STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0928

State of Minnesota,
Respondent,

vs.

Moses Louis Hubert,
Appellant.

Filed June 7, 2021
Affirmed in part, reversed in part, and remanded
Reilly, Judge

Hennepin County District Court
File No. 27-CR-19-8671

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Reilly, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

Appellant challenges his conviction for first-degree assault, arguing that the evidence was insufficient to sustain the jury's guilty verdict, the district court erred in its evidentiary rulings, and he is entitled to resentencing because of the revised Minnesota

Sentencing Guidelines. We affirm appellant's conviction. But we remand to the district court for resentencing.

FACTS

This appeal arises out of appellant Moses Louis Hubert's conviction for first-degree assault.[1] In March 2019, appellant lived in an apartment building down the hall from S.W. One evening, S.W. and his then-girlfriend D.O. were in S.W.'s apartment when appellant knocked on the door. S.W. let appellant into the apartment. D.O. described appellant as "loud" and "very aggressive," and testified that he was carrying a firearm and a bottle of liquor. Appellant's presence in the apartment with a firearm scared D.O. S.W. placed appellant's firearm on the kitchen counter, and appellant and S.W. began speaking.

Appellant turned to D.O., said some "disrespectful things" to her, and "smacked [her] on [her] rear twice, skin to skin." S.W. and appellant began struggling. During the struggle, appellant hit D.O. twice on the left side of her face with a closed fist. D.O. immediately felt pain in her head and felt dizzy. She also "saw stars" and noticed that her "ears started ringing." D.O. began "making a lot of noise" because she was in pain, and her boyfriend, S.W., hit her on the back of her head and told her to be quiet. Appellant and S.W. continued struggling. Appellant punched S.W. and bit him on the chest. Appellant then grabbed the firearm off the kitchen counter and hit S.W. twice with the butt of the gun above his eye. S.W. pushed appellant out of the apartment.

[1] Appellant does not challenge his conviction for first-degree burglary.

S.W. and D.O. called the police, who came to S.W.'s apartment. Police officers saw that S.W. was "covered in blood," had blood over his left eye, and had a gash on the palm of his hand. They also noticed that D.O. was beginning to develop bruises on the side of her face. D.O. told officers that appellant was responsible for their injuries. Officers noticed "signs of struggle" in the apartment, including a "blood trail" on the floor, blood on the bedsheets, and blood on the kitchen countertops and on the kitchen floor. Officers found a magazine clip for a rifle and "ammunition scattered throughout the floor and then inside the magazine."

The state charged appellant by amended complaint with first-degree assault, great bodily harm against D.O.; second-degree assault, dangerous weapon against S.W.; first-degree burglary against S.W.; and two counts of threats of violence against S.W. and D.O. Following a jury trial, the jury found appellant guilty of first-degree assault against D.O. and first-degree burglary against S.W. The jury acquitted appellant of the remaining charges. The district court sentenced appellant to 94 months in prison for the assault conviction and 58 months in prison for the burglary conviction. This appeal follows.

DECISION

I. Sufficient evidence supports appellant's first-degree-assault conviction.

Appellant challenges the sufficiency of the evidence for his first-degree-assault conviction. We review a sufficiency-of-the-evidence challenge by carefully examining the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to support the conviction. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012). We assume that "the jury believed the state's witnesses and disbelieved any

evidence to the contrary." *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). We will not disturb a guilty verdict "if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense." *Ortega*, 813 N.W.2d at 100. We review de novo whether an appellant's conduct satisfies the statutory definition of an offense. *State v. Hayes*, 826 N.W.2d 799, 803 (Minn. 2013).

The jury found appellant guilty of first-degree assault under Minn. Stat. § 609.221, subd. 1 (2018). Under this statute, "[w]hoever assaults another and inflicts great bodily harm" is guilty of first-degree assault. Minn. Stat. § 609.221, subd. 1. "Great bodily harm" is "bodily injury [1] which creates a high probability of death, or [2] which causes serious permanent disfigurement, or [3] which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or [4] [which causes] other serious bodily harm." Minn. Stat. § 609.02, subd. 8 (2018); *see also State v. Moore*, 699 N.W.2d 733, 738 (Minn. 2005) (adding numerals to identify four alternative definitions).

