STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1037

State of Minnesota,
Respondent,

vs.

David Eugene Nelson,
Appellant.

Filed June 24, 2013
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge

Dakota County District Court
File No. 19HA-CR-11-2999

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

James C. Backstrom, Dakota County Attorney, Kevin J. Golden, Assistant County Attorney, Jenny R. Nystrom, Special Staff Assistant, Hastings, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Ross, Judge; and Kirk, Judge.

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

BJORKMAN, Judge

Appellant challenges his convictions of first-, third-, and fifth-degree assault; two counts of first-degree burglary; engaging in a pattern of stalking conduct; and

kidnapping. Appellant argues that (1) the evidence is insufficient to support his kidnapping and first-degree-assault convictions, (2) the district court erred by admitting several items of plainly inadmissible evidence, (3) the prosecutor committed misconduct by eliciting inadmissible testimony and misstating the evidence, and (4) the district court erred by imposing an upward durational sentencing departure based on improper grounds. Appellant asserts several additional claims in a pro se supplemental brief.

We affirm appellant's convictions. But because the district court imposed an upward durational departure based in part on improper aggravating factors and we cannot discern whether it would have imposed the same sentence based on the single proper aggravating factor, we reverse appellant's sentence and remand.

FACTS

Appellant David Nelson and C.D. dated briefly in 1980, while they were in high school. The two lost contact until fall 2009, when Nelson contacted C.D. through a social-networking website. They began a long-distance romantic relationship in April 2010. C.D. ended the relationship in January 2011.

After the breakup, Nelson began sending C.D. insulting and threatening messages by phone, text message, and e-mail. Nelson contacted C.D. at home and at work, sometimes ten times a day, saying things like "I'm going to make your life miserable," and that he would "come find" her. C.D. was alarmed and contacted the police, who told her to keep a record of the messages. Between February and April, C.D. documented numerous phone calls and voicemails, text messages, and e-mails in which Nelson

suggested that C.D. kill herself, called her insulting names, referenced facts about her private life, and indicated that he had hacked into her computer.

On March 23, C.D. obtained a harassment restraining order against Nelson. Nelson was aware of the order but continued to leave C.D. threatening messages. C.D. moved residences in May. She did not give Nelson her new address and used a P.O. box so that he would not be able to find her.

On May 25, C.D. called police to report that someone had defecated on the concrete slab in front of her place of employment. Police were unable to find the person who did it but discovered that someone was living in a shed behind C.D.'s workplace. Police searched the shed and found food and clothing, including a pair of size 29 jeans. C.D. told police about the restraining order and that Nelson knew where she worked and wore size 29 jeans.

On July 26, as C.D. was leaving for work, she noticed that the light in the hallway immediately above her apartment door was out; it was on again when she returned home. The next morning, C.D. heard someone outside her apartment door at 7:20 a.m. and noticed that her hallway light was out again. She checked the light, realized the light bulb was loose, and screwed it back in; it went on. At 7:30, C.D.'s usual departure time, she started to leave her apartment and Nelson rushed at her, pushed her back into the apartment, and started hitting her in the head. C.D. momentarily lost consciousness. When she came to and tried to move, Nelson hit her in the head again. C.D.'s neighbor, P.S., heard a scuffle and banging sounds and knocked on C.D.'s door. P.S. heard C.D. asking for help in a weak voice. P.S. announced she was calling the police, and Nelson

fled. C.D. then walked out of her apartment into the hallway, and P.S. saw that she was "totally covered in blood." Police and paramedics arrived shortly thereafter.

Paramedics took C.D. to the hospital where Casey Woster, M.D., treated her for several injuries. C.D. had a laceration on her arm and significant bruising on her wrists and hands, including one hand so swollen that it was initially believed to be broken. C.D.'s eyes were swollen shut. And C.D. had four lacerations on her head, ranging in size from five centimeters long to three inches long and requiring approximately 30 staples to close them. Dr. Woster expected that C.D.'s head injuries would leave permanent scars, which C.D. might be able to cover if her missing hair grew back. At the time of trial, nearly nine months later, C.D. was missing some hair and testified that she had scars running "the whole length of the back of [her] head."

