STATE OF MINNESOTA
IN COURT OF APPEALS
A10-965

State of Minnesota,
Respondent,

vs.

Eric Ordell Johnson,
Appellant.

Filed July 5, 2011
Affirmed in part, reversed in part, and remanded
Peterson, Judge

Winona County District Court
File No. 85-CR-08-3748

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Thomas H. Frost, Winona County Attorney, Stephanie E. Nuttall, Assistant County Attorney, Winona, Minnesota (for respondent)

Bradford Colbert, L.A.M.P., St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Worke, Judge; and Schellhas, Judge.

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

PETERSON, Judge

In this appeal from convictions of aggravated first-degree witness tampering, terroristic threats, and domestic assault by strangulation, appellant argues that the district

court erred by (1) admitting into evidence statements that appellant made during the booking process; (2) imposing a sentence for aggravated first-degree witness tampering that was at the high end of the presumptive range; (3) imposing sentences for both domestic assault by strangulation and first-degree aggravated witness tampering; and (4) finding appellant in contempt and sentencing him to one year in jail. We affirm in part, reverse in part, and remand.

FACTS

After drinking most of the day, appellant Eric Ordell Johnson and D.M. went to a bar. At the bar, appellant acted drunk and disorderly and seemed like he wanted to get into a fight. When appellant came home from the bar, the victim asked him why he had slammed her head against the bed earlier in the day. Appellant denied doing it, which made the victim angry, so she flipped a table over, which made appellant's drink spill.

Appellant got up and grabbed the victim and shoved her against the wall. The victim landed on a table with a tabletop tree on it, and the table and tree fell over. The victim grabbed the phone and ran towards the bathroom because the bathroom door was the only door that had a lock. Before the victim could get the door locked, appellant pushed it open, grabbed the phone from the victim and threw it, and began hitting the victim repeatedly in the face. While hitting the victim, appellant swore at her and asked her if it felt good. After about five or ten minutes, appellant slammed the victim's head against the corner of a wall, and she blacked out. When the victim came to, appellant was kicking her and telling her to get up and fight back. The victim stood up and tried to push appellant away, but he moved her arms out of the way and continued hitting her in

the face. Appellant then pushed the victim up against a cabinet, held one hand against her chest, and choked her around the neck with his other hand. The victim could not breathe and thought she was going to die. As the victim started to pass out, she heard someone at the door, and appellant stopped, told her to clean the blood from her face, and put his sweater over her clothes, which had blood on them.

The victim went to the door and saw people walking away. She told appellant that it was the neighbor and that she was going to tell him that everything was okay. The victim went outside and saw D.M. and some other friends walking away. She told them what had happened, and D.M. went inside and confronted appellant. Appellant became angry and told D.M. that it was none of his business and that appellant "was going to kill him if he told anybody." After D.M. calmed appellant down, appellant said that he wanted to talk to the victim. Appellant and the victim went into another room. Acting "really calm, like nothing had just happened," appellant threatened to kill the victim if she told police what had happened.

When police arrived, the victim initially told them that nothing had happened, that "it wasn't that big of a deal." She said that she had provoked appellant and that he pushed her into a wall. The victim testified that she said that because she was afraid that she was going to die. Due to the extent of the victim's injuries, the police did not believe her. Eventually, the victim said that she could not say what had happened because her life was in jeopardy. After police promised that she would not be hurt, the victim described what appellant had done to her and told them that she felt like appellant "was trying to take my life that night."

Winona Police Officer Edward Wooden noticed signs of a struggle, including a broken mirror in the hallway outside of the bathroom, a towel bar ripped from the bathroom wall, and shelving on the floor. The victim's face was puffy and red, there were scratch marks on both sides of her neck, dried blood on her lips, and finger marks on her throat. The victim was crying and appeared to be very afraid.

Appellant was arrested and taken to jail. During the booking process, appellant made statements to police that were recorded. Appellant was charged with two counts of aggravated first-degree witness tampering in violation of Minn. Stat. § 609.498, subd. 1b(a)(4)-(5) (2008); two counts of domestic assault in violation of Minn. Stat. § 609.2242, subd. 4 (2008); two counts of terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2008); one count of domestic assault by strangulation in violation of Minn. Stat. § 609.2247, subd. 2 (2008); and two counts of fifth-degree assault in violation of Minn. Stat. § 609.224, subd. 1(1)-(2) (2008).

The state dismissed one count each of aggravated first-degree witness tampering, domestic assault, terroristic threats and fifth-degree assault. The remaining charges were tried to a jury. The jury found appellant guilty of committing the following offenses against the victim: first degree witness tampering; domestic assault; and domestic assault by strangulation. The jury found appellant guilty of committing terroristic threats against D.M. but not guilty of fifth-degree assault against D.M.

The district court sentenced appellant to concurrent, executed terms of 36 months for domestic assault by strangulation, 189 months for first-degree aggravated witness tampering, and 36 months for terroristic threats. After the sentence was announced,

appellant accused the victim of lying on the witness stand. The district court found appellant in contempt of court and sentenced him to a consecutive term of one year for the contempt. Appellant then became angry and made a sexual comment to and swore at the district court judge. This appeal followed.

