STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1338

State of Minnesota,
Respondent,

vs.

William Charles Nelson,
Appellant.

Filed June 27, 2011
Affirmed in part, reversed in part, and remanded
Hudson, Judge

St. Louis County District Court
File No. 69DU-CR-08-4472

Lori Swanson, Attorney General, John Galus, Assistant Attorney General, St. Paul, Minnesota; and

Mark Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Hudson, Judge; and Bjorkman, Judge.

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

HUDSON, Judge

Appellant challenges his conviction of attempted second-degree intentional murder. Because the conviction was supported by sufficient evidence, and because other-

crimes and impeachment evidence were properly admitted, we affirm the conviction. But because the applicable version of the sentencing guidelines did not authorize a permissive consecutive sentence, we reverse the sentence and remand for resentencing.

FACTS

In the early morning hours of July 31, 2008, appellant William Charles Nelson stabbed complainant R.M. multiple times in the neck, chest, and abdomen during an altercation in downtown Duluth. Appellant was charged with attempted second-degree intentional murder in violation of Minn. Stat. §§ 609.17, subd. 1 (2006), and 609.19, subd. 1(1) (2006), and first-degree assault in violation of Minn. Stat. § 609.221, subd. 1 (2006). Appellant appeared pro se at trial.

R.M., who was in a coma for two months after the stabbing, had difficulty recalling the details of the incident. He testified that, on the evening of July 30, 2008, he was drinking with his friends P.L. and J.B. at the Cozy Bar in downtown Duluth. He testified that a woman named K.B. was also with them.

At some time during the night, the group walked to the Jackson McGhee Memorial (McGhee Memorial), where R.M. and his friends spoke to appellant. R.M. saw appellant leave the McGhee Memorial and walk toward the Carter Hotel. A minute later, R.M. observed appellant return to the McGhee Memorial, and he heard J.B. tell appellant that he was asking for it. R.M. did not recall appellant threatening him in any way.

R.M. testified that he and appellant exchanged words and that he told appellant, "I'll whoop your ass." R.M. thought that he and appellant were going to fight, but he

testified that then, "out of nowhere, I was getting stabbed." R.M. testified that appellant was holding him with one hand and stabbing him with the other and that he was only able to get away once appellant let him go.

R.M. denied threatening to kill appellant or striking appellant. R.M. admitted that he also had a knife, but he did not tell appellant he had one. R.M. further testified that he had an opportunity to reach for his knife, but he did not do so because he was not trying to kill appellant.

R.P. was a passenger in a nearby vehicle when she observed appellant, whom she described as 6', and R.M., whom she described as 5'9", arguing as they moved from the McGhee Memorial toward the Carter Hotel. R.P. testified that R.M. backed up, appellant aggressively moved forward, and R.M. started to run away. R.P. testified that she then saw appellant and R.M. in front of the Carter Hotel, with appellant swinging his arm at R.M. in a stabbing motion. R.P. testified that she did not see R.M. swinging at appellant, raising his arm, or holding any kind of weapon.

R.P. rolled down the window and heard, "[h]e's stabbing me, he's stabbing me." R.P. exited the vehicle and screamed at appellant to stop stabbing R.M. Appellant turned around and advised R.P. that, "I asked him for a cigarette. He should have gave me a F-ing cigarette." R.P. understood that by "he," appellant was referring to R.M. R.P. did not see any injuries on appellant.

D.B. was walking along Second Avenue East toward the Fond du Luth Casino when R.M. stopped D.B. between the Carter Hotel and the casino and asked D.B. for a cigarette. D.B. testified that, at the time R.M. stopped him, he did not see anyone with

R.M., nor did he see anyone threatening appellant or hitting him. D.B. took about three or four steps toward the casino when he heard a scream. D.B. turned around and saw appellant stabbing R.M.

