STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0105

State of Minnesota,
Respondent

vs.

Curtis Lablanche Vanengen,
Appellant.

Filed December 19, 2022
Affirmed
Jesson, Judge

Hennepin County District Court
File No. 27-CR-21-6415

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

Michael O. Freeman, Hennepin County Attorney, Mark V. Griffin, Senior Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Gaïtas, Presiding Judge; Worke, Judge; and Jesson, Judge.

SYLLABUS

An aggravated sentence for criminal sexual conduct against a sleeping victim may be based on the offense occurring within the victim's zone of privacy when it is committed in the victim's own bedroom.

OPINION

JESSON, **Judge**

On a morning in October 2020, A.F. awoke in her own bed to appellant Curtis Lablanche Vanengen sexually penetrating her. Vanengen argues that the district court erred in admitting evidence of a similar prior incident between him and A.F. as relationship evidence at his trial. He also asserts that the district court abused its discretion by granting an upward durational departure at his sentencing hearing after the jury found the offense occurred in A.F.'s zone of privacy. Because the prior incident constituted appropriate relationship evidence and the district court acted within its discretion in granting the departure, we affirm.

FACTS

Respondent State of Minnesota charged Vanengen with one count of felony third-degree criminal sexual conduct against a physically helpless victim[1] based on an allegation that on October 10, 2020, Vanengen entered A.F.'s bedroom while she was sleeping and penetrated her vagina with his penis. The presumptive sentence for this offense with Vanengen's criminal-history score was 65 to 91 months' imprisonment. The state moved for a 29-month upward durational departure to 120 months' imprisonment. Vanengen pleaded not guilty to the offense and the matter proceeded to trial. The district court held a unitary trial on the allegations and, after the conviction, the aggravating factors that would warrant an upward durational departure.

[1] In violation of Minnesota Statutes section 609.344, subdivision 1(d) (2020).

The following facts summarize the evidence established at trial. The offense occurred at a residence in Minneapolis. The owner of the residence (the homeowner) often let people without a home rent a room or stay on one of her couches. The house was characterized by A.F. and other witnesses at trial as a restroom, gas station, or drug house because people were always coming in and out, rent was paid in varying amounts by each occupant, and no one had keys to the house. And it was common that individuals staying in the home would use drugs there.

In 2018, A.F. met the homeowner and rented a place to sleep on a couch in the house for a few months. Then, in March 2020, A.F. began renting an upstairs bedroom from the homeowner on a more permanent basis. Sometime after she moved in, A.F. met Vanengen because he frequently stayed on a couch on the upstairs level of the residence. Vanengen did not pay rent to stay at the residence, but he came and went as he pleased and was at the house about six days a week. The homeowner testifed that Vanengen was basically living at the house.

Vanengen and A.F. became friends, but there were differing accounts on whether there were romantic aspects to their friendship. A.F. testified that Vanengen sometimes would give her massages and they would occasionally fall asleep in her bed together after watching a movie, but they never kissed or had sex. A.F.'s housemate agreed with A.F. and testified that there were no romantic feelings between Vanengen and A.F. On the other hand, the homeowner said that A.F. and Vanengen acted like a couple—slept in the same bed, cuddled, and ran errands together.

Prior to the charged offense, a similar incident occurred between A.F. and Vanengen. According to A.F., she awoke in her bed to her hair getting pulled while Vanengen was moving her body, specifically her hips, in different positions, while he was under her covers in only his boxer shorts. She testified that it felt like Vanengen was trying to push his penis between her "butt cheeks" through his boxer shorts. A.F. reacted strongly and "made a huge fuss" about this incident because she felt violated. Specifically, A.F. yelled at Vanengen that he cannot come into her room while she was sleeping, that he violated her, and that he cannot touch women when they are sleeping. Her reaction was so loud, everyone in the house woke up and found out what had happened. A.F. asked the homeowner to kick Vanengen out of the house after this incident, but the homeowner did not kick him out, and the other housemates did not take the incident very seriously.

About six weeks later, A.F. awoke with her leggings pulled down and felt a penis penetrating her vagina. A.F. said that she felt Vanengen's penis behind her with her hand and pushed him out of her. A.F. abruptly left her bedroom in tears. A housemate saw Vanengen go into A.F.'s bedroom that morning, and the housemate confronted Vanengen after the offense took place and asked him why he did not stop when A.F. said no. According to the housemate, Vanengen replied, "[S]he didn't say no. She was sleeping and I put my dick in her."

