STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1872

State of Minnesota,
Respondent,

vs.
David Alexander Schill, Jr.,
Appellant.

Filed December 9, 2019
Affirmed
Ross, Judge

Polk County District Court
File No. 60-CR-17-2089

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, Crookston, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Ross, Judge; and Reilly, Judge.

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

ROSS, Judge

The state charged David Schill with felony domestic assault for punching his fiancée. The district court admitted as trial evidence prior criminal complaints against Schill and convictions for domestic-conduct-related offenses, and it found Schill guilty. It departed upward from the sentencing guidelines and imposed a 48-month prison term.

Schill asks us to reverse his conviction and sentence, arguing that the district court improperly relied on inadmissible hearsay and violated his right to an aggravated-sentence trial. Because Schill waived his evidentiary objections at the bench trial, because no inadmissible evidence was essential to the district court's finding of an aggravating sentencing factor, and because the district court's sentencing procedure did not violate Schill's Sixth Amendment rights, we affirm.

FACTS

The state charged David Schill with felony domestic assault for striking his fiancée, and Schill waived his right to a jury trial. The prosecutor offered evidence of six prior criminal complaints and convictions against Schill involving previous girlfriends. The district court asked Schill's counsel if Schill had any objection to the evidence, and the answer was no with an explanation indicating that Schill had strategic reasons for not opposing the evidence. The district court admitted the complaints and convictions as relationship evidence involving other women and as evidence of domestic conduct under Minnesota Statutes section 634.20 (2016).

Both Schill and the alleged victim, T.S., testified at the trial. The district court considered the evidence and then issued as its factual findings a narrative unsuitable for paraphrasing:

> This criminal proceeding arises out of an incident which occurred on or about October 5, [2017], in Crookston, Polk County, Minnesota.
>
> It was mid-afternoon, the weather was mild, and David Schill was released from jail. He struck off down the street to his apartment – the same apartment he shared with his *then*

fiancé[e]: [T.S.]. Before his short stint back at the NWRCC, he gave her an engagement ring and pledged her his troth. But when he arrived, he found she was gone – her belongings had been removed, and she was at her friend Scott Wikstrom's apartment. Schill walked over to Wikstrom's apartment and found his fiancé[e] – they both left the apartment hand in hand – off to experience life together and drink heavily. Things were back to normal.

But before the party could begin, Schill needed cash. He had coins, but what he needed was *paper* cash – to allow for transactional ease at the liquor store, and a simpler mode of monetary transit. So he took his coin jar to Walmart and ran it through the money-changing machine. With the cash now pocketed, Schill and [T.S.] headed over to I.C. Muggs to get liquored up on some Earthquakes. To get from Walmart to I.C. Muggs, one has to walk across the Walmart parking lot. During this trek across blacktop and painted lines, Joshua Plante, a Corporal at the NWRCC, recognized the Defendant and observed the pair's conduct together.

At the liquor store they purchased a four-pack of Earthquakes – a 12% ABV High Gravity Lager that has been described [by an outside source] as something that will get you "tore out of the frame" one-hundred percent of the time. Loaded for action, and ready for anything, they headed back to their apartment. Again, another person from the NWRCC – Correctional Officer Melanie Lessard, recognized the Defendant and observed the pair to be "getting along just fine."

To get to their apartment on South Minnesota Street from I.C. Muggs, requires walking down South Main Street[.] Along this stretch of sidewalk near the 300th block, something happened, and someone *snapped*. [T.S.] was punched in the temple, kneed to the ground, and struck in the breast. But she didn't call the cops and she didn't go to the hospital. Instead, she returned with Schill back to their apartment to drink the Earthquakes. And that's what they did – four total, two apiece, and split right down the middle.

In the apartment, Schill and [T.S.] drank and talked together. But when he explained his plan to move to California – a place that was warmer and would possibly treat him better,

> she became irate and some sort of altercation erupted. Both parties engaged in this brawl, with Schill claiming a defensive posture. But wanting sleep and not war, Schill retreated into bed, where he heard [T.S.] leave the apartment at 9:30-10:00. When she was gone, he found her engagement ring on the television stand. Their relationship was officially over.
>
> [T.S.] left the apartment to go to Riverview Hospital, which was a short walk down the street. After visiting the hospital, she called her friend Bryan Suggs at 12:30 a.m. to get a ride to Scott Wikstrom's apartment. Nearly forty hours later, she reported to the police that Schill had assaulted her. And so commenced this case.