A Duluth police officer testified to voluntary statements made by appellant on July 31 and August 1, 2008. In his first statement, appellant stated that he was walking along Second Avenue East from the area near the Cozy Bar to his home at the Carter Hotel, when he saw a woman who he knew by the nickname of K.B. near the McGhee Memorial. Appellant stated that he asked K.B. for a cigarette, when three black males approached him and started a verbal confrontation. Appellant stated that one of the men, who was taller than the others, told appellant to quit talking to his wife. Appellant stated that he told the man that he was just trying to get a cigarette, and at that point, the man said, "you're not getting pussy for free," and asked appellant if he had any money. Appellant stated that he repeated that he was just trying to get a cigarette, when one of the men told him he should "get the hell out of there or he was going to kill him."

Appellant stated that he started walking home, when he decided to go back and speak to the men a second time. Appellant stated that he wanted to tell them that he just lived in the area, he was not trying to do anything to them, and he was just trying to get a cigarette. But appellant stated that one of the men told him that if he did not stop talking, he was going to kill him, and that when appellant said something else, one of the men came over and started hitting him. Appellant stated that he pushed the man back and walked to the casino.

In his first statement, appellant did not identify the man who hit him. Appellant also denied seeing any weapons during the fight, and he also denied having a knife himself, even though the police officer asked him multiple times whether he possessed a knife. When the police officer asked appellant about an injury to his hand, appellant explained that the person with whom he was fighting may have had a knife, but he never saw one and could not say for sure.

During the second interview, appellant's account of the altercation was largely consistent with his first statement. Then, the police officer informed appellant that a knife had been found and that witnesses said that appellant was using the knife during the incident. Appellant subsequently admitted that he did have a silver-colored pocket knife that was approximately six inches long.

Appellant explained that, after he was hit for the first time, he pulled out a knife, held it in the air, and stated that if the man did not stop hitting him, he was going to get it. Appellant stated that the man attempted to hit him again, and appellant stabbed him three or four times in the side and neck. Appellant stated that he knew he was in serious trouble, so he dropped the knife and went down to the casino, but after he was told that surveillance video showed him carrying the knife into the casino, appellant admitted that he might have dropped the knife elsewhere. The knife was found on the curb between the casino parking ramp and Superior Street.

Appellant did not testify, but in cross-examining prosecution witnesses and during his case-in-chief, he appears to have been attempting to elicit testimony that (1) R.M. and R.M.'s friends had harassed or assaulted K.B. earlier in the night and (2) appellant had

acted to defend himself and K.B. from R.M. and his friends. On cross-examination, R.M. testified that he remembered K.B. telling him that someone had done something to her, he told her that he would keep her safe, and he got into an argument with appellant shortly thereafter. But he gave no indication that he or his friends had harmed K.B. Appellant also recalled D.B., who was walking toward the casino at the time of the altercation, to testify about his statement to police. Appellant asked D.B. whether he told police that there were three males standing outside the Carter Hotel, but D.B. responded that he only remembered seeing appellant and R.M. and that the police may have misunderstood him. Appellant also called an acquaintance named D.L., who testified that, on the evening of July 30, 2008, he was at an apartment with his brother and a woman named K.B., and they eventually went downstairs to the alley, where a police car drove up and questioned all of them, including K.B. Appellant elicited no testimony connecting D.L. to appellant or to R.M. and his friends.

Finally, appellant called another Duluth police officer, who testified to a statement taken from T.D., a witness to the altercation who was unavailable to testify at trial. T.D. was waiting for someone in a vehicle parked outside the casino when she heard a commotion, turned around, and saw two men arguing. T.D. stated that the men were up in each other's faces and that one was white and the other black. T.D. said they were having an argument; the black male punched the white male; then they began to physically fight. T.D. also stated that during the fight, the white male stabbed the black male and that she saw blood on the black male's shirt. T.D. also said that she heard the

black male say, "[o]h, shit, you cut me," and that she heard the white male after the incident say repeatedly "[a]ll I did was ask for a cigarette and he punched me in the face."