During trial, the district court gave two limiting instructions for the prior-incident evidence. The first limiting instruction was given before A.F. testified about the prior act.

The second was read before jury deliberations:

> Receipt of testimony of conduct on a prior occasion. The state has introduced evidence of conduct by the defendant with [A.F.] on a prior occasion. As I told you at the time this evidence was offered, *it was admitted for the limited purpose of demonstrating the nature and extent of the relationship between the defendant and [A.F.]* in order to assist you in determining whether the defendant committed the act with which the defendant is charged in the complaint. The defendant is not being tried for and any [sic] may not be convicted of any behavior other than the charged offense. *You are not to convict the defendant on the basis of similar conduct on a prior occasion*.

The jury found Vanengen guilty of third-degree criminal sexual conduct against a physically helpless victim. The district court then instructed the jury to deliberate on whether the offense occurred in the victim's zone of privacy to determine the existence of an aggravating factor, which could be used to justify an upward durational departure from the sentencing guidelines. Vanengen argued to the jury that he was allowed in A.F.'s bedroom because the bedroom was "transient," and he was "regularly in that room." The jury found that the offense of criminal sexual conduct against a physically helpless person was committed in A.F.'s zone of privacy[2] because it occurred in a location in which she had an expectation of privacy.

Vanengen was sentenced to 120 months of imprisonment after the district court granted the state's request for an upward durational departure. The district court relied on the jury's zone-of-privacy finding and its evaluation that the "victim should have been able

[2] The district court provided the jury with the definition for zone of privacy—the interior of the home and the area that surrounds the victim's home.

to expect safety and security in her own home . . . considering that the prior incident took place, which should have given Mr. Vanengen more than enough warning that his . . . acts were uninvited and not wanted in any way."

Vanengen appeals.

ISSUES

I. Did the district court abuse its discretion when it admitted evidence of a similar prior incident between A.F. and Vanengen as relationship evidence?

II. Did the district court abuse its discretion when it granted an upward durational departure at sentencing based on the jury's finding that the offense occurred in A.F.'s zone of privacy?

ANALYSIS

I. The district court properly exercised its discretion when it admitted evidence of a prior incident between A.F. and Vanengen as relationship evidence.

Vanengen argues that the district court abused its discretion in admitting testimony regarding a prior incident between A.F. and himself because (1) it did not meet the elements of relationship evidence under Minnesota Statutes section 634.20 (2022) because A.F. and Vanengen were not household members, and (2) any probative value the evidence may have had was substantially outweighed by the danger of unfair prejudice.

Evidence of a defendant's prior acts of domestic conduct that may illuminate the history of the relationship between the accused and the alleged victim and place the crime charged in the context of their relationship may be admitted at trial. *State v. Zinski*, 927 N.W.2d 272, 278 (Minn. 2019); *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004).

Specifically, in a prosecution:

> Evidence of domestic conduct by the accused against the victim of domestic conduct, 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.

Minn. Stat. § 634.20. Evidence admitted pursuant to section 634.20 is commonly known as "relationship evidence."[3] *Zinski*, 927 N.W.2d at 273.

Here, for evidence of the prior act to have been admissible as relationship evidence, the incident must have been (1) domestic conduct by Vanengen (2) against a household member, and (3) its probative value could not have been substantially outweighed by the danger of unfair prejudice to Vanengen. Minn. Stat. § 634.20. Because the conduct alleged in the prior incident was not challenged, we turn to whether A.F. and Vanengen were household members under the statute and whether the probative value of the relationship evidence was substantially outweighed by the danger of unfair prejudice to Vanengen. The district court found that A.F. and Vanengen were household members and that the probative value of the relationship evidence was not outweighed by the danger of unfair prejudice.

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[3] This court has held that the relationship-evidence statute is not applicable outside of domestic-abuse prosecutions. *State v. McCurry*, 770 N.W.2d 553, 560 (Minn. App. 2009), *rev. denied* (Minn. Oct. 28, 2009). On appeal, the parties do not argue that the relationship-evidence statute should not have been used in the prosecution for criminal sexual conduct. As a result, we do not create an exception to the general rule but defer to the district court's application in a criminal sexual conduct case and the parties' concession of its use as such.