Appellant argues that respondent failed to prove that D.O. suffered great bodily harm. An injury that causes "protracted loss or impairment of the function of any bodily member or organ" constitutes great bodily harm. Minn. Stat. § 609.02, subd. 8. While the statute does not specifically define the term "protracted," we understand it to mean drawn out, prolonged, or lengthened in time. *The American Heritage Dictionary* 1417-18 (5th ed. 2011). Whether an injury constitutes a particular degree of bodily harm is a question for the jury. *Moore*, 699 N.W.2d at 737 (Minn. 2005) (noting that whether an injury constitutes great bodily harm is a jury question).

Here, the record shows that appellant punched D.O. twice on the left side of her face with a closed fist. D.O. immediately developed pain in her head and felt dizzy. Several days later, D.O. continued to have headaches and pain, and felt her jaw "starting to lock." D.O. had trouble opening her mouth and was in "excruciating pain." D.O. could not close her jaw properly to eat and noticed "blood and pus" coming out of her mouth. D.O. made several visits to the emergency room and to her primary care doctor.

Respondent called D.O.'s doctors at trial to testify about her injuries. Dr. Marc Salita was D.O.'s primary-care doctor and treated her from April to October 2019 for her jaw pain. Dr. Salita testified that D.O. had trouble opening her jaw and "just couldn't open it up all the way due to pain." D.O.'s condition worsened and she required surgery. Dr. Luke McMahon, an oral and maxillofacial surgeon, testified about this surgery. Dr. McMahon stated that a CT scan revealed that D.O. had "a large area of fluid collection, which is consistent with abscess or infection, and that's typically a surgical disease that requires draining or removing the abscess." This type of infection limits a patient's "ability to either speak or eat" and can spread to the brain if left untreated. Dr. McMahon noticed that D.O. had swelling on the left side of her face and drainage coming out of her mouth. Dr. McMahon performed the surgery to drain the fluid causing D.O.'s infection. D.O. remained in the intensive-care unit of the hospital for two weeks following the surgery. In response to a question from counsel, Dr. McMahon agreed that "blunt force trauma" could have caused D.O.'s injuries, and that her inability to open her mouth was "consistent with" having been struck with a closed fist on the left side of her face.

D.O. continued to visit Dr. Salita and Dr. McMahon. By October, which was nearly eight months after the assault, D.O. was still reporting that she had muscle spasms and discomfort along the left side of her face. Counsel asked Dr. McMahon if he had an opinion about how long D.O.'s jaw issue would last. The doctor responded, "At this point, being that the patient, from my last exam, was six months out from surgery, I don't know that there will be a significant improvement in the jaw range of motion, based on experience." Dr. McMahon noted that together with the jaw issue, D.O. might have "complications related to muscular discomfort or muscle spasm."

D.O. testified that she continues to have lasting effects from her injury. D.O. stated she "can't talk for long periods of time without taking a muscle relaxer," cannot open her mouth as much as she used to, has headaches "[a]t least four times a week," and experiences "[t]remors on [her] face" and "spasms." D.O. did not experience any of these physical effects before the assault. Based on the record, a jury could reasonably infer that D.O. suffered great bodily harm because her injury caused a protracted loss or impairment of the function of her mouth. *See State v. Russell*, 503 N.W.2d 110, 114 (Minn. 1993) ("In making its factual determination, the [fact-finder] was entitled to make reasonable inferences from the evidence, including inferences based on their experiences or common sense.") (quotation omitted).

Appellant argues that even if D.O. suffered great bodily harm, respondent failed to prove that appellant was the one who inflicted it. This court will not disturb a guilty verdict if the jury could "reasonably conclude that the defendant was guilty of the charged offense." *Ortega*, 813 N.W.2d at 100. While appellant argues that the testimony could

have been interpreted in an alternate way, it is not within the scope of this court's review to reweigh the evidence and draw different conclusions. *See State v. Robinson*, 536 N.W.2d 1, 2 (Minn. 1995) (stating that appellate courts do not reweigh evidence). Given the evidence presented, which we view in the light most favorable to the guilty verdict, we conclude that sufficient evidence supports appellant's first-degree-assault conviction.