Over appellant's objection, the district court admitted *Spreigl* evidence regarding appellant's involvement in a July 22, 2008, aggravated robbery that occurred in the vicinity of the Cozy Bar and the Fond du Luth casino. Over appellant's objection, the district court also concluded that appellant's 2001 conviction of second-degree assault and his 2009 conviction of the aggravated robbery would have been admissible for impeachment purposes had appellant chosen to testify. But because appellant opted not to testify, the convictions were not admitted into evidence.

The jury found appellant guilty of both charges. The district court vacated appellant's assault conviction and sentenced him on the attempted-murder conviction to an executed prison term of 183 and 1/2 months, to be served consecutive to the aggravated robbery conviction. This appeal follows.

D E C I S I O N

I

When reviewing a claim of insufficient circumstantial evidence, this court first identifies the circumstances proved, deferring to "'the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State.'" *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010) (quoting *State v. Stein*, 776 N.W.2d 709, 718 (Minn. 2010)). This court next "'examine[s] independently the reasonableness of all inferences that might be drawn from the circumstances proved,'" giving no deference to the jury's choice between

reasonable inferences. *Id.* (quoting *Stein*, 776 N.W.2d at 716). Ultimately, the circumstances proved must be consistent with guilt and inconsistent with any rational hypothesis except that of guilt. *Id.* (citing *Stein*, 776 N.W.2d at 716). Appellant argues that the record contains insufficient evidence for the jury to have found that he intended to cause R.M.'s death and that he was not acting in self-defense.

Intent

A defendant is guilty of attempted second-degree intentional murder if he performed an act that was a "substantial step" toward "caus[ing] the death of a human being with intent to effect the death of that person or another, but without premeditation." *See* Minn. Stat. §§ 609.17, subd. 1 (defining attempt); 609.19, subd. 1(1) (defining second-degree intentional murder). Because intent is a state of mind, it is generally proved circumstantially "by drawing inferences from the defendant's words and actions in light of the totality of the circumstances." *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). In assessing circumstantial evidence of intent, "the jury may infer that a person intends the natural and probable consequences of his actions." *Id.*

Appellant argues that the record contains insufficient evidence of his intent to kill R.M. But we have previously concluded that a "single shot to the victim's torso, an area of the body containing vital organs, is sufficient to support a finding of intent to kill," which was necessary for a conviction of attempted first-degree murder. *State v. Chuon*, 596 N.W.2d 267, 271 (Minn. App. 1999), *review denied* (Minn. Aug. 25, 1999). Here, appellant stabbed R.M. once in the neck, four times in the chest, and once in the abdomen. The jury could have only inferred that, by stabbing R.M. multiple times near

his vital organs, appellant intended to cause the natural and probable consequences of his actions—R.M.'s death. *See id.*

Self-defense

A person is not guilty of a crime if he used reasonable force to resist an offense against him. Minn. Stat. § 609.06, subd. 1(3) (2006). A person is justified in defending himself so long as he (1) was not the aggressor; (2) actually and honestly believed that he was in imminent danger of death or great bodily harm; (3) had reasonable grounds for that belief; and (4) lacked a reasonable opportunity to retreat. *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006). But even if a person is allowed to defend himself, he may use only the degree of force that a reasonable person under similar circumstances would deem necessary. *State v. Bland*, 337 N.W.2d 378, 381 (Minn. 1983). A defendant bears the initial burden of presenting evidence to support a claim of self-defense, but once the defendant has met that burden, the state bears the burden of disproving one of the elements of self-defense beyond a reasonable doubt. *State v. Basting*, 572 N.W.2d 281, 286 (Minn. 1997).

Appellant argues that the record contains insufficient evidence to disprove any of the elements of self-defense. There was conflicting evidence as to whether appellant, R.M., and/or R.M.'s friends were the aggressors during this incident. But the jury was entitled to disbelieve the statements of appellant's witnesses and credit the testimony of the state's witnesses, specifically, that appellant and R.M. were arguing, and R.M. threatened appellant, but R.M. did not hit appellant. *See State v. Carufel*, 783 N.W.2d 539, 546 (Minn. 2010) (stating that appellate courts give deference to the jury's weight

and credibility determinations). Based on the circumstances proved, the jury could have only inferred that, because appellant could have extricated himself from the situation, he was not entitled to defend himself. *See State v. Baker*, 280 Minn. 518, 524–27, 160 N.W.2d 240, 243–45 (1968) (concluding that jury was justified in rejecting claim of self-defense based on evidence that defendant and complainant were engaged in mutual combat and that defendant stabbed complainant because complainant was winning).