D E C I S I O N

I.

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). "Evidence of threats to witnesses may be relevant in showing consciousness of guilt." *Holt v. State*, 772 N.W.2d 470, 481 (Minn. 2009) (quotation omitted). "But even relevant evidence, including evidence of threats, will be excluded if 'its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" *State v. Clifton*, 701 N.W.2d 793, 797 (Minn. 2005) (quoting Minn. R. Evid. 403).

The district court admitted an audio recording of the following excerpts from statements that appellant made during the booking process:

> That b...h better hope I don't get out of jail.
> Hah. You know, I really don't give a f..k anymore. Do you get this?
>
> . . . .
>
> Okay. Well, you read the paper. You read whatever you want. I do not care. I'm going to take a few people with me, and that's it. I'm done with this s..t.
> I suggest you guys don't ever let me out of jail. Just keep me in here for good. Deal? Because if I get out.
> You better tell that b...h she better get out of state.

> I wish I would have killed somebody. At least I would be in here for some f..king murder.
> Tell [the victim] she better get out of town. Put that on the record. You think I give a f..k? How long do you guys think you can send me to prison before I get out, huh?
>
> . . . .
>
> Tell [D.M.] that he's going to the hospital when I get out of here. Is that terroristic threats? Ooh, add it to my case. Think I give a f..k?

Appellant's statements were not threats to witnesses because no witnesses were present when he made the statements. But his statements included threats against the victim and D.M. that were similar to threats that were elements of two of the charged offenses. Minn. Stat. §§ 609.498, subd. 1b(a)(4)-(5) (aggravated first-degree witness tampering), .713, subd. 1 (terroristic threats). This similarity tended to show a propensity or disposition to commit those offenses. We, therefore, conclude that the district court erred in admitting the statements because their probative value was substantially outweighed by the danger of unfair prejudice caused if the jury interpreted the evidence as showing a propensity or disposition to commit those offenses.

Although the district court erred in admitting the statements, appellant is only entitled to reversal of his convictions if the error was prejudicial. When the erroneous admission of "evidence does not implicate a constitutional right, a new trial is required only when the error substantially influenced the jury's verdict." *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009). [1]

[1] Appellant cites the prejudice standard that applies when a constitutional right is implicated. *Sanders*, 775 N.W.2d at 887. Appellant, however, does not claim that the admission of his statements implicated a constitutional right.

The evidence against appellant was extremely strong. The victim's trial testimony regarding the assault was consistent with her injuries and photographs of damage in the apartment and its state of disarray. The victim's demeanor also corroborated her testimony. Wooden described her as crying and appearing very afraid, and D.M. described her as crying, hysterical, and unable to talk well. *See State v. Mosby*, 450 N.W.2d 629, 635 (Minn. App. 1990) (stating that victim's demeanor after assault corroborated her testimony), *review denied* (Minn. Mar. 16, 1990). There was also strong evidence showing the credibility of the victim's testimony about appellant's threat to kill her if she told police what had happened. When police first arrived, the victim attempted to downplay the incident and did not describe what appellant had done to her until after being assured that she would be protected. Given the strength of this evidence, we conclude that the admission of the statements that appellant made during booking did not substantially influence the jury to convict appellant of the offenses against the victim. Regarding the offense against D.M., the victim testified unequivocally that appellant threatened to kill D.M., and the jury found appellant not guilty of committing fifth-degree assault against D.M. We, therefore, conclude that the admission of appellant's statements during booking did not substantially influence the jury to convict appellant of committing terroristic threats against D.M. *See State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994) (concluding that acquittal on some counts, coupled with convictions on others, indicated that jury was not substantially influenced to convict by prosecutor's improper comments).

II.

A sentence is reviewed under the abuse-of-discretion standard. *State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000). An abuse of discretion occurs when a sentence unfairly exaggerates the criminality of the defendant's conduct. *State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007). An appellate court generally will not interfere with a sentence within the presumptive range even when grounds exist that would justify a departure. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). Only a rare case "would warrant reversal of the refusal to depart." *Id.* (quotation omitted).

Appellant argues that the district court abused its discretion by imposing the highest presumptive sentence of 189 months for aggravated first-degree witness tampering because he received only a 36-month sentence for the domestic assault by strangulation conviction and because his threat against the victim was essentially a terroristic threat, the maximum sentence for which is 60 months. "The seriousness of an offense can be determined by analyzing the severity-level rankings and the statutory maximums." *State v. Ferguson*, 786 N.W.2d 640, 644 n.3 (Minn. App. 2010), *review granted* (Minn. Oct. 19, 2010). The legislature has prescribed maximum penalties of three years for domestic assault by strangulation, five years for terroristic threats, and 20 years for aggravated first-degree witness tampering. Minn. Stat. §§ 609.2247, subd. 2 (domestic assault by strangulation), .498, subd. 1b(b) (aggravated first-degree witness tampering) .713, subd. 1 (terroristic threats) (2008). The severity-level rankings are IV for terroristic threats and domestic assault by strangulation and IX for aggravated first-degree witness tampering. Minn. Sent. Guidelines V (2008). Because the sentencing

guidelines commission and the legislature have determined that aggravated first-degree witness tampering is a more serious offense than terroristic threats or domestic assault by strangulation, the sentence imposed for aggravated first-degree witness tampering did not unfairly exaggerate the criminality of appellant's conduct.

