STATE OF MINNESOTA
IN COURT OF APPEALS
A11-576

State of Minnesota,
Respondent,

vs.

Michael Eugene Bulen,
Appellant.

Filed March 19, 2012
Affirmed
Stoneburner, Judge

Lake County District Court
File No. 38CR09666

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, St. Paul, Minnesota; and

Laura Auron, Lake County Attorney, Two Harbors, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Stoneburner, Judge; and Cleary, Judge.

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

STONEBURNER, Judge

Appellant challenges his conviction of first- and second-degree criminal sexual conduct, arguing that the district court abused its discretion by admitting relationship

evidence that was not similar to the charged conduct and was more prejudicial than probative. Appellant also challenges his sentence, arguing that the district court erred by applying the sex-offender-guidelines grid, effective August 1, 2006, absent a specific finding that the offense occurred after August 1, 2006. We affirm.

FACTS

In November 2009, 17-year-old Z.B., the adopted son of appellant Michael Bulen, reported to his mother that Bulen had been sexually abusing him since he was in the sixth or seventh grade. In December 2009, Bulen was charged with: count 1, criminal sexual conduct in the first degree in violation of Minn. Stat. §§ 609.342, subds. 1(h)(iii), 2 (2008); count 2, criminal sexual conduct in the second degree in violation of Minn. Stat. §§ 609.343, subds. 1(h)(iii), 2 (2008); count 3, solicitation of a child to engage in sexual conduct in violation of Minn. Stat. §§ 609.352, subds. 2, 4 (2008), and counts 4 and 5, each charging Bulen with domestic assault in violation of Minn. Stat. § 609.2242, subd. 1 (2008).

The details of the alleged sexual abuse are not relevant to this appeal. The domestic assault charges involve an allegation that, in the summer of 2007, Bulen chased Z.B, sat on his chest, and slapped him after Z.B. squirted Bulen with a squirt gun, and an allegation that Bulen punched Z.B. in the face and, as they struggled, reinjured Z.B.'s collarbone while attempting to take Z.B.'s cell phone away in retaliation for Z.B.'s refusal to have sex with him. After that incident, Z.B., his brother I.B., and their mother, T.B., left the home until Bulen moved out.

Before trial, the state made an offer of proof, seeking admission of incidents of Bulen's physical abuse against family members as relationship evidence. The state argued that the evidence was relevant "to an understanding of how the crime occurred and to an assessment of the credibility of both the victim and the defendant." While that motion was pending, Bulen moved to sever and to dismiss the domestic-assault charges. The district court granted the motion to sever but ruled that evidence of the domestic-assault charges would be admissible as relationship evidence in the trial on the sexual-conduct charges.

The state then moved successfully to remove the judge who had presided over the case to that time. The newly assigned judge held a hearing on pending motions in limine and also reviewed, and in some cases reversed, the holdings on motions decided by the original judge. The district court granted the state's motion to admit, as relationship evidence, proffered evidence of other instances of Bulen's physical abuse of Z.B. but excluded proffered evidence of Bulen's conduct toward I.B. and T.B.

During the five-day jury trial, the district court dismissed count 3 (solicitation of a child to engage in sexual conduct). Bulen testified, denying the allegations of sexual conduct and describing the allegations of physical abuse as discipline, not assault. Character witnesses testified on his behalf. The jury found appellant guilty of first- and second-degree criminal sexual conduct. The district court sentenced appellant to 156 months in prison, which is within the presumptive range of the sentencing guidelines for first-degree criminal-sexual conduct, which became effective on August 1, 2006. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by admitting relationship evidence.

Bulen asserts that the relationship evidence was erroneously admitted because it did not involve conduct similar to the conduct charged and was more prejudicial than probative. He argues that the evidence was prejudicial because it encouraged the jury to find him guilty because of his character rather than because the jury was persuaded that he committed sexual abuse.

The district court's admission of relationship evidence is reviewed for an abuse of discretion. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004); *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). An appellant has the burden of establishing that the district court abused its discretion and that the appellant was thereby prejudiced. *McCoy*, 682 N.W.2d at 161; *State v. Meyer*, 749 N.W.2d 844, 848 (Minn. App. 2008).

> 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. "Similar conduct" includes, but is not limited to, evidence of domestic abuse[.]