Respondent State of Minnesota charged Nelson with third-degree assault, two counts of first-degree burglary (occupied dwelling and assault within the building), first-degree aggravated robbery, and engaging in a pattern of stalking conduct. The state subsequently added a kidnapping charge. Nelson agreed to plead guilty to one of the first-degree-burglary counts; the district court rejected the plea agreement after reviewing a presentence investigation report. The following month, the state amended the complaint a second time, adding a charge of first-degree assault. Shortly thereafter, Nelson discharged his lawyer and proceeded to trial pro se, with his former public defender as advisory counsel.

After a three-day trial, the jury acquitted Nelson of first-degree aggravated robbery but found him guilty of the other offenses and the lesser-included offense of fifth-degree

assault. Based on the evidence adduced at trial, the jury also specially found that C.D. was "treated with particular cruelty" in connection with all of the offenses, all of the offenses involved "a high degree of sophistication or planning," and all of the offenses occurred in a location where C.D. had "an expectation of privacy." The district court sentenced Nelson to 18 months' imprisonment for engaging in a pattern of stalking conduct, imposed a concurrent term of 240 months' imprisonment for first-degree burglary (assault within the building), and imposed a concurrent 117-month term for kidnapping. This appeal follows.

D E C I S I O N

I. Sufficient evidence supports Nelson's kidnapping and first-degree assault convictions.

When reviewing a sufficiency-of-the-evidence challenge, we carefully analyze the record to determine whether the jury could reasonably find the defendant guilty of the offense charged based on the facts in the record and the legitimate inferences that can be drawn from them. *State v. Buckingham*, 772 N.W.2d 64, 71 (Minn. 2009). In doing so, we view the evidence in the light most favorable to the conviction, presuming the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). We defer to the jury's credibility determinations. *Buckingham*, 772 N.W.2d at 71.

Kidnapping

Nelson argues that there is insufficient evidence to sustain his kidnapping conviction because the record establishes only incidental confinement. A conviction of

kidnapping requires proof that the defendant (1) confined or removed another person from one place to another, (2) without that person's consent, and (3) for one of four enumerated purposes, including to commit great bodily harm or terrorize the victim. Minn. Stat. § 609.25, subd. 1 (2010). "[W]here the confinement or removal of the victim is completely incidental to the perpetration of a separate felony, it does not constitute kidnapping." *State v. Smith*, 669 N.W.2d 19, 32 (Minn. 2003), *overruled on other grounds by State v. Leake*, 699 N.W.2d 312, 322-23 (Minn. 2005). But the fact that the force used to confine the victim was necessary to accomplish the underlying felony does not mean that it was merely incidental. *See State v. Earl*, 702 N.W.2d 711, 722-23 (Minn. 2005) (holding that confinement of family in kitchen of residence to "keep them out of the way" during burglary may have been "necessary" to the burglary but was distinct from, not merely incidental to, that offense).

C.D. testified that she was halfway out of her apartment when she was pushed back in and attacked. C.D. estimated the assault took five minutes. Nelson urges that this is insufficient confinement because he "did not do anything [in the apartment] other than commit the assault." We disagree. Viewed in the light most favorable to the verdict, the evidence establishes that Nelson confronted C.D. as she was leaving her apartment and pushed her back in, thereby confining her to the apartment where he committed the assault. This is not the reactive, incidental confinement in *Smith*, where the defendant momentarily blocked the doorway during the attack that resulted in the victim's death, *see* 669 N.W.2d at 32-33, but "purposeful behavior in its own right," *see*

Earl, 702 N.W.2d at 723. We conclude that sufficient evidence supports Nelson's kidnapping conviction.