II. The district court did not abuse its discretion by limiting alternative-perpetrator evidence.

Appellant argues that the district court improperly excluded evidence suggesting that an alternative perpetrator caused D.O.'s injuries. We review a district court's decision to exclude alternative-perpetrator evidence for an abuse of discretion. *State v. Woodard*, 942 N.W.2d 137, 141 (Minn. 2020). If a reviewing court determines that the district court improperly excluded evidence, "the conviction will still stand if the error was harmless beyond a reasonable doubt." *State v. Sailee*, 792 N.W.2d 90, 93 (Minn. App. 2010), *review denied* (Minn. March 15, 2011). "The error is harmless if the jury's verdict is surely unattributable to the error." *Id*.

A criminal defendant has a due-process right under the United States and Minnesota Constitutions to be treated fairly and to present a complete defense. *See* U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7; *see also State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992). This includes the right "to present evidence showing that an alternative perpetrator committed the crime with which the defendant is charged." *Sailee*, 792 N.W.2d at 93 (quotation omitted). A criminal defendant may present evidence of other crimes, wrongs, or bad acts committed by the alleged alternative perpetrator to "cast reasonable doubt upon

the identification of the defendant as the person who committed the charged crime." *State v. Jones*, 678 N.W.2d 1, 16-17 (Minn. 2004). This evidence is often called "reverse-*Spreigl*" evidence. *Id*. at 16; *see also State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965). Such evidence "is admissible if it has an inherent tendency to connect the alternative party with the commission of the crime." *Jones*, 678 N.W.2d at 16 (citations omitted). But the district court may limit such testimony to "ensure that the defendant does not confuse the jury with misleading inferences." *Sailee*, 792 N.W.2d at 93.

Appellant sought to assert an alternative-perpetrator defense. Appellant alleged that S.W. caused D.O.'s injuries in a domestic-violence attack. Appellant sought to introduce evidence of two orders for protection in 2013 and 2014; no-contact orders; and domestic assaults from 2012 to 2016; the incident in March 2019, when S.W. hit D.O. on the back of her head to stop her from screaming after appellant punched her; an incident in June 2019, when S.W. slapped D.O. in the face; and an incident in August 2019, when S.W. violated a domestic abuse no-contact order and hit D.O. in the hip with his car. The district court partially granted appellant's motion and permitted appellant to present evidence that S.W. hit D.O. on the back of the head in March 2019, and slapped her in the face in June 2019. That said, the district court prohibited the defense from presenting the rest of the evidence from 2012 to 2016, or the August 2019 violation.

A defendant seeking to introduce reverse-*Spreigl* evidence must first connect the alternative perpetrator to the actual commission of the crime. *Jones*, 678 N.W.2d at 16. The proponent must then establish: "(1) clear and convincing evidence that the alleged alternative perpetrator participated in the reverse-*Spreigl* incident; (2) that the reverse-

Spreigl incident is relevant and material to defendant's case; and (3) that the probative value of the evidence outweighs its potential for unfair prejudice." *Id*. at 16-17. "Failure to satisfy any part of this test results in the evidence being inadmissible." *State v. Gutierrez*, 667 N.W.2d 426, 437 (Minn. 2003).

Here, the district court did not abuse its discretion by limiting the alternative-perpetrator evidence. The evidence must be admissible under the rules of evidence. *State v. Nissalke*, 801 N.W.2d 82, 102 (Minn. 2011). The district court noted that the incidents between 2012 and 2016 were irrelevant because they were "remote in time" and were not similar to the charged crime. The district court also determined that the August 2019 incident was "not the same modus operandi at all" because it involved S.W. hitting D.O.'s hip with his car. And the district court determined that evidence of S.W.'s domestic-abuse crimes against D.O. were unduly prejudicial and that the probative value did not outweigh the prejudicial effect. "[E]vidence of other crimes, wrongs, or acts separate from the crime charged is not admissible to 'prove the character of a person in order to show action in conformity therewith.'" *State v. Swaney*, 787 N.W.2d 541, 557 (Minn. 2010) (quoting Rule 404(b)). The district court noted that evidence of domestic abuse between 2012 and 2016 was "impermissible character evidence" and "the fact that [S.W.] has [hit D.O.] before is propensity evidence" and was therefore inadmissible. Because the proffered evidence was inadmissible under the rules of evidence and the prejudicial effect exceeded any probative value, the district court did not deny appellant a meaningful right to present a complete defense by excluding it.