The district court found Schill guilty of felony domestic assault. It credited T.S.'s testimony and found Schill's version not believable because of inconsistencies between his testimony and injuries and because of his history of domestic abuse.

Schill waived his right to a sentencing jury. The state moved for an upward sentencing departure based on aggravating factors, arguing that, like one of his previous victims, T.S. was injured by his attack and that Schill was a "career offender." The state supported its argument with criminal complaints, court minutes, warrants of commitment, and other records related to several of Schill's prior convictions. The district court departed upward from the sentencing guidelines and sentenced Schill to a 48-month prison term.

Schill appeals his conviction and sentence.

D E C I S I O N

Schill asks us to reverse his conviction, arguing that the district court erred by admitting prior criminal complaints containing testimonial hearsay in violation of the Confrontation Clause, and by admitting his prior convictions as evidence of "domestic conduct" under Minnesota Statutes section 634.20. He argues alternatively that we should

reverse his sentence and remand for a new sentencing trial, maintaining that the district court erred at the sentencing trial by relying on inadmissible evidence to determine the aggravating factors and by failing to comply with the requisite procedures. Neither argument supports reversal.

I

Schill challenges the district court's admission of evidence at his trial. He focuses on six criminal complaints containing testimonial hearsay and records of Schill's prior convictions and sentences submitted as evidence of domestic conduct. On appeal, we generally review evidentiary decisions for an abuse of discretion. *State v. Burrell*, 772 N.W.2d 459, 465 (Minn. 2009). And where, as here, the appellant failed to object to the evidence during trial, we generally review for plain error. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). But the state argues that we should refuse to apply even the plain-error test because Schill did not merely fail to object to the evidence he now challenges; he agreed to the admissibility of the evidence as part of his defense strategy. Our review of the record and the controlling authority helps frame the state's position.

The state contends that Schill waived—not just forfeited—his evidentiary objections as a matter of trial strategy. Waiver and forfeiture are distinct concepts; forfeiture is the "failure to make the timely assertion of a right," while waiver is the "intentional relinquishment or abandonment of a known right." *State v. Beaulieu*, 859 N.W.2d 275, 278 n.3 (Minn. 2015) (quoting *United States v. Olano*, 507 U.S. 725, 733, 113 S. Ct. 1770, 1777 (1993)). When a right has been forfeited by the failure to assert it, courts review the denial of that right for plain error. *Id.* at 279. But at least under the

United States Supreme Court's development of plain-error review, when a party has instead voluntarily waived a right, there is no "error" to be reviewed, plain or otherwise. *See Olano*, 507 U.S. at 732–33, 113 S. Ct. at 1777 ("Deviation from a legal rule is 'error' unless the rule has been waived.").

The record supports the state's theory that Schill did not merely forfeit any evidentiary challenges by not objecting at trial; he waived them by deliberately agreeing to admissibility. The prosecutor indicated that he intended to admit five prior "incidents" as evidence of domestic conduct under Minnesota Statutes section 634.20. Schill's attorney gave the following explanation responding to the district court's inquiry about Schill's position on admissibility:

> We took no position on that, Your Honor. And as [the prosecutor] is noting, the defense is potentially seeking to introduce a Domestic Assault conviction of the victim against the Defendant under 634.20, and we will not oppose their 634.20 submission . . . . And so we believe that there would be enough relevance for you to permit that prior conviction . . . to potentially be admitted also.

The prosecutor then moved to introduce six exhibits (Exhibits 10–15) containing various criminal complaints, warrants of commitment, court minutes, and a plea petition. Before admitting Exhibits 10 and 11, the court specifically asked if the defense had any objection, to which Schill's counsel responded, "No." Likewise, when asked about and shown Exhibits 12 through 15, which included criminal complaints against Schill, counsel stated, "I believe the Court has previously ruled that they're going to be admissible, so there's no objection." It is evident that Schill did not merely fail to object to the evidence, he intentionally allowed the evidence as a trade-off for a key component of his defense

strategy. His response reveals his particular reason for not opposing the state's exhibits as evidence—he was planning to rely on a prior conviction *of the victim* to show her hostile domestic conduct toward Schill, bolstering his account that she, not Schill, had been the aggressor in the episode for which Schill was on trial.