First-degree assault

Nelson argues that the evidence is insufficient to sustain his first-degree-assault conviction because it does not establish great bodily harm as required by Minn. Stat. § 609.221, subd. 1 (2010).[1] Great bodily harm means "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm." Minn. Stat. § 609.02, subd. 8 (2010). The evidence adduced at trial implicates two of these definitions.

We first consider the evidence of "serious permanent disfigurement." Scars may constitute "serious permanent disfigurement," depending on their size and visibility. *See State v. McDaniel*, 534 N.W.2d 290, 293 (Minn. App. 1995) (discussing six-centimeter scar on front of neck and two-thirds-inch scar on right center chest), *review denied* (Minn. Sept. 20, 1995). This court has held that "relatively small" scars located "in areas where they are not particularly noticeable" do not constitute serious permanent disfigurement. *State v. Gerald*, 486 N.W.2d 799, 802 (Minn. App. 1992) (discussing two one-half-inch scars, one located in the victim's ear and the other on the back of his neck behind his ear). But the mere fact that a scar can be hidden does not preclude a finding of great bodily harm. *See State v. Anderson*, 370 N.W.2d 703, 706 (Minn. App. 1985)

[1] Nelson also challenges his kidnapping conviction on this basis. While we disagree that the kidnapping offense necessarily requires proof of great bodily harm, the ample evidence of great bodily harm supports Nelson's kidnapping conviction.

(concluding that a long scar running the length of victim's torso constitutes serious permanent disfigurement), *review denied* (Minn. Sept. 19, 1985).

Nelson argues that this case is like *Gerald* because the evidence does not establish the size or visibility of C.D.'s scars. We disagree. While the state did not submit photographs or have C.D. show her scars to the jury, the testimony of C.D. and Dr. Woster establishes that C.D. has four scars on her head, ranging up to three inches long; that she has hair loss in those areas; and that the scars likely would be visible if she wore her hair shorter. On this record, we conclude there is sufficient evidence of serious permanent disfigurement.

We next consider the evidence of "other serious bodily harm."[2] This definition focuses on a victim's injuries as a whole, including the need for hospitalization, the use of stitches or staples to treat the injuries, and significant bleeding, bruising and/or lapses in consciousness. *See id; see also State v. Jones*, 266 N.W.2d 706, 710 (Minn. 1978). Viewed in the light most favorable to the jury's verdict, the evidence here establishes that C.D. sustained numerous severe injuries at Nelson's hand. She suffered lacerations and bruising on her hands and wrists, lost consciousness at least once during the attack, and

[2] Nelson argues that we should confine our review to the evidence of serious permanent disfigurement needed to sustain a finding of great bodily harm because that is what the state argued to the jury. We disagree. When reviewing the sufficiency of the evidence to establish an element of an offense, we examine all of the facts in the record in the light most favorable to the state to determine whether the jury could reasonably find the defendant guilty. *Buckingham*, 772 N.W.2d at 71. While the state did not specifically argue that C.D.'s injuries constitute "other serious bodily harm," the district court found sufficient evidence to submit the first-degree-assault charge to the jury and properly instructed the jury that great bodily harm means "bodily harm that . . . causes serious permanent disfigurement" or "other serious bodily harm."

was left with multiple open head wounds severe enough to leave pools of blood in her apartment and cover her head and face in blood. Her injuries required hospitalization, and her head injuries required approximately 30 staples. This record amply establishes that Nelson's assault caused C.D. "other serious bodily harm."

II. The district court did not commit prejudicial evidentiary error.

Nelson argues that the district court erred by admitting (1) documents C.D. prepared listing contacts from and statements made by Nelson, (2) testimony about C.D.'s harassment restraining order, and (3) speculative testimony about Nelson's other conduct. He concedes that he did not object to this evidence.[3] When an appellant fails to object to the evidence at trial on the grounds advocated on appeal, the plain-error test applies. *Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011). In applying the plain-error test, we will reverse only if the district court (1) committed an error; (2) that was plain; (3) that affected the defendant's substantial rights; and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

C.D.'s recorded recollections

Nelson argues that the district court plainly erred by admitting exhibits 1 and 2 because they are inadmissible hearsay. We agree. Exhibit 1 is a one-page document that C.D. prepared, listing phone calls she received from Nelson on February 2 and 3, 2011. Exhibit 2 is a five-page document that C.D. prepared, memorializing the content of voicemail messages, text messages, and e-mails that C.D. received from Nelson between

[3] Although Nelson objected to admission of C.D.'s recorded statements, he did not object on the grounds he advocates on appeal.