We review the district court's decision to admit relationship evidence for an abuse of discretion. *McCoy*, 682 N.W.2d at 161. And a district court abuses its discretion when its "ruling is based on an erroneous view of the law or is against logic and the facts in the record." *State v. Bustos*, 861 N.W.2d 655, 666 (Minn. 2015) (quotation omitted). This court "will reverse the district court's ruling if the error substantially influenced the jury's decision." *State v. Loving*, 775 N.W.2d 872, 879 (Minn. 2009).

We begin our review with an examination of the district court's household-member determination. A household member can be "persons who are presently residing together or who have resided together in the past." Minn. Stat. § 518B.01, subd. 2(b)(4) (2022). It is not disputed that A.F. was residing in the Minneapolis residence. The issue is whether Vanengen was too. According to trial testimony, Vanengen was sleeping on the couch in the upstairs area of the residence (on the same level as the bedroom A.F. was renting) about six nights per week, he did not pay rent, he came and went as he pleased, and the homeowner said that Vanengen was "basically living at the house." Additionally, the nature of the residence was such that the tenants or occupants would come and go as they pleased, rent was paid in varying amounts by each person, and no one had keys to the house. Given the nature of the residence, the type of occupants, and Vanengen's consistent presence at the household, the factual record supports the district court's finding that Vanengen was residing at the Minneapolis home.

Still, Vanengen argues that he did not reside at the house because he was not paying rent at the residence and had another place to stay, relying on *Elmasry v. Verdin*, 727 N.W.2d 163, 166 (Minn. App. 2007) (holding that persons may not be "residing

together" when one person is a guest or merely staying at another's home for a limited period of time). But *Elmasry* also held that residing is living in a given place for *some time*. 727 N.W.2d at 166. The testimony confirmed that Vanengen resided at the house because he had been living there for "some time." *Id.* And Vanengen himself relies upon his presence at the home when he asserts that he and A.F. had a consensual relationship—falling asleep in A.F.'s bed after watching movies, cuddling, and running errands together. In view of these facts, Vanengen met the statutory definition of a household member to A.F. *See* Minn. Stat. § 518B.01, subd. 2(b)(4). Thus, the district court did not abuse its discretion by concluding that Vanengen and A.F. were household members.

Nor did the district court err in weighing the probative value of this evidence. When balancing the probative value of the relationship evidence against potential for unfair prejudice to Vanengen, "unfair prejudice is [seen as] 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). In reviewing the district court's assessment in this regard, we recognize that there was likely some prejudice toward Vanengen from the admission of this prior incident because it has similarities to the charged offense: A.F. was asleep and in her bed. But "[a]ll evidence offered against defendants in criminal trials is prejudicial to some extent." *State v. Spaeth*, 552 N.W.2d 187, 195 (Minn. 1996). This does not mean that this prejudice substantially outweighed the relationship evidence's high probative value. As we will discuss in turn, its probative value was high, given the contradicting characterizations of Vanengen and

A.F.'s relationship. And in light of the limiting instructions that accompanied the minimal references to the prior incident, its prejudice to Vanengen was low.

The evidence's probative value was high because the prior incident provided relevant and material context into the boundaries set by A.F. with Vanengen and what Vanengen should have known to be acceptable, consensual contact.[4] *See State v. Lindsey*, 755 N.W.2d 752, 756 (Minn. App. 2008) ("Evidence that helps to establish the relationship between the victim and the defendant or which places the event in context bolsters its probative value."), *rev. denied* (Minn. Oct. 29, 2008). A.F.'s negative reaction to being woken up by Vanengen in his boxers while she was in her bed demonstrated these boundaries. She testified that she felt violated after this incident, and the homeowner reiterated that the entire household was aware that A.F. did not like that Vanengen came into her bedroom and into her bed without her knowledge or consent, because A.F.'s yelling woke up the entire household. The probative value of the prior incident serves to clarify the contradicting accounts of the relationship between Vanengen and A.F. by the witnesses and the parties. *See McCoy*, 682 N.W.2d at 161 (holding that evidence of domestic abuse that illuminates the history of the relationship between an accused and a victim is treated differently because it typically occurs in the privacy of the home, involves a pattern of activity that may escalate over time, and is often underreported).