The state's accurate characterization of Schill's waiver does not technically end the analysis, however, because the state supreme court continues to allow for review of seemingly waived, invited errors under the plain-error standard. *See State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012) ("The invited error doctrine does not apply . . . if an error meets the plain error test."). But the accurate characterization does *practically* end the analysis in this case. That is because, "[e]ven if [the] three elements [of plain error] are met, this court has discretion whether to address the error to ensure the fairness and integrity of the judicial proceedings," *State v. Smith*, 819 N.W.2d 724, 730–31 (Minn. App. 2012), *aff'd*, 835 N.W.2d 1 (Minn. 2013), and the supposed error in Schill's trial strategy not to object to evidence in order to develop defense testimony and argument does not implicate the fairness and integrity of the proceedings. The supreme court reached a similar conclusion in a different case, albeit on the third plain-error prong. *See State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007) (holding that a defendant's trial strategy not to object to evidence in order to develop defense testimony and argument "does not fall within the plain error exception to the invited error doctrine" because it precluded the defendant from "establish[ing] that his substantial rights were violated by the admission of the . . . evidence.").

It turned out that Schill's implicit evidentiary quid pro quo strategy failed to discredit T.S. as much as he had hoped. Having placed his bet using the parties' competing prior conduct as his bargaining chip, Schill cannot challenge the exchange as unfair after his gamble failed to win him the pot. He is essentially urging reversal based on the district court's decision not to overrule his own tactical objectives and evidentiary concessions. But as the supreme court has put it, "We do not agree that the district court must, or even should, interfere with the trial strategy of the defendant. To act *sua sponte* here would risk highlighting or enforcing rights that the defendant had, for tactical reasons, decided to waive." *State v. Washington*, 693 N.W.2d 195, 205 (Minn. 2005). By intentionally choosing not to object to the evidence during the trial as a matter of deliberate strategy, Schill effectively surrendered his chance to prevail on appeal.

II

Schill argues next that the district court's sentencing procedures violated his Sixth Amendment rights because the district court relied on inadmissible hearsay to find the aggravating factors to justify a departure. He also argues that the sentencing process failed to follow the procedural requirements of Minnesota Rule of Criminal Procedure 26.01 and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). We ordinarily review sentencing decisions for an abuse of discretion. *State v. Soto*, 855 N.W.2d 303, 307–08 (Minn. 2014).

Schill did not object to the alleged hearsay at the sentencing hearing. But unlike his decision not to object to this evidence during the guilt phase of the trial, his failure to object at the sentencing hearing was not part of a deliberate trial strategy. We will therefore review

for plain error. *See Beaulieu*, 859 N.W.2d at 279. We will consider reversing under this standard only if an appellant shows that there was an error, the error was plain, and the error affected his substantial rights. *State v. Sanchez-Sanchez*, 879 N.W.2d 324, 328 n.2, 330 (Minn. 2016). An error affects an appellant's substantial rights if there is a reasonable likelihood that it substantially affected the outcome. *State v. Rossberg*, 851 N.W.2d 609, 618 (Minn. 2014). If the appellant establishes these three elements, still we will not reverse a plain error unless we also conclude that it is necessary to ensure fairness and the integrity of the judicial proceedings. *Id*.

We need not decide whether the district court plainly erred by relying on hearsay because, even assuming plain error, Schill has not established that his substantial rights were affected. The district court found as aggravating factors both that Schill's prior and current convictions were for offenses that resulted in injuries to his victims under Minnesota Sentencing Guidelines section 2.D.3.b(3) (Supp. 2017), and that Schill is a repeat offender under Minnesota Statutes section 609.1095, subdivision 4 (2016). Because the district court clarified that it was basing its departure decision on "both, or either" of the aggravating factors, we will affirm the sentence if the unchallenged evidence supports either of the aggravating factors.

The largely unchallenged, admissible evidence of Schill's prior convictions supports the district court's finding that Schill is a repeat offender; Schill's responsive sentencing memorandum acknowledged, "Mr. Schill does not deny the existence of the requisite number of prior felonies." The repeat-offender statute allows the sentencing court to impose an aggravated sentence "up to the statutory maximum sentence if the factfinder

determines that the offender has five or more prior felony convictions and that the present offense is a felony that was committed as part of a pattern of criminal conduct." Minn. Stat. § 609.1095, subd. 4. It is undisputed that Schill has five prior felony convictions. A pattern of criminal conduct may be shown through evidence of conduct "similar, but not identical, in motive, purpose, results, participants, victims, or other shared characteristics," including evidence of past felony convictions. *State v. Henderson*, 706 N.W.2d 758, 761 (Minn. 2005) (quotation omitted). Any findings that go beyond the fact of a prior conviction must be proved beyond a reasonable doubt. *Id*. at 762.