February and April 2011. Exhibit 2 contains statements that C.D. attributes to Nelson, but the document itself is C.D.'s out-of-court statement offered to establish that Nelson contacted her on the dates and in the ways indicated. Accordingly, we conclude both documents are hearsay.

Hearsay is generally inadmissible. Minn. R. Evid. 802. But the content of a hearsay document concerning a matter about which a witness once had knowledge and made when the matter was fresh in the witness's memory may be admissible if the witness has insufficient recollection to testify fully and accurately. Minn. R. Evid. 803(5). "If admitted, the [document] may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party." *Id.* The district court plainly erred by admitting the documents themselves as exhibits. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (stating that an error is plain if it "contravenes case law, a rule, or a standard of conduct"). But this does not end our analysis. "To satisfy the third [plain-error] prong, [the defendant] bears the heavy burden of showing that there is a reasonable likelihood the error had a significant effect on the verdict." *State v. Davis*, 820 N.W.2d 525, 535 (Minn. 2012) (quotation omitted). Nelson agrees that C.D. could have testified to the content of the documents. Admitting the content as exhibits merely provided admissible evidence to the jury in a different form. And in view of the nature of the evidence at issue—Nelson's threatening and insulting messages—presenting the jury with written documents rather than having C.D. read aloud from them likely accrued to Nelson's advantage. Moreover, the documents were only part of the extensive evidence of Nelson's repeated harassing contacts with C.D. On this record, we conclude there is

no reasonable likelihood that the erroneous admission of exhibits 1 and 2 significantly affected the jury's verdict.

Restraining order

Nelson next argues that testimony about C.D.'s restraining order against Nelson is improper other-acts evidence. *See* Minn. R. Evid. 404(b) (providing that evidence of a defendant's prior crimes or bad acts is generally inadmissible). The state counters that this testimony is admissible because the existence of the restraining order is "intrinsic" to the charge of engaging in a pattern of stalking conduct. We agree with the state.

Rule 404(b) does not apply when the state offers evidence of the defendant's prior crimes or misconduct "as direct evidence" to prove an element of the charged offense. *State v. Cross*, 577 N.W.2d 721, 725 (Minn. 1998); *see also State v. Hollins*, 765 N.W.2d 125, 131 (Minn. App. 2009) (stating that "a rule 404(b) analysis is unnecessary if the evidence of another crime is intrinsic to the crime charged"). A pattern of stalking conviction requires the state to prove that (1) the defendant committed two or more enumerated acts, including stalking and various forms of harassing conduct, within a five-year period; (2) the defendant committed the acts knowing, or with reason to know, that they would cause the victim to feel terrorized or fear bodily harm; and (3) the defendant's acts caused this reaction. Minn. Stat. § 609.749, subd. 5(a)-(b) (2010). The evidence that Nelson continued to contact C.D. despite his awareness of the restraining order demonstrates stalking conduct and his intent to cause her fear, both of which are elements of the stalking offense. Accordingly, we discern no error in admitting evidence of the restraining order.

Speculative evidence

Nelson also argues that the district court plainly erred by admitting testimony that he lived in a shed near and defecated on the doorstep of C.D.'s workplace, contending that this evidence is improper character evidence and speculative. We disagree. The defecation is direct evidence of stalking conduct, and living in close proximity to C.D.'s workplace indicates surreptitious monitoring, which is direct evidence of planning conduct, as we discuss below; neither is character evidence. And Nelson's assertion that this testimony is speculative ultimately presented a question of credibility for the jury to decide. Nelson had an opportunity to cross-examine the officer who investigated the workplace incidents and argued to the jury that he could not be linked to them. On this record, we conclude Nelson has not established plain error in admitting the evidence.