And the record shows that the district court did permit the defense to pursue the alternative-perpetrator theory. For example, D.O. testified that after appellant struck her on the face, she began "making a lot of noise." D.O. stated that S.W. then leaned over and hit her on the back of her head and told her to be quiet. D.O. testified that S.W. also "smacked" her in the face in June 2019 during an argument, when her face was "still tender" from surgery. Even with this evidence, the jury determined that appellant inflicted great bodily harm on D.O. Based on the evidence and on the district court's findings, we determine that the district court did not abuse its discretion in excluding the reverse-*Spreigl* evidence.

III. Appellant is entitled to resentencing.

Appellant argues that he is entitled to resentencing under the revised Minnesota Sentencing Guidelines. We review the district court's calculation of a defendant's criminal-history score for an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). But "[i]nterpreting the Minnesota Sentencing Guidelines presents a question of law, which we review de novo." *State v. Scovel*, 916 N.W.2d 550, 554 (Minn. 2018). When a defendant's incorrect criminal-history score increases the presumptive sentencing range, we remand the case for resentencing under the correct criminal-history score. *State v. Provost*, 901 N.W.2d 199, 202 (Minn. App. 2017).

"An offender's criminal history score is the sum of points from eligible [] prior felonies[,] custody status at the time of the offense[,] prior misdemeanors and gross misdemeanors[,] and prior juvenile adjudications." Minn. Sent. Guidelines 2.B. "If the

sum of the weights results in a partial point, the point value must be rounded down to the nearest whole number." *See* Minn. Sent. Guidelines 2.B.1.i. The sentencing guidelines were revised in 2019. "[T]he language concerning custody status points was modified to indicate that half a point, and not one point, should be assigned to an offender who commits an offense while on probation." *State v. Epps*, 949 N.W.2d 474, 488 (Minn. App. 2020), *review granted* (Minn. Nov. 25, 2020); *see also* Minn. Sent. Guidelines 2.B.2.a (Supp. 2019). "[T]his change to the sentencing guidelines is retroactive." *Epps*, 949 N.W.2d at 488 (citing *State v. Robinette*, 944 N.W.2d 242, 252 (Minn. App. 2020), *review granted* (Minn. June 30, 2020)); *State v. Kirby*, 899 N.W.2d 485, 489-90 (Minn. 2017) (noting that amelioration doctrine applies to modifications to guidelines).

We agree that this case must be remanded for resentencing. The district court sentenced appellant in 2019, for offenses which occurred in March 2019. The district court calculated the sentence using the 2017 sentencing guidelines. The district court sentenced appellant to 58 months in prison on the burglary charge and 94 months in prison on the assault charge. These sentences were within the presumptive sentencing range for an individual with appellant's criminal history score. Appellant received one custody-status point because he was on probation for a gross misdemeanor obstruction-of-legal-process conviction from September 2018 when he committed the offenses in this case. Under the revised sentencing guidelines, however, appellant would receive only one-half custody status point for his gross-misdemeanor charge, rather than a full point. Appellant is

therefore entitled to have his sentence recalculated using a correct criminal history score. We therefore remand for resentencing under the 2019 Minnesota Sentencing Guidelines.[2]

IV. Appellant has no right to relief on his pro se claims.

In a pro se supplemental brief, appellant substantially repeats the arguments of his principal brief. To the extent that appellant attempts to raise new issues, we find those issues forfeited because they are conclusory and unsupported by legal argument. *See State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (declining to address arguments raised in supplemental pro se brief that were "unsupported by any facts in the record" and contained "no citation to any relevant legal authority").

Affirmed in part, reversed in part, and remanded.

[2] Respondent urges us to defer making a decision until the Minnesota Supreme Court issues an opinion in *Robinette*, which is currently on appeal. We decline to do so. This court will follow published opinions of this court unless the supreme court announces a different rule of law. *See State v. Chauvin*, 955 N.W.2d 684, 694-695 (Minn. App. 2021) (recognizing "that a precedential opinion of this court has immediate precedential effect, which is not limited by the availability or grant of further appellate review"), *review denied* (Minn. Mar. 10, 2021).