[4] Vanengen argued that since he would give A.F. massages and that they would fall asleep together in her bed after watching a movie, the prior incident and the fact he was in her bedroom without her explicitly inviting him was within what was expected in their relationship.

Further, since this evidence was not emphasized by the state in its case and it was mitigated by the district court's cautionary instructions, there is no reasonable probability that the admitted evidence prejudiced Vanengen or significantly affected the verdict. *State v. Robinson*, 718 N.W.2d 400, 407 (Minn. 2006). Given that the prior incident was mentioned by only two of the eleven witnesses (A.F. and the homeowner), one time in the state's ten-page opening statement, and three times in the state's approximately 20-page closing argument, the prior incident was not a critical part of the state's theory of the case. And, since the district court gave two limiting instructions to the jury regarding the relationship evidence, instructing them to not use the prior incident to determine Vanengen's guilt, Vanengen's contention that the jury must have found him guilty because of the admission of the relationship evidence does not persuade this court. This is especially true when we are to assume the jury followed the limiting instructions "not to convict the defendant on the basis of similar conduct on a prior occasion." *State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005); s*ee State v. Ware*, 856 N.W.2d 719, 729 (Minn. App. 2014) (stating that a district court's limiting instruction mitigates the risk that a jury may give undue weight to relationship evidence).

In sum, the district court was within its discretion in admitting the prior incident as relationship evidence because A.F. and Vanengen were household members and the evidence's high probative value was not substantially outweighed by the danger of unfair prejudice.

II. The district court properly exercised its discretion when it imposed an upward durational departure at sentencing based on the offense having been committed within the victim's zone of privacy.

We review a district court's decision to depart from the presumptive guidelines sentence for an abuse of discretion. *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015). If the reasons given for an upward departure are legally permissible and factually supported by the record, the departure will be affirmed. *Id.* But if the district court's reasons for departure are improper or inadequate, the departure will be reversed. *Id.*

Before the district court may impose an upward departure, a jury must determine whether aggravating factors are present beyond a reasonable doubt. *See Blakely v. Washington*, 542 U.S. 296, 301 (2004); *see also State v. Shattuck*, 704 N.W.2d 131, 135 (Minn. 2005). And a single aggravating factor may support an upward sentencing departure. *Hicks*, 864 N.W.2d at 159. The Minnesota Sentencing Guidelines contain a nonexclusive list of aggravating factors that may be used as reasons for departure. Minn. Sent'g Guidelines 2.D.3 (2020). One of those factors is that "[t]he offense was committed in a location in which the victim had an expectation of privacy," also called the zone-of-privacy aggravating factor. Minn. Sent'g Guidelines 2.D.3.b.14. But even when the jury finds the presence of one of these factors, the district court must then determine that it constitutes a "substantial and compelling" circumstance that renders the offense significantly more serious than a typical offense. Minn. Sent'g Guidelines 2.D.1 (2020); *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017).

Turning to the circumstances here, the jury found that Vanengen committed the offense in A.F.'s zone of privacy because it occurred in a location in which she had an

expectation of privacy—her bedroom. The district court then determined that, due to this finding, the offense justified an upward departure because "the victim should have been able to expect safety and security in her own home."

Vanengen assigns three errors to these conclusions. First, he argues that the zone-of-privacy aggravating factor requires an *invasion* of a victim's privacy. *See State v. Johnston*, 390 N.W.2d 451, 457 (Minn. App. 1986) (explaining that a defendant is normally a stranger to the household where the crime was committed when an invasion of a victim's zone of privacy is used to justify a sentencing departure), *rev. denied* (Minn. Aug. 27, 1986).[5] Next, Vanengen argues that given he was not a stranger to the house or A.F.—indeed, they were friends—no zone of privacy existed here. To the jury, Vanengen argued that since A.F.'s room was "a pretty transient room," and that he was, in fact, "regularly in that room," his presence in her room when she was sleeping was "allowed" and, as a result, A.F. did not have a zone of privacy in her bedroom. But the jury rejected this argument and found that A.F. did have a zone of privacy in her bedroom. We defer to that finding. *See State v. Andersen*, 784 N.W.2d 320, 334 (Minn. 2010) (granting great deference to a jury's findings of fact and holding that appellate courts shall not set those findings aside unless they are clearly erroneous). It is reasonable that the jury made this finding given the evidence at trial—A.F. established that Vanengen was not allowed in her