III. The prosecutor did not commit misconduct.

Nelson argues that the prosecutor committed misconduct by eliciting inadmissible testimony and misstating the evidence. Nelson did not object to this claimed prosecutorial misconduct, so we review his arguments under a modified plain-error standard. *See Ramey*, 721 N.W.2d at 299-300, 302; *see also* Minn. R. Crim. P. 31.02. Under this standard, an appellant must demonstrate that the prosecutor's unobjected-to conduct was erroneous and the error was plain. *Ramey*, 721 N.W.2d at 302. The burden then shifts to the state to prove that the error did not affect the appellant's substantial rights. *Id.* We consider closing arguments in their entirety to determine whether prejudicial misconduct occurred. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

Nelson first contends that the prosecutor elicited inadmissible evidence about the restraining order when questioning C.D. and the police officer who investigated the incidents at her workplace. It is misconduct for a prosecutor to ask questions calculated to elicit "clearly inadmissible evidence." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). Because evidence of the restraining order is relevant to an element of the stalking offense, eliciting such evidence was not misconduct.

Nelson next argues that the prosecutor misstated the evidence by inaccurately characterizing C.D.'s injuries. "[I]t is misconduct for a prosecutor to mischaracterize evidence or make arguments unsupported by the record." *State v. Ferguson*, 729 N.W.2d 604, 616 (Minn. App. 2007), *review denied* (Minn. June 19, 2007). But the law recognizes that inadvertent misstatements may occur and requires only that closing arguments be "proper, not perfect." *State v. Atkins*, 543 N.W.2d 642, 648 (Minn. 1996).

This challenge focuses on the prosecutor's characterization of the testimony of Dr. Woster and C.D. First, Nelson contends that the prosecutor mischaracterized Dr. Woster's testimony by stating, "[H]e told you that there were three to four about 3-inch gashes in her head. . . . You remember, he held up his fingers about 3 inches. So you have three or four of these large scars on [C.D.'s] head." This argument does slightly overstate Dr. Woster's testimony that the lacerations ranged from 5 centimeters to 3 inches in length. But the prosecutor's description is similar enough to Dr. Woster's testimony that it does not suggest purposeful mischaracterization, particularly in the absence of an objection. Moreover, the district court properly instructed the jury that closing arguments are not evidence. *See State v. Johnson*, 679 N.W.2d 378, 389 (Minn.

App. 2004) (noting that district court instructed the jury that counsel's arguments are not evidence in concluding no prejudicial misconduct occurred), *review denied* (Minn. Aug. 17, 2004).

Second, Nelson contends that the prosecutor mischaracterized C.D.'s testimony by stating that she testified "on some of it there's hair that's not growing back, making it even more visible." We disagree. C.D. testified that she is missing some hair; and Dr. Woster testified that if C.D.'s hair were shorter or missing, the scars could be more visible. The prosecutor did not mischaracterize this testimony.

IV. The district court relied on improper grounds in imposing an upward durational sentencing departure.

A district court must impose the presumptive guidelines sentence unless "identifiable, substantial, and compelling circumstances" warrant an upward departure. Minn. Sent. Guidelines II.D. (2010). Substantial and compelling circumstances are those showing that the defendant's conduct was significantly more serious than that typically involved in the commission of the offense. *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). When such circumstances are present, whether to depart from the presumptive sentence is left to the district court's discretion. *State v. Stanke*, 764 N.W.2d 824, 827 (Minn. 2009). But whether a particular basis for departure is proper is a question of law that we review de novo. *State v. Grampre*, 766 N.W.2d 347, 350 (Minn. App. 2009), *review denied* (Minn. Aug. 26, 2009).

