MCBW Minnesota Coalition for Battered Women

60 East Plato Blvd., Suite 130
St. Paul, MN 55107

Telephone: (651) 646-6177 or (800) 289-6177
Fax: (651) 646-1527

MEMO FROM THE MINNESOTA COALITION FOR BATTERED WOMEN

REGARDING DOMESTIC ABUSE NO CONTACT ORDERS (DANCO)

To Whom It May Concern:

Pursuant to Minn. Stat. § 629.75, subdivision 1 (b), a Domestic Abuse No Contact Order (DANCO) is independent of any condition of pretrial release or probation imposed on the defendant. Since a DANCO is not a condition of release, if a judge were to set the maximum bail on the defendant, a DANCO can also be ordered by the judge as an adjoining but separate matter.

A DANCO is "an order issued by a court against a defendant in a criminal proceeding or a juvenile offender in a delinquency proceeding for: domestic abuse, harassment or stalking against a family or household member, violation of an order for protection, or violation of a prior DANCO order." Minn. Stat. § 629.75, subd. 1 (a). Further, the issuance of a DANCO may occur as a pretrial order before the final disposition of the underlying criminal case or it may occur as a post-conviction probationary order. It is important to note that a DANCO "is independent of any condition of pretrial release or probation imposed on the defendant…and it may be issued in addition to a similar restriction imposed as a condition of pretrial release or probation." Minn. Stat. § 629.75, subd. 1 (b).

Minn. Stat. § 629.72, subdivision 2 (b) allows the court to impose conditions of release or bail on the defendant, thereby restricting the defendant's contact with the alleged victim and affected family or household members. The court may issue a no-contact order as a condition of release. It is crucial to note that a no-contact condition of release order is distinct from a DANCO. The no-contact order

60 East Plato Blvd., Suite 130
St. Paul, MN 55107

Telephone: (651) 646-6177 or (800) 289-6177
Fax: (651) 646-1527

would only apply upon release, and, even if the defendant remains incarcerated, the defendant would be allowed to contact the victim. In addition, law enforcement officials do not have the authority to arrest a person for violation of a condition of release. In contrast, if the defendant were issued a DANCO, the DANCO would apply whether the defendant is released or not; thus, the defendant would be prohibited from contacting the victim, and law enforcement officials may impose a separate criminal charge in the event of a DANCO violation. See *State v. Milner*, No. A12-2137, 2013 WL 6152174, at *3 (Minn. Ct. App. Nov. 25, 2013).

In the state of Minnesota, a defendant has a constitutional right to unconditional bail in a criminal proceeding. *State v. Pett*, 253 Minn. 429, 435, 92 N.W.2d 205, 209 (1958). However, the Minnesota legislature has made the distinction that the issuance of a DANCO is a separate matter from fixing the amount of bail; a DANCO is not a condition of release. See Minn. Stat. § 629.75, subd. 1 (a).

The court in *Milner* discussed this very distinction. "The DANCO statute provides a mechanism for protecting victims of domestic violence separate and apart from bail, and with the evidence purpose of ensuring that a defendant will not have contact with a victim, whether or not bail is posted. The legislature provided that a DANCO shall be issued in a proceeding separate from the criminal case, thereby ensuring that, even if a defendant makes unconditional bail in the criminal case, a procedure is available by which an enforceable no-contact order may exist and which may give rise to a separate criminal charge in the event of a violation." *State v. Milner*, No. A12-2137, 2013 WL 6152174, at *3 (Minn. Ct. App. Nov. 25, 2013) (citing Minn.Stat. § 629.75, subd. 1 (c)). Thus, the

MCBW Minnesota Coalition for Battered Women

60 East Plato Blvd., Suite 130
St. Paul, MN 55107

Telephone: (651) 646-6177 or (800) 289-6177
Fax: (651) 646-1527

Milner court concluded, "If a DANCO is issued, it must be issued in a proceeding separate from the criminal case that immediately follows a proceeding in which any pretrial release or sentencing issues are decided." See Minn. Stat. § 629.75, subd. 1 (c).