Minn. Stat. § 634.20 (2008). The rationale for admitting relationship evidence is to illuminate the relationship between the defendant and the alleged victim and put the alleged crime in the context of the relationship between the two. *McCoy*, 682 N.W.2d at 159. Relationship evidence "assist[s] the jury by providing a context with which it [can] better judge the credibility of the principals in the relationship." *Id.* at 161. Evidence

under Minn. Stat. § 634.20 need not meet the heightened standard of clear and convincing evidence required for the admission of character or *Spreigl* evidence but need only be more probative than prejudicial. *Id.* at 159. Relationship evidence is admissible under section 634.20 if "(1) it demonstrates 'similar conduct' by the accused; (2) the conduct is perpetrated against the victim of domestic abuse or against another family or household member; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *State v. Barnslater*, 786 N.W.2d 646, 651 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010).

The relationship evidence admitted includes the two incidents alleged in the severed domestic-assault charges and (1) Bulen's holding Z.B.'s head underwater until Z.B. nearly blacked out after Z.B. was wrestling with I.B. in the water during a camping trip; (2) Bulen pinning Z.B.'s arm in a doorway; and (3) Bulen pulling Z.B. out of bed by his ankle. Bulen does not challenge the admissibility of the charge of domestic assault related to taking Z.B.'s cell-phone for refusing to engage in sex. Rather, he argues that the admission of the other incidents was an abuse of discretion.

The district court admitted the relationship evidence, in part, as relevant to why Z.B. did not report the sexual abuse earlier. Bulen argues that, because the incidents involve physical, rather than sexual, assault, they are not similar to the charged offenses alleging anal and oral sex. We disagree.

Similar conduct includes prior acts of domestic assault. Minn. Stat. § 634.20. Domestic assault, when committed against a family or household member, includes "physical harm, bodily injury, or assault" as well as criminal sexual conduct within the

meaning of Minn. Stat. §§ 609.342, .343. Minn. Stat. § 518B.01, subd. 2 (2008). The charges of criminal sexual conduct are acts of domestic assault and the incidents of relationship evidence admitted are acts of domestic assault. The evidence offered is evidence of similar conduct as defined by the statute.

And we find no merit in Bulen's argument that the relationship evidence was more prejudicial than probative. "Evidence that helps to establish the relationship between the victim and the defendant or which places the event in context bolsters its probative value." *State v. Lindsey*, 755 N.W.2d 752, 756 (Minn. App. 2008), *review denied* (Minn. Oct. 29, 2008). "When balancing the probative value against the potential 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).

As the state argues, the physical assaults were probative of Z.B.'s fear of Bulen and Z.B.'s credibility when he testified that he feared Bulen as a result of both the sexual and physical assaults; and Z.B.'s delay in reporting the sexual assaults to his mother or another adult.[1] It also had probative value by providing a timeframe for the sexual assaults and assisting the jury in determining Z.B.'s credibility. Z.B. testified that he feared Bulen because of the physical and sexual assaults, and he did not report the assaults sooner because he feared Bulen's reaction. Z.B. was unable to recall the dates of

[1] Two of Z.B.'s childhood friends recalled Z.B. telling them that his father was touching him inappropriately, but neither friend reported this information to anyone.

various sexual assaults but was able to recall the temporal relationship between some acts of sexual assault and incidents of physical assault. And T.B., who witnessed some of the acts of physical assault, was able to provide dates for those incidents, which in turn provided a timeframe for the sexual assaults. Plainly, the incidents of domestic assault were probative, and we conclude that the probative value outweighed the prejudicial effect of the evidence.

Bulen argues that the relationship evidence should have been excluded as "bad character evidence." We disagree. Minn. Stat. § 634.20 does not exclude evidence of prior bad acts, but rather, was expressly adopted by the Minnesota Supreme Court as "a rule of evidence for the admission of evidence of similar conduct by the accused against the alleged victim of domestic abuse." *McCoy*, 682 N.W.2d at 161.

Bulen also argues that, because there were multiple references to the incidents that made up the relationship evidence, the potential for prejudice was increased. We disagree. The incidents were referred to by several witnesses. Z.B. testified about the incidents. T.B. testified about the incidents she witnessed and provided a timeframe for the incidents. Deputy DeRosier testified about Z.B.'s description of the incidents to him, which was relevant to Z.B.'s credibility. Bulen himself described the incidents on direct examination, and, in cross-examination of Z.B., brought out the incident of Z.B. having been dragged from his bed, an incident that Bulen now complains of, which was not introduced by the state at trial. Because each reference to the incidents constituting relationship evidence had a separate purpose and because the district court minimized any prejudice by cautioning the jury that the relationship evidence was offered for the limited

purpose of assisting the jury in determining whether appellant committed the acts with which he was charged, we conclude that the multiple references to the relationship evidence was not unfairly prejudicial.