The district court sentenced Nelson to 240 months' imprisonment for first-degree burglary (assault within the building), an upward durational departure, based on three

aggravating factors: particular cruelty, sophistication and planning, and invasion of the victim's zone of privacy. Nelson contends all three aggravating factors are improper. We address each in turn.

Particular cruelty

A defendant's treatment of a victim with particular cruelty is a proper basis for an upward durational departure. Minn. Sent. Guidelines II.D.2.b.(2). Particular cruelty "involves the gratuitous infliction of pain and cruelty of a kind not usually associated with the commission of the offense in question." *State v. Rourke*, 773 N.W.2d 913, 922 (Minn. 2009) (quotation omitted). The district court determines whether commission of a crime with particular cruelty provides a reason to depart from the guidelines sentence, but a jury must find specific facts that support that departure ground. *Id.* at 920-21. Thus, the district court must submit to a sentencing jury one or more special interrogatories that ask whether the state has proven, beyond a reasonable doubt, a factual circumstance that supports a legal determination that the defendant acted with particular cruelty. *Id.* at 923.

Nelson argues that particular cruelty was not a proper basis for departure here because the jury was not asked to and did not find any specific facts that indicate he committed the burglary in a particularly cruel manner. We agree. The jury was asked only whether C.D. was "treated with particular cruelty." This interrogatory is markedly similar to the interrogatory deemed improper in *Rourke*, which asked, "Was [the victim] treated with particular cruelty on January 28, 2003?" *Id.* at 916. And this court has held that interrogatories of this sort are insufficient under *Rourke* to support an aggravated

sentence. *E.g.*, *State v. Ahmed*, 782 N.W.2d 253, 262 (Minn. App. 2010); *Carse v. State*, 778 N.W.2d 361, 373 (Minn. App. 2010), *review denied* (Minn. Apr. 20, 2010).

The state urges that the limited interrogatory used here is sufficient under *Rourke* because the prosecutor explained particular cruelty to the jury. We disagree. Asking the jury to determine whether the defendant acted with particular cruelty requires the jury to perform the role of the district court in addition to its own fact-finding role. *See Rourke*, 773 N.W.2d at 920-21. Because the jury did not make any findings as to the existence of specific additional facts that would support a legal conclusion that Nelson committed the offense in a particularly cruel way, we conclude the district court erred by relying on particular cruelty to support an upward durational departure.

Planning

When an offense involves a high degree of planning, that factor can constitute a basis for an upward durational departure. *State v. Yaritz*, 791 N.W.2d 138, 146 (Minn. App. 2010). This factor encompasses planning as to when, where, or how to commit the offense; gathering materials to use in the commission of the offense; and taking steps to conceal identity, eliminate evidence, or otherwise avoid detection. *See State v. Kindem*, 338 N.W.2d 9, 17 (Minn. 1983) (noting defendant's "immense amount of planning to determine when the victim would be most vulnerable"); *Yaritz*, 791 N.W.2d at 147 (noting defendant purchased and tested chloroform for use on victim); *Grampre*, 766 N.W.2d at 353 (considering the fact that defendant wore stocking cap and hooded sweatshirt to conceal his identity; brought knife, golf club, and rope; forced victim to shower after the assault; and cut out and later destroyed the portion of bed sheet on which

he ejaculated). But a departure cannot be based on planning conduct that is part of the underlying crime or part of an offense of which the defendant was separately convicted. *See Grampre*, 766 N.W.2d at 351 (citing *State v. Jones*, 745 N.W.2d 845, 849 (Minn. 2008)).

Nelson argues that his planning conduct cannot support a sentencing departure because it was the basis for his stalking and burglary convictions. We disagree. The evidence supporting Nelson's stalking conviction includes the series of insulting and threatening phone calls, text messages, and e-mails Nelson sent to C.D., even after she obtained a restraining order against him, and his defecating in front of her workplace. *See* Minn. Stat. § 609.749, subd. 5(a), (b).[4] The evidence supporting the burglary convictions includes C.D.'s testimony that Nelson came into her apartment without her permission and hit her repeatedly, as well as P.S.'s testimony that she saw Nelson leave C.D.'s apartment immediately after the assault. *See* Minn. Stat. § 609.582, subd. 1(a), (c) (2010). None of this evidence establishes that Nelson's burglary offenses involved a high degree of planning.

