. Appellate Review of Documents Submitted for In Camera Review

Before trial, appellant requested certain counseling records relating to the state's *Spreigl* witness, T.A., be transmitted to the district court for in camera review under *State v. Paradee*, 403 N.W.2d 640, 640-41 (Minn. 1987). The district court concluded that the records contained no exculpatory information. Appellant now requests that this court independently review the relevancy of the records.

Ordinarily, the district court's determination of relevancy following in camera documentary review is subject to appellate review, and our normal practice is to conduct an independent review. *See, e.g.*, *State v. Goldenstein*, 505 N.W.2d 332, 345 (Minn. App. 1993) (finding no abuse of discretion in district court's denial of discovery after conducting independent review of confidential documents), *review denied* (Minn. Oct. 19, 1993). But because appellant failed to ensure that the pertinent records were included in the appellate record, his request is waived. *State v. Medibus-Helpmobile, Inc.*, 481 N.W.2d 86, 92 (Minn. App. 1992) (affirming denial of discovery of in camera materials in part because appellant failed to ensure their inclusion in record on appeal), *review denied* (Minn. Mar. 19, 1992).

V. Postconviction Petition Based on Newly-Discovered False Testimony

Finally, appellant argues that the district court erred when it denied his postconviction petition for relief. He argues that the district court should have ordered a new trial based on T.A.'s false trial testimony. Appellant argues that T.A.'s *Spreigl* testimony at trial that she had nonconsensual sexual intercourse with appellant approximately a dozen times in December 2009 and January 2010 was false because she told her doctor that she had not been sexually active during that period of time.

This court will not overturn a postconviction court's decision absent an abuse of discretion. *Pippitt v. State*, 737 N.W.2d 221, 226 (Minn. 2007). "A postconviction court's legal determinations are reviewed de novo, but its factual findings will not be set aside unless they are clearly erroneous." *Id.* "A petitioner seeking postconviction relief has the burden of establishing, by a fair preponderance of the evidence, facts that would

warrant relief." *Ferguson v. State*, 645 N.W.2d 437, 442 (Minn. 2002). Where a new trial is sought during a postconviction proceeding based on an allegation that false testimony was given at trial, the court must evaluate the claim under the following three-prong test: "(1) the court must be reasonably well satisfied that the trial testimony was false; (2) without the false testimony, the jury might have reached a different conclusion; and (3) the petitioner was taken by surprise at trial or did not know of the falsity until after trial." *Dukes v. State*, 621 N.W.2d 246, 258 (Minn. 2001) (quotation omitted). The Minnesota Supreme Court has clarified this test, holding that "the third prong is not a condition precedent for granting a new trial, but rather a factor a court should consider when deciding whether to grant petitioner's request." *Dobbins v. State*, 788 N.W.2d 719, 733-34 (Minn. 2010).

The district court was not satisfied that T.A.'s trial testimony was false. The district court acknowledged that the medical record contained "a prior inconsistent statement given to a medical provider that T.A. was living a sober lifestyle and not sexually active from October 2009 to January 2010." The district court also noted that "[s]tatements made for the purpose of medical diagnosis or treatment where the declarant knows that a false statement may cause misdiagnosis or mistreatment contain special guarantees of credibility." *State v. Salazar*, 504 N.W.2d 774, 777 (Minn. 1993) (quotation omitted).[4] But, considering all of the evidence in the record, the district court

[4] Although not addressed by the parties, we note that T.A.'s statement to the medical provider was not made for the purpose of medical diagnosis or treatment. Rather, she had already been diagnosed with a sexually-transmitted disease and the doctor told T.A. that she should inform her sexual partner of the diagnosis. At that point, T.A. stated that

was not satisfied that T.A.'s prior inconsistent statement to a medical provider established that her trial testimony had been false.

The district court did not abuse its discretion in determining that T.A.'s trial testimony was not false. As the district court noted, the fact that T.A. had contracted a sexually-transmitted disease and the evidence introduced at trial of the numerous statements T.A. had made to other individuals about her encounters with appellant, provided ample circumstantial evidence that T.A.'s trial testimony had been true. The district court judge who heard the postconviction petition was the same judge who heard the trial testimony, and was in an ideal position to weigh the credibility of the witnesses. Finally, it should be noted that a police officer who spoke with T.A. testified that the reason T.A. had denied being sexually active to the medical provider was because her mother had been present in the exam room at the time. Weighing all of these factors, the district court did not abuse its discretion in concluding that T.A.'s trial testimony was not false.

Because the petitioner bears the burden of establishing facts that would warrant postconviction relief, we do not address the other two prongs for granting a new trial based on false testimony because appellant has failed to demonstrate that the trial testimony was false. *See Ferguson*, 645 N.W.2d at 442.

Affirmed.

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she did not know who her partner was and that she had not been sexually active from October 2009-January 2010. Because this was not a statement made for the purpose of treatment, it does not contain a special guarantee of credibility.