Appellant also argues that the district court abused its discretion in sentencing him to 189 months for the witness-tampering offense because the district court relied on the assault to justify the sentence. Although the district court referred to the assault when imposing the witness-tampering sentence, the district court also noted appellant's long history of not doing well on probation and his lack of cooperation with the presentence investigation and then stated:

> THE COURT: [C]ontrary to what you have written and said in the courtroom here today, this is the first time you've ever stepped up and taken responsibility for what you did to [the victim]. This is the first time. The rest of the time you have been just defiant.
> THE DEFENDANT: I haven't said a word.
> THE COURT: It's your behavior. It's your behavior. It's your physical behavior. I mean, it's very obvious that you were ticked off at her for coming forth. She had the right to do that. She should have done it, and she did it, and it's good for a victim to be able to do that; to move on in this world, and your only response was to be physically just absolutely obstinately defiant, with your arms crossed oftentimes in the courtroom. I write all this down during the course of the trial. I write physical appearance down. I wrote your demeanor down. I'm very aware of what was going on, and she sat right there and watched it too, and in spite of that, she testified, when she sure as heck could have easily run through that door, and I don't know that I could blame her for doing that.

Reading the district court's comments in their entirety shows that the court did not rely on the assault to justify the sentence for witness tampering.

"This court will generally not exercise its authority to modify a sentence within the presumptive range absent compelling circumstances." *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010) (quotation omitted), *review denied* (Minn. July 20, 2010). "[A]ny sentence within the presumptive range for the convicted offense constitutes a presumptive sentence. A sentence within the range provided in the appropriate box on the sentencing guidelines grid is not a departure from the presumptive sentence." *Id.* at 428-29 (citations omitted). Because appellant cites no compelling reason for departure, we affirm the sentence for aggravated first-degree witness tampering.

III.

Generally, "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." Minn. Stat. § 609.035, subd. 1 (2008). In determining whether a series of offenses constitutes a single behavioral incident, the relevant factors are: (1) unity of time and place and (2) whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective. *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). The district court's determination whether multiple offenses are part of a single behavioral incident is a fact determination and should not be reversed unless clearly erroneous. *State v. Carr*, 692 N.W.2d 98, 101 (Minn. App. 2005). The state has the burden of proving that the offenses were not part of a single course of conduct. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000).

This court has upheld a determination that an assault and an obstruction-of-legal-process offense were not part of a single behavioral incident when the initial assault occurred against one officer upon the defendant being told he was under arrest, and then after the defendant had calmed down and been released, he obstructed legal process in an attempt to avoid apprehension. *State v. Fischer*, 354 N.W.2d 29, 35 (Minn. App. 1984), *review denied* (Minn. Dec. 20, 1984). Here, there were two cooling-off periods between the domestic-assault-by-strangulation and the witness-tampering offenses. Appellant calmed down after the victim heard someone at the door, he became angry when D.M. confronted him, and then calmed down a second time before threatening the victim, and the witness-tampering offense was motivated by a desire to avoid prosecution for the assault. Under *Fischer*, the district court did not err in finding that the two offenses were not part of a single behavioral incident. *See also Bookwalter*, 541 N.W.2d at 294-95 (explaining analysis used to determine whether multiple offenses are part of a single behavioral incident).

IV.

> Direct contempts are those occurring in the immediate view and presence of the court, and arise from one or more of the following acts:
>
> (1) disorderly, contemptuous, or insolent behavior toward the judge while holding court, tending to interrupt the due course of a trial or other judicial proceedings;
>
> (2) a breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the business of the court.

Minn. Stat. § 588.01, subd. 2 (2008).

Appellant argues that his conduct of accusing the victim of lying at trial did not justify the contempt finding. Although not shown in the record, the state claims that appellant shoved electronic equipment off of the table in front of him before the district court found him in contempt. The district court, however, did not state what conduct and/or statements provided the basis for its contempt finding. After appellant objected to the 189-month sentence and accused the victim of lying, the district court stated: "My sentence is justified by the evidence, and you get an extra year for that. I find you in civil contempt of Court." Because this court cannot determine the basis for the contempt finding, we reverse the contempt finding and remand with instructions to the district court to state the conduct and/or statements on which the contempt finding is based.

The district court imposed a one-year sentence for the contempt. The state concedes that the maximum contempt sentence is six months. Minn. Stat. § 588.10 (2008). Accordingly, on remand, the district court shall not impose a sentence longer than six months. We note that a 90-day sentence is the maximum penalty "for ordinary instances of summary and punitive contempt orders" and that the district court must state the grounds justifying a longer sentence. *State v. Tatum*, 556 N.W.2d 541, 548 (Minn. 1996).

Affirmed in part, reversed in part, and remanded.