Moreover, even if the jury had credited the version of the events presented by appellant's witnesses and inferred that appellant was entitled to defend himself, there was sufficient evidence for the jury to find that appellant used unreasonable force. R.P. testified that appellant is 6', whereas R.M. is 5'9". R.M. admitted that he had a knife, but he testified that he never informed appellant about it. R.M. further testified that appellant held him so that he could not get away. Finally, it is undisputed that R.M. was stabbed a total of six times in the neck, chest, and abdomen. Based on this evidence, the jury could reasonably have found that appellant was larger than R.M.; that appellant had a weapon and had no objective basis for believing that R.M. had one; and that appellant held R.M. and stabbed him multiple times near his vital organs. And based on the circumstances proved, the jury was entitled to conclude that, even if appellant were authorized to use self-defense, a reasonable person in appellant's situation would not have found it necessary to stab R.M.—let alone stab him six times—to avoid serious bodily harm. *See State v. Fidel*, 451 N.W.2d 350, 353–54 (Minn. App. 1990) (concluding that jury was entitled to find that defendant did not use reasonable force when he stabbed a young man

with whom he had a verbal argument but who was not attempting to physically assault defendant or prevent defendant from escaping), *review denied* (Minn. Apr. 13, 1990).

II

The admission of evidence of other crimes or bad acts—more commonly referred to as *Spreigl* evidence—is reviewed for an abuse of discretion. *State v. Clark*, 738 N.W.2d 316, 345 (Minn. 2007). If the evidence was erroneously admitted, this court must determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *State v. Fardan*, 773 N.W.2d 303, 320 (Minn. 2009). If such a possibility exists, then the error is prejudicial, and a new trial is required. *State v. Rucker*, 752 N.W.2d 538, 549 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008).

Generally, evidence of other crimes or bad acts is not admissible for the purposes of proving the defendant's character or acts in conformity with that character. Minn. R. Evid. 404(b). But *Spreigl* evidence may be admitted for limited purposes, including proving intent, plan, or absence of mistake or accident. *Id.* *Spreigl* evidence is only admissible if the state (1) provides notice of its intent to use the evidence; (2) indicates what the evidence is intended to prove; (3) produces clear and convincing evidence that the defendant was involved in the other crime or bad act; (4) demonstrates that the evidence is relevant and material to its case; and (5) shows that the probative value of the evidence is not outweighed by its potential for prejudice. *State v. Burrell*, 772 N.W.2d 459, 465 (Minn. 2009).

The district court admitted *Spreigl* evidence of a July 22, 2008, aggravated robbery that occurred in the vicinity of the Cozy Bar and the Fond du Luth Casino. The complainant in that incident testified that, during the incident, appellant approached him and asked if he wanted to purchase crack cocaine. The complainant testified that he refused, but appellant followed him to the entrance of the casino and asked him for money. The complainant further testified that he told appellant to get out of his space, at which point appellant started hitting and kicking him. After the incident, complainant discovered that two of his medications were missing. Appellant contends that the evidence of the 2008 aggravated robbery was irrelevant and immaterial and was also more prejudicial than probative.

Relevance and materiality

To determine the relevance and materiality of *Spreigl* evidence, the district court must consider (1) the issues in the case; (2) the reasons and need for the evidence; and (3) the relationship between the *Spreigl* incident and the charged offense in time, place, and modus operandi. *State v. Lynch*, 590 N.W.2d 75, 80 (Minn. 1999). "The closer the relationship between the events, the greater the relevance or probative value of the evidence and the lesser the likelihood that the evidence will be used for an improper purpose." *Id.* (quotation omitted). The district court concluded that the issues in this case were likely to be intent and self-defense; that the evidence of the 2008 robbery was relevant to those issues; and that the 2008 robbery was sufficiently similar to appellant's attack on R.M. to be relevant and material.