Rather, the record contains the following evidence of independent planning conduct. C.D. moved to a new apartment to evade Nelson's advances and used a P.O. box to keep him from finding her. But Nelson surreptitiously monitored C.D., including living in the shed near her workplace, and tracked her down. Because Nelson did not intend for C.D. to be aware of his monitoring, and she was largely unaware of it, it was

[4] The district court instructed the jury on three enumerated acts alleged to establish the pattern of stalking conduct: stalking, making harassing telephone calls, and sending harassing letters. *See* Minn. Stat. § 609.749, subd. 5(b)(1), (10), (11).

not stalking conduct but independent planning conduct. *See* Minn. Stat. § 609.749, subd. 5(a) (requiring that actor know stalking conduct will cause victim to feel terrorized or to fear bodily harm and that it actually causes that reaction). Also, Nelson's early morning interference with C.D.'s hallway light the day before and the day of the assault shows that he entered C.D.'s apartment building multiple times and targeted her specific apartment at the time she usually leaves for work. Whether Nelson was confirming which apartment belonged to C.D., identifying when she leaves for work, assessing her awareness of what occurs in the hallway, or all of these, his conduct demonstrates planning and preparation for the burglary he committed. And Nelson brought a dime and super glue to C.D.'s apartment, using them to obstruct the key hole to her apartment door so that no one could enter the apartment to interrupt his assault or aide C.D.[5] Finally, Nelson positioned himself off to the side of C.D.'s apartment door while awaiting her exit, so he would not be visible if she looked through the peephole.

Because the record contains ample evidence of planning distinct from that establishing the elements of the offenses of which Nelson was convicted, we conclude the district court did not abuse its discretion by relying on this factor to impose an upward durational departure.

[5] Nelson agrees that the dime on the lock could suggest planning but asserts that there is no direct evidence that he put the dime on the lock. Because the only reasonable inference from the evidence in light of all of Nelson's conduct is that he glued the dime to the door, we consider this fact evidence of Nelson's planning. *See State v. Andersen*, 784 N.W.2d 320, 329-30 (Minn. 2010) (stating that circumstantial evidence is sufficient to support a finding if the evidence does not support any other rational inferences).

Zone of privacy

Committing an offense in the victim's "zone of privacy" may also justify a "more severe punishment." *State v. Thao*, 649 N.W.2d 414, 422 (Minn. 2002); *see also* Minn. Sent. Guidelines II.D.2.b.(14). The "zone of privacy" includes the victim's home and curtilage. *Thao*, 649 N.W.2d at 422. But as noted above, a departure cannot be based on elements of the underlying crime or of a crime of which the defendant was separately convicted. *Grampre*, 766 N.W.2d at 351.

Nelson contends that the district court erred by relying on the jury's finding that he committed first-degree burglary (assault within the building) in C.D.'s zone of privacy to impose the upward durational departure because the location of the burglary (C.D.'s apartment) is an element of first-degree burglary (occupied dwelling), of which he was separately convicted. We agree. When multiple convictions are based on a single course of conduct, the district court generally is precluded from imposing sentences for all convictions on the principle that sentencing the most serious conviction includes punishment for all and accurately accounts for the criminality of the entire course of conduct. *See* Minn. Stat. § 609.035, subd. 1 (2010); *Jones*, 745 N.W.2d at 850. For the same reason, a court generally may not use a fact underlying one conviction to aggravate the sentence for another conviction resulting from the same course of conduct.[6] *See Jones*, 745 N.W.2d at 850-51; *see also State v. Jackson*, 749 N.W.2d 353, 358 (Minn.