[5] Vanengen did not make this argument on invasion at trial or at sentencing. Generally, "litigants are bound [on appeal] by the theory or theories, however erroneous or improvident, upon which the action was actually tried below," *Annis v. Annis*, 84 N.W.2d 256, 261 (Minn. 1957), and an appellate court will not consider matters not argued to and considered by the district court, *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

bedroom when she was sleeping without her permission from the prior incident, and on the day of the offense, her door was closed. This evidence could reasonably lead a jury to determine A.F. expected privacy in her bedroom. *See State v. Evans*, 756 N.W.2d 854, 870 (Minn. 2008) (holding that if the jury's findings are supported by reasonable evidence, the appellate court will not disturb those findings).

Finally, Vanengen contests the district court's determination that his offense was significantly more serious than a typical offense. In deciding whether the district court abused its discretion in this regard, we must ascertain what is "typical" for a criminal-sexual-conduct charge with a physically helpless, sleeping victim. Vanengen argues that his offense is not significantly more serious than a typical crime of this nature because most criminal-sexual-conduct cases with sleeping victims occur in a bedroom, citing to several cases to describe this as a "typical" offense. But the cases Vanengen relies upon involve offenses that occurred in a *friend's* bedroom, in a *coworker's* bedroom, and in a *boyfriend's* bedroom. *See, e.g.*, *State v. Cao*, 788 N.W.2d 710, 713 (Minn. 2010) (criminal sexual conduct occurred when victim was sleeping in her friend's bedroom at a party); *State v. Berrios*, 788 N.W.2d 135, 137 (Minn. App. 2010), *rev. denied* (Minn. Nov. 16, 2010) (criminal sexual conduct occurred when victim was sleeping in coworker's bedroom); *State v. Perkins*, 395 N.W.2d 729, 730 (Minn. App. 1986) (criminal sexual conduct occurred when victim was sleeping in boyfriend's bedroom).[6] These situations illustrate the dichotomy here. In the referenced cases, the victims could choose not to

[6] None of these cases discuss aggravating factors in the context of sentencing or what is "typical" for a criminal-sexual-conduct offense with a sleeping victim.

return to the scene of their assault. A.F. had no such choice. She returned to the location of her assault daily. This supports the district court's conclusion that Vanengen's offense was more serious than typical because "the victim's home [was] no longer the island of security upon which the victim has previously relied, thereby making the offense particularly cruel." *State v. Coley*, 468 N.W.2d 552, 555 (Minn. App. 1991).[7]

For these reasons, we conclude that the jury and the district court did not err because an aggravated sentence for criminal sexual conduct against a sleeping victim may be based on the offense occurring within the victim's zone of privacy when it is committed in the victim's own bedroom.

DECISION

The district court did not abuse its discretion in allowing testimony, as relationship evidence, on a prior incident between Vanengen and A.F. because Vanengen and A.F. were household members and the evidence's probative value was not substantially outweighed by prejudice to Vanengen. Also, for a criminal-sexual-conduct crime with a sleeping victim, the zone-of-privacy aggravating factor applies when the offense is committed in the victim's own bedroom. And a district court has sufficient grounds to grant an upward durational departure, at its discretion and after considering the seriousness of the offense, on this basis.

[7] The state requested that this opinion be precedential under Minnesota Rule of Civil Appellate Procedure 128.02, subdivision 1(f), because of the lack of precedential opinions regarding the zone-of-privacy aggravating factor in criminal-sexual-conduct cases with a victim sleeping in their own bedroom.

We recognize that the commission of a criminal-sexual-conduct offense with a sleeping victim when the victim is in their own bedroom may not *always* demonstrate that the offense was committed in a particularly serious way. In each case, the district court will need to determine if the particular facts of the offense, as found by a sentencing jury or admitted by the defendant, demonstrate that the offense was committed in a particularly serious way. *See Hicks*, 864 N.W.2d at 162. But here, the district court was well within its discretion to grant the upward durational departure and sentence Vanengen to 120 months of imprisonment on the single zone-of-privacy aggravating factor because the criminal sexual conduct occurred in A.F.'s personal bedroom.

Affirmed.