We agree. The *Spreigl* incident was relevant and material to disproving appellant's contention that, during the charged incident, he asked for a cigarette, and R.M. and his friends responded with physical violence. The *Spreigl* incident and the charged incident were also markedly similar in the way that appellant began to interact with the complainants, exchanged words with the complainants, and responded by physically assaulting them.

Probative value versus potential for prejudice

Even if *Spreigl* evidence is relevant and material, it must be excluded if its potential for unfair prejudice outweighs its probative value. Minn. R. Evid. 403. The district court concluded that the probative value of the *Spreigl* evidence outweighed its potential for unfair prejudice. Again, we agree. The *Spreigl* evidence tended to disprove appellant's claims that R.M. and his friends initiated physical violence in response to an innocuous question from appellant, and the possibility that the evidence would be improperly used by the jury was minimal. The *Spreigl* evidence was, therefore, more probative than prejudicial on the issue of self-defense.

Appellant also contends that the district court's introduction of a videotape of the robbery was particularly prejudicial, but appellant failed to object to the introduction of the videotape at trial. "Failure to object to the admission of evidence generally constitutes waiver of the right to appeal on that basis." *State v. Vick*, 632 N.W.2d 676, 684 (Minn. 2001). But this court may consider an issue that was waived at trial "if there is (1) error, (2) that is plain, and (3) the error affects the defendant's substantial rights." *Id.* at 685. Appellant argues that the district court erred in admitting the videotape of the

robbery because the complainant was already testifying to the incident and the videotape highlighted the significance of the *Spreigl* evidence. It is unclear why the videotape was necessary in light of the complainant's testimony, but appellant has produced no authority for the proposition that the introduction of testimony *and* a videotape of other-crime evidence constitutes error, let alone plain error.

Harm

Finally, even if we were to determine that the district court abused its discretion in admitting evidence of the robbery, the error would not be prejudicial absent a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *State v. Clark*, 738 N.W.2d at 347. Appellant argues that there is a reasonable possibility that the *Spreigl* evidence significantly affected the verdict because the jury heard the complainant testify and saw a videotape of the robbery. *See id.* (indicating that in-person testimony regarding other crime or bad act may be more prejudicial than the prosecutor reading an excerpt from the defendant's plea hearing). But the state did not refer to the *Spreigl* evidence in its closing argument, and the district court provided a limiting instruction. *See id.* (concluding that improper introduction of *Spreigl* evidence was harmless in part because the state did not refer to the *Spreigl* evidence during closing argument and the district court provided a limiting instruction). Additionally, there was abundant evidence of appellant's guilt. For these reasons, even if the district court abused its discretion in admitting the *Spreigl* evidence, the admission was harmless error.

III

The district court's decision to admit a defendant's prior convictions for impeachment purposes is reviewed for an abuse of discretion. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). A prior conviction that is punishable by imprisonment for longer than one year is admissible as impeachment evidence if the conviction is less than ten years old and its prejudicial effect is outweighed by its probative value. Minn. R. Evid. 609(a)(1), 609(b). But whether the probative value of the conviction outweighs its prejudicial effect depends on five factors:

> (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978). Based on the *Jones* factors, the district court found that, if appellant testified, the following two convictions would be admissible: (1) the 2001 conviction of second-degree assault and (2) the 2009 conviction of aggravated robbery. Appellant challenges the district court's findings on the last four *Jones* factors.

Date of the conviction and defendant's subsequent history

Generally, "[e]vidence of a conviction . . . is not admissible [for impeachment purposes] if a period of more than ten years has elapsed since the date of the conviction." Minn. R. Evid. 609(b). Appellant's convictions occurred in 2001 and 2009, within the ten-year time limit imposed by Minn. R. Evid. 609(b). Appellant appears to concede that

this factor favors the admission of the 2009 conviction, but he contends that it disfavors the admission of the 2001 conviction.