In a similar note, the *Rosillo* court concluded, "A DANCO is not a pretrial release condition…[in which] the statute expressly states that a DANCO 'is independent of any condition of pretrial release.'" *State v. Rosillo*, No. A13-0504, 2014 WL 1660653, at *1 (Minn. Ct. App. Jul. 15, 2014) (citing Minn.Stat. § 620.75, subd. 1 (b)). In this case, the district court issued a DANCO and set bail at $500,000 unconditional and $250,000 with conditions. However, the defendant violated the DANCO order by repeatedly calling the victim from jail. The *Rosillo* court noted, "Under the statute, violation of a DANCO does not result in bail revocation. Rather, the statute makes a DANCO violation a separate criminal offense and establishes punishments for violations." *Id.*, at *2-3 (citing Minn.Stat. § 629.75, subd. 2.). Further, the *Rosillo* court emphasized, "[Minn. Stat. § 629.75] provides a method for protecting victims of domestic abuse that is separate from and does not conflict with the procedure for determining bail and pretrial release conditions." *Id.*, at *3.

Under Minn. Stat. §§ 629.75 and 629.72, issuance of a DANCO is not a pretrial release condition, and a DANCO is a separate matter that is apart from bail. The Court has the authority to set maximum bail AND issue a Domestic Abuse No Contact Order (DANCO).

Minnesota Coalition for Battered Women

2013 WL 6152174
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Edward Leroy **MILNER**, Appellant.

No. A12–2137.
|
Nov. 25, 2013.

Olmsted County District Court, File No. 55–CR–11–7334.

Attorneys and Law Firms

Lori Swanson, Attorney General, St. Paul, MN; and Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Assistant County Attorney, Rochester, MN, for respondent.

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Jessica Benson Merz Godes, Assistant Public Defender, St. Paul, MN, for appellant.

Considered and decided by SMITH, Presiding Judge; WORKE, Judge; and RODENBERG, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge.

***1** Appealing from his convictions of violating a domestic abuse no-contact order (DANCO) and direct criminal contempt during the trial proceedings, appellant argues that (1) the district court erred in determining that his constitutional challenges are barred as an impermissible collateral attack; (2) the DANCO statute is unconstitutional; (3) the district court committed reversible error by failing to properly instruct the jury; and (4) his direct contempt conviction should be reversed as unsupported by the record. We affirm.

FACTS

Appellant Edward Leroy **Milner** was charged with violating a DANCO. The DANCO was issued during appellant's rule 5 hearing in a criminal proceeding in which appellant was charged with several crimes relating to a domestic assault on V.L.T., a woman with whom he was previously involved. The district court **stated** that appellant was "not to have contact with [V.L.T] or be at ... any location where she resides." On or about August 30, 2011, appellant sent a letter to V.L.T. from the Olmsted County Jail using the name of a different jail inmate in the return address. V.L.T. did not know the inmate whose name was used on the return address of that letter. The letter referred to intimate details from V.L.T.'s past relationship with appellant. It was also written in what V.L.T. described as appellant's distinct handwriting and contained fingerprints of appellant's right thumb and left palm. On October 12, V.L.T. gave the letter to the officer investigating the underlying domestic assault charges.

On October 20, 2011, appellant was charged with felony violation of the DANCO in violation of Minn.Stat. § 629.75 (2010). At the omnibus hearing, appellant argued that the DANCO statute is unconstitutional under several theories. The district court determined that these challenges were barred as an impermissible collateral attack. Thereafter, appellant entered a plea of not guilty, and the case was tried to a jury.