Schill insists that there is insufficient evidence to show a pattern of criminal conduct because the fact that he was convicted does not show such a pattern and the strongest supporting facts are contained within inadmissible hearsay evidence detailing his conduct in those cases. Schill is correct that the fact of a prior conviction, by itself, ordinarily does not establish a pattern of criminal conduct. *State v. McClenton*, 781 N.W.2d 181, 193 (Minn. App. 2010), *review denied* (Minn. June 29, 2010). But in this case, detailing the facts underlying his convictions is not necessary because the nature of his offenses, by itself, is sufficient to show a pattern. Schill's present offense and prior convictions necessarily show a pattern of domestic conduct. His present conviction of felony domestic assault parallels his five prior felony convictions, all of which constitute domestic conduct as defined in Minnesota Statutes section 634.20. *See* Minn. Stat. §§ 609.2242, subd. 4 (2014 & 2016), .224, subds. 1, 4(b) (2008, 2010 & 2012), .749, subds. 2, 4(a) (2008); *see also* Minn. Stat. § 518B.01, subd. 2(2) (2016) (defining "domestic abuse" as used in section 634.20). It was not the fact of Schill's convictions alone that enabled the district court to

find a pattern of criminal conduct. Rather, the elements necessarily proved by virtue of the convictions establish similar "domestic conduct" sufficient to demonstrate a pattern of criminal conduct. The district court had ample admissible evidence to find that the repeat-offender aggravating factor is met. The upward departure stands.

Schill also argues that the district court's sentencing procedure violated his Sixth Amendment rights because he did not receive a proper sentencing trial outlined in Minnesota Rule of Criminal Procedure 26.01 and that this constitutes a structural error necessitating a new sentencing trial. We reject the argument.

When an appellant maintains that the district court failed to follow rule 26.01 procedures, we review unobjected-to errors for plain error. *See State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016) (reviewing error in a "trial to the court" under rule 26.01, subdivision 4). The same standard applies when the challenge is couched in constitutional terms. *See State v. Tscheu*, 758 N.W.2d 849, 863 (Minn. 2008) (applying plain-error analysis to constitutional challenge). We see no error. Schill received a proper sentencing trial under the rule, which provides, "The defendant and the prosecutor may agree that a determination of . . . the existence of facts to support an aggravated sentence . . . may be submitted to and tried by the court based entirely on stipulated facts, stipulated evidence, or both." Minn. R. Crim. P. 26.01, subd. 3(a). A stipulated fact is an agreement between opposing parties regarding an event or circumstance. *Dereje v. State*, 837 N.W.2d 714, 720 (Minn. 2013). For a proper trial on stipulated facts, the parties cannot submit evidence of contradictory versions of events, because this requires the court to adopt one party's version and reject the other's. *Id*. at 721.

Schill maintains that he never agreed to a stipulated-facts sentencing trial. But it was Schill's counsel who suggested handling the sentencing trial through briefing. The district court expressly offered Schill the opportunity to present evidence, but Schill declined, answering, "No, Your Honor. I think my argument is pretty well contained in my brief . . . ." Schill's agreement to proceed on stipulated facts is clear from the record.

Schill's hearing complied with the requirements for a trial on stipulated facts because he tacitly stipulated to the facts presented by the state by not disputing them. The state submitted a memorandum of law in support of its motion for an aggravated sentencing departure, attaching multiple exhibits providing details about Schill's prior convictions. Schill filed only a two-page reply memorandum that disputed none of the facts about his prior convictions and which argued only that those facts were insufficient to establish the aggravated sentence. The district court did not have to choose between competing facts. The process met the requirements of a rule 26.01 trial.

Schill argues last that the district court was required to issue written findings of fact regarding the aggravating factors and that the failure to do so requires a remand. The controlling rule provides that the district court must, after making its general finding, "make findings in writing of the essential facts." Minn. R. Crim. P. 26.01, subd. 2(b). The purpose of written findings is to assist the appellate court in reviewing the conviction. *State v. Scarver*, 458 N.W.2d 167, 168 (Minn. App. 1990). The district court did not issue written findings explaining why it found the aggravating factors but merely indicated on the record that it was adopting the written arguments presented by the state. The district court should have carefully followed the rule. But because the state's memorandum rested on evidence

provided contemporaneously, the district court's oral explanation provides the means for us to examine its reasoning. Schill has identified no plain error that affected his substantial rights.

Affirmed.