The Minnesota Supreme Court has specifically held that "recent convictions [are considered] to have more probative value than older ones, and recent convictions can enhance the probative value of older convictions by placing them within a pattern of lawlessness, indicating that the relevance of the older convictions has not faded with time." *State v. Davis*, 735 N.W.2d 674, 680 (Minn. 2007). The district court did not cite *Davis*, but it invoked the language of the opinion in concluding that, even though the 2001 conviction occurred eight years ago, it remains probative when considered alongside the 2009 conviction, which demonstrates that appellant engaged in a pattern of lawlessness and that the relevance of the 2001 conviction had not faded.

Appellant challenges this conclusion on the grounds that two convictions in a period of eight years does not demonstrate a pattern of lawlessness. When a defendant has been in prison for the time period between two offenses, "it would seem that the [prior] offense had not lost any relevance by the passage of time." *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980). But here, appellant had been released from prison for several years before he committed the aggravated robbery in July 2008 that led to his 2009 conviction. We conclude that the 2001 conviction was not part of a pattern of lawlessness, and the date of conviction disfavors the admission of the 2001 conviction.

Similarity between the past crime and the charged crime

"The danger when the past crime is similar to the charged crime is that the likelihood is increased that the jury will use the evidence substantively rather than merely

for impeachment purposes." *Id.* The greater the similarity between the crimes, the greater the reason for not permitting use of the prior crime to impeach. *Jones*, 271 N.W.2d at 538. The defendant, however, can be insulated from the risk of the jury improperly using the prior conviction when a proper limiting instruction is given. *State v. Pendleton*, 725 N.W.2d 717, 729 (Minn. 2007).

Appellant does not dispute that the 2001 conviction was dissimilar to the charged offense. But he challenges the district court's determination that the 2009 conviction was similar to the charged offense for *Spreigl* purposes, yet somehow dissimilar for impeachment purposes. Appellant argues that the district court's reasoning strains logic. But appellant relies on similar logic to argue that the 2009 conviction was dissimilar for *Spreigl* purposes and similar for impeachment purposes.

The admission of a prior conviction for impeachment purposes may not be prejudicial when evidence of the underlying offense is independently admissible as *Spreigl* evidence. *Bettin*, 295 N.W.2d at 546. Thus, regardless of whether the incidents are similar or dissimilar for impeachment purposes, appellant would have suffered no additional harm or prejudice by introducing the 2009 conviction for impeachment purposes because the evidence of the 2008 robbery underlying that conviction was already admissible under *Spreigl*. This factor is at least neutral as to the admission of the 2009 conviction.

Importance of defendant's testimony

If a defendant's account of the events is "centrally important to the result reached by the jury," this factor may support the exclusion of impeachment evidence, the

introduction of which would discourage defendant from testifying. *Gassler*, 505 N.W.2d at 67. The district court found that "the primary issue in this case is one of self-defense, and if [appellant] testifies, [appellant's] testimony will be important." As appellant points out, however, regardless of whether he testified, hearing his version of the events was essential for the jury to understand his claim of self-defense.

But, if the record clearly shows that other witnesses presented the defendant's version of the events to the jury, this concern is mitigated. *Id.* Here, a police officer presented appellant's version of the events, and appellant offered no indication that he would have testified differently. This factor favors the admission of the convictions.

Centrality of credibility

"[T]he general view is that if the defendant's credibility is the central issue in the case . . . then a greater case can be made for admitting the impeachment evidence, because the need for the evidence is greater." *Bettin*, 295 N.W.2d at 546. The district court found that appellant's credibility was "central to the outcome of the case." Appellant does not challenge this conclusion. This factor favors the admission of the convictions.