[6] We note that a similar concern arises even if multiple convictions are factually distinct enough that the district court may impose sentences for both convictions because using conduct underlying one conviction to impose a sentencing departure on the other exaggerates the criminality of that conduct by punishing it twice. *See State v. Spaeth*, 552 N.W.2d 187, 196 (Minn. 1996).

2008) (holding that departure based on uncharged criminal conduct was improper but observing that "[a] departure would also have been improper" "for conduct that constitutes more than one offense"). An upward departure based on "'overlapping' facts" is permitted only when sentencing on each of the multiple convictions is permitted. *See Edwards*, 774 N.W.2d at 604-07 (addressing multiple-victim exception to Minn. Stat. § 609.035 (2010)).

Here, the district court properly sentenced Nelson only on burglary (assault within), the most serious of his two burglary convictions. But because Minn. Stat. § 609.035 prohibits sentencing Nelson on his burglary (occupied dwelling) conviction, conduct underlying that conviction, including invasion of C.D.'s zone of privacy, cannot support an upward sentencing departure on the burglary (assault within) conviction. We therefore conclude that the district court erred by relying on the zone-of-privacy factor to justify an upward durational departure.

Remedy

If the district court imposes an aggravated sentence on both valid and invalid departure grounds, we will affirm the sentence only if we "can conclude from the record that the district court would have imposed the same sentence absent its reliance on the improper aggravating factors." *State v. Mohamed*, 779 N.W.2d 93, 100 (Minn. App. 2010), *review denied* (Minn. May 18, 2010). If we cannot determine whether the district court would have imposed the same sentence absent reliance on the invalid grounds, remand is required. *See State v. Vance*, 765 N.W.2d 390, 395-96 (Minn. 2009).

The district court departed from the presumptive sentence of 58 months, imposing 240 months—the statutory maximum—based on three aggravating factors. The district court addressed all three at sentencing, without emphasizing any one factor. Because we cannot determine from this record whether the district court would have imposed the same sentence based solely on Nelson's planning conduct, we reverse and remand for resentencing consistent with this opinion.

V. The warrant of commitment must be corrected.

Nelson argues that the warrant of commitment incorrectly states that he was convicted of kidnapping to facilitate felony or flight under Minn. Stat. § 609.25, subd. 1(2), rather than kidnapping to commit great bodily harm or to terrorize the victim under Minn. Stat. § 609.25, subd. 1(3). We agree. Nelson was charged under both subdivisions, but the district court instructed the jury only as to great bodily harm and sentenced him on that basis. Because we affirm Nelson's conviction of kidnapping to commit great bodily harm, the warrant of commitment must be corrected.

VI. Nelson's pro se arguments lack merit.

In a pro se supplemental brief, Nelson asserts a number of arguments, including ineffective assistance of counsel, insufficiency of the evidence, prosecutorial misconduct, and evidentiary error. Nelson supports only his prosecutorial-misconduct claim with citation to legal authority; all others are waived. *See State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (deeming waived pro se argument that included "no citation to any relevant legal authority").

Nelson argues that the prosecutor committed misconduct by withholding police photographs of C.D.'s injuries. A prosecutor's failure to disclose material exculpatory evidence is misconduct. *See State v. Jenkins*, 782 N.W.2d 211, 232 (Minn. 2010) (citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963) (other citations omitted)). But a prosecutor is under no obligation to introduce such evidence at trial. Assuming the photographs Nelson references are exculpatory evidence within the scope of *Brady*, our careful review of the record indicates only that the prosecutor declined to use the police photographs, or any other photographs of C.D.'s injuries, at trial. Nothing in the record suggests that the prosecutor deprived Nelson of access to such evidence. Accordingly, Nelson is not entitled to relief on this basis.

In sum, we conclude that sufficient evidence supports Nelson's kidnapping and first-degree-assault convictions and that he was not prejudiced by the district court's evidentiary determinations or prosecutorial error. But because the district court relied on improper aggravating factors and the warrant of commitment is inaccurate, we reverse in part and remand for resentencing consistent with this opinion.

Affirmed in part, reversed in part, and remanded.