II. The district court did not err in sentencing Bulen.

Bulen argues that, because the jury did not make a specific finding that the first-degree sexual conduct occurred after August 2006, the district court erred by sentencing him to 156 months, which is within the presumptive sentencing range under the sentencing guidelines that became effective on August 1, 2006. Bulen argues that his sentence should be reduced to 144 months, the statutorily mandated minimum sentence for first-degree criminal sexual conduct, which was adopted by the legislature effective August 1, 2000.

The district court instructed the jury that, in order to find Bulen guilty of first-degree criminal sexual conduct, it would have to find that "some of [Bulen's] acts took place on various dates between April 2004 and April 2008 in Lake County." But the jury was not asked to find specifically that any acts occurred after August 1, 2006.

The maximum sentence a judge may impose is one based solely on facts admitted or found beyond a reasonable doubt by a jury. *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 2537 (2004). This rule also applies to situations in which the presumptive sentence depends on a fact not found by the jury. *State v. DeRosier*, 719 N.W.2d 900, 903 (Minn. 2006) (involving application of a presumptive sentence that was dependent on the date the offense of criminal sexual conduct occurred). The supreme court held that, "[i]f the determination of which presumptive sentence applies depends on

a fact issue," the jury must decide the issue. *Id.* The right to a jury determination of when an offense occurred may not be waived through a defendant's failure to request such a determination. *Id.* at 903-04. Under *DeRosier*, the district court's independent determination that acts of first-degree criminal sexual conduct occurred after August 1, 2006, is a violation of *Blakely*. *Id.* at 903.

But *Blakely* violations are examined under a harmless-error standard. *State v. Chauvin*, 723 N.W.2d 20, 30 (Minn. 2006) (citing *Washington v. Recuenco*, 548 U.S. 212, 221, 126 S. Ct. 2546, 2553 (2006)). An error is harmless if there is no reasonable doubt that the result would have been the same if the error had not occurred. *DeRosier*, 719 N.W.2d at 904.

In this case, there is overwhelming evidence that the offense occurred after August 1, 2006. Z.B. testified that the *first* of many occurrences of anal intercourse took place when he was in the eighth or ninth grade, which, he testified, would have been at the end of 2006 to sometime in 2007. T.B. testified that the incident in which Bulen sat on Z.B. and slapped him occurred in the summer of 2007, and Z.B. testified that at the time of that incident the oral sex had started but the anal sex had not started. Z.B. testified that the last act of anal intercourse took place only a couple of months before the cell phone incident, and T.B. testified that the cell phone incident occurred on March 20, 2008. T.B. testified that she obtained an order for protection on April 10, 2008. DeRosier testified that Z.B. reported to him that the last act of anal intercourse occurred a couple of months before T.B. obtained the April 2008 order for protection, and the last act of fellatio occurred a couple of weeks before T.B. obtained the April 2008 order for protection. If

the jury had been asked whether first-degree criminal sexual conduct occurred after August 1, 2006, the record would support only an affirmative answer. We conclude, therefore, that the *Blakely* error was harmless beyond a reasonable doubt, and the district court did not err in applying the 2006 sentencing guidelines.

III. Bulen's pro se supplemental brief does not raise any issues meriting relief on appeal.

In a pro se supplemental brief, Bulen asserts that his defense counsel was ineffective and that he is the victim of "political influence," based on many alleged facts that are outside of the record. Bulen's brief does not provide any citations to the record or to legal authority, or to any legal argument. Issues not briefed on appeal are waived. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). And an assignment of error based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006) (citation omitted). Because no prejudicial error is obvious based on the record, we decline to address Bulen's arguments. We note, however, that Bulen's complaints about counsel's failure to (1) move for a change of venue, (2) subpoena all witnesses Bulen suggested, (3) object more at trial, (4) pursue Bulen's suggested lines of cross-examination of witnesses, and (5) inform Bulen of his right to delay allocution until the sentencing hearing, relate primarily to trial tactics that lie within the proper discretion of trial counsel and will not be reviewed later for competence. *See State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999) ("What evidence to present to the jury, including which defenses to raise at trial

and what witnesses to call, represent an attorney's decision regarding trial tactics which lie within the proper discretion of trial counsel and will not be reviewed later for competence.").

Affirmed.