In sum, it appears that the first, fourth, and fifth *Jones* factors strongly favor the admission of the two convictions; the second *Jones* factor favors the admission of the 2009 conviction but the exclusion of the 2001 conviction; and the third *Jones* factor strongly favors the admission of the 2001 conviction and is at least neutral as to the admission of the 2009 conviction. Because the majority of the *Jones* factors favor the

admission of both convictions, the district court did not abuse its discretion by finding them admissible for impeachment purposes.

IV

Appellant contends that the district court abused its discretion by imposing a permissive consecutive sentence because it unfairly exaggerated his criminality. We agree that the district court improperly imposed a permissive consecutive sentence, but our conclusion is based on different grounds. The decision to impose a permissive consecutive sentence is within the district court's discretion and will not be disturbed absent an abuse of that discretion. *State v. Yang*, 774 N.W.2d 539, 563 (Minn. 2009). But the determination of whether a permissive consecutive sentence is authorized under the sentencing guidelines is a question of law, which this court reviews de novo. *State v. Rivers*, 787 N.W.2d 206, 212 (Minn. App. 2010), *review denied* (Minn. Oct. 19, 2010). We hold that the district court erred as a matter of law in its determination that the applicable version of the sentencing guidelines authorized a permissive consecutive sentence for attempted second-degree murder.[1]

The 2010 guidelines, which became effective on August 1, 2009, and which the district court apparently applied at the sentencing hearing on May 5, 2010, provide that "[a] current felony conviction for a crime on the list of offenses eligible for permissive

[1] We note that, here, appellant received consecutive sentences for offenses that did not occur during a single behavioral incident and that the multiple-victim exception to the single-behavioral-incident rule is not applicable. *See* Minn. Stat. § 609.035 (2010) (stating that if a person's conduct constitutes more than one offense, that person may only be punished for one of the offenses); *State v. Cruz-Ramirez*, 771 N.W.2d 497, 511–12 (2009) (stating that Minn. Stat. § 609.035 does not apply when multiple victims are involved and that the offender can receive multiple and consecutive sentences).

consecutive sentences found in [s]ection VI may be sentenced consecutively to a prior felony sentence for a crime listed in [s]ection VI which has not expired or been discharged." Minn. Sent. Guidelines II.F.2.a (2010). Section VI, in turn, begins with a sentence that states: "Convictions for attempted offenses or conspiracies to commit offenses listed below are eligible for permissive consecutive sentences as well as convictions for completed offenses." *Id.*, VI. Second-degree murder is one of the offenses listed in section VI. *Id*.

The 2008 version of the guidelines, which became effective on August 1, 2007, and was in effect on the date of the offense on July 31, 2008, also provides that "[a] current felony conviction for a crime on the list of offenses eligible for permissive consecutive sentences found in [s]ection VI may be sentenced consecutively to a prior felony sentence for a crime listed in [s]ection VI which has not expired or been discharged." Minn. Sent. Guidelines II.F.1 (2008). But, unlike the 2010 version of section VI, the 2008 version of section VI does not include the language regarding the permissibility of consecutive sentences for convictions for attempts to commit the listed offenses. *Id.*, VI. And the 2008 version of section VI listed attempted first-degree murder, but not attempted second-degree murder, as an offense eligible for a permissive consecutive sentence. *Id*. In fact, this court recently held that, because the version of the guidelines at issue similarly included attempted first-degree murder—but not attempted second-degree murder—in section VI, the district court erred in imposing a permissive consecutive sentence for attempted second-degree murder. *See State v. Johnson*, 756 N.W.2d 883, 895 (Minn. App. 2008) ("If the commission meant to include all attempted

offenses, it would not have listed attempted first-degree murder as the only attempted homicide in section VI."), *review denied* (Minn. Dec. 23, 2008).

By applying the 2010 guidelines, the district court erred as a matter of law. First, both the 2008 and 2010 versions of the guidelines provide that modifications to the guidelines and associated commentary are to be "applied to offenders whose date of offense is on or after the specified modification effective date." Minn. Sent. Guidelines III.F (2010); Minn. Sent. Guidelines III.F (2008). They also provide that only modifications to the commentary "that relate to clarifications of existing policy" are to be "applied to offenders sentenced on or after the specified effective date." Minn. Sent. Guidelines III.F (2010); Minn. Sent. Guidelines III.F (2008). In light of *Johnson*, the modification to section VI is clearly a modification to the guidelines, not a clarification of existing policy. *See Johnson*, 756 N.W.2d at 895 (specifically holding that prior version of the guidelines did not authorize permissive consecutive sentencing for attempted second-degree intentional murder).

Second, the application of revised sentencing guidelines that increase the sentence of a defendant whose crime occurred before the revision's effective date may violate the ex post facto clause. *Miller v. Florida*, 482 U.S. 423, 435–36, 107 S. Ct. 2446, 2454 (1987); *State v. Goldenstein*, 505 N.W.2d 332, 348 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). "Generally, when an offender is convicted of multiple current offenses, or when there is a prior felony sentence which has not expired or been discharged, concurrent sentencing is presumptive," and when consecutive sentences are neither presumptive nor permissive, "[t]he use of consecutive sentences . . . constitutes a

departure from the guidelines and requires written reasons." Minn. Sent. Guidelines II.F (2008). Had appellant been sentenced under the 2008 guidelines, appellant would have been entitled to a presumptive concurrent sentence, and the state would have had to request an upward departure for appellant to have been sentenced consecutively. *See id.* But because appellant was sentenced under the 2010 guidelines, the state was able to secure a consecutive sentence without establishing the factors necessary for an upward departure.

We acknowledge that the appellant, who appeared pro se at sentencing, did not raise this argument before the district court, nor did appellant's counsel raise it on appeal, choosing instead to argue that the sentence exaggerated appellant's criminality. Normally, a party waives issues that were not raised before the district court or on appeal, but, in the interests of justice, this court may address issues that would otherwise be waived. *See State v. Clow*, 600 N.W.2d 724, 726 (Minn. App. 1999) (stating that the appellate court has discretion to decide issues that were not raised before the district court when consideration is required in the interests of justice), *review denied* (Minn. Oct. 21, 1999); *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (stating that "it is the responsibility of appellate courts to decide cases in accordance with law, and that responsibility is not to be diluted by counsel's oversights, lack of research, failure to specify issues or to cite relevant authorities" (quotation omitted)). We address this issue in the interests of justice and hold that the district court erred as a matter of law by concluding that appellant is eligible for a permissive consecutive sentence.

V

In his pro se supplemental brief, appellant makes a number of assertions based on his version of the events and his conversations with his appointed attorney. But appellant does not cite support in the record for these statements, and, therefore, they cannot be considered by this court. *State v. Krosch*, 642 N.W.2d 713, 719–20 (Minn. 2002). Appellant also points out inconsistencies in the testimony of R.P. and D.B. But "[i]nconsistencies or conflicts between one witness and another do not necessarily constitute false testimony or serve as a basis for reversal." *State v. Mems*, 708 N.W.2d 526, 531 (Minn. 2006).

Although appellant is not entirely clear, it appears that he is also challenging the district court's decision not to admit K.B.'s statement to an investigator from the public defender's office. But the district court's evidentiary rulings will not be reversed absent a clear abuse of discretion. *State v. Cram*, 718 N.W.2d 898, 903–04 (Minn. 2006). Minn. R. Evid. 807 creates a residual hearsay exception for an out-of-court statement that is offered as evidence of a material fact, is more probative than prejudicial on the point for which it is offered than any other evidence that can be procured through reasonable efforts, and should be admitted based on the purposes of the rules and the interests of justice. In her statement, K.B. stated that R.M. and his friends were harassing her and that appellant was trying to assist her, but she also stated that she left before the physical altercation occurred. K.B.'s statement, therefore, was not material to appellant's claim of self-defense or defense of others, and the district court did not abuse its discretion in excluding K.B.'s statement.

Affirmed in part, reversed in part, and remanded.