At trial, the district court instructed the jury on the elements of the charged felony DANCO violation as follows: "First, there was an existing court domestic abuse no-contact order; second, the defendant violated a term or condition of the order; third, the defendant knew of the existence of the order; fourth, the defendant's act took place on or about August 30, 2011, in Olmsted County." Additionally, the special verdict form provided to the jury posed this question: "Did the defendant knowingly commit this crime within ten years of the first of defendant's two or more previous qualified domestic violence-related offense convictions?" The judge instructed the jury regarding this special verdict question as follows:

> If you find defendant is guilty, you have an additional issue to determine and it will be put to you in the form of a question on the verdict form. The question is: Did the defendant knowingly commit this crime within ten years of the first of defendant's two or more previous qualified domestic violence-related offense convictions? You should answer the question yes or no. If you have a reasonable doubt as to the answer, you should answer the question no.

***2** Appellant did not object to either the special verdict form or to these jury instructions. The jury found appellant guilty of the charged offense and answered the special verdict question in the affirmative. Appellant was sentenced to an executed commitment to prison for one year and one day.

Throughout the trial proceedings, appellant was uncooperative, refused to stand when the judge entered the courtroom, refused to answer the judge's questions, and was eventually removed from the courtroom because of his behavior. After the final summations of counsel, appellant was brought back into the courtroom and was asked if he wanted to be present for the return of the verdict. Despite warnings that the district court could hold him in contempt, appellant ignored the district court's questions and repeatedly interrupted the judge while she was speaking. After multiple warnings and admonitions, the district court found appellant in direct contempt of court and imposed a 90–day jail sentence, to be served consecutively to the sentence for the DANCO conviction. This appeal followed.

DECISION

I.

On appeal, appellant raises the same arguments regarding the constitutionality of the DANCO statute that he raised at the omnibus hearing; namely, that it violates (1) procedural due process; (2) the void-for-vagueness doctrine of the due process clauses of the federal and **state** constitutions; and (3) the separation of powers doctrine of the **state** constitution. He also argues for the first time on appeal that the statute violates substantive due process and the First Amendment by (1) infringing on a "fundamental liberty interest in forming and preserving personal relationships," and (2) "making it a crime to have any type of contact, whether harassing or benign, with a particular person."

We first consider whether appellant's constitutional arguments are barred as an impermissible collateral attack. The district court did not address the merits of appellant's constitutional challenges, but instead ruled that they amounted to an impermissible collateral attack because appellant could have raised arguments concerning the validity of the DANCO order in the underlying proceeding at which the order was issued.

We held in ***State*** *v. Ness* that "[b]ecause there is no right to appeal the issuance of a pretrial DANCO, ... a challenge to the issuance of the DANCO in a subsequent prosecution for violating that DANCO is not barred as a collateral attack." 819 N.W.2d 219, 221 (Minn.App.2012), *aff'd,* 834 N.W.2d 177 (Minn.2013). The Minnesota Supreme Court did not disturb this holding on appeal. ***State*** *v. Ness,* 834 N.W.2d 177, 181 n. 3 (Minn.2013) ("Because the question of whether a collateral attack of the statute is permissible has not been preserved for our review, we have no occasion to address that question in this opinion."). Based on our opinion in *Ness,* appellant is entitled to challenge the constitutionality of the DANCO statute in this proceeding. 819 N.W.2d at 221. His challenge is not barred as an impermissible collateral attack.

3** The constitutionality of a statute is a question of law, which we review de novo. ***State *v. Crawley,* 819 N.W.2d 94, 101 (Minn.2012), *cert. denied,* 133 S.Ct. 1493 (2013). We presume a statute is constitutional, ***State*** *v. Bussmann,* 741 N.W.2d 79, 82 (Minn.2007), and the party challenging a statute's constitutionality must establish, "beyond a reasonable doubt, that the statute violates a provision of the constitution," ***State*** *v. Grossman,* 636 N.W.2d 545, 548 (Minn.2001).

With respect to appellant's contentions that the DANCO statute violates procedural due process and is void for vagueness, our supreme court recently rejected those arguments. *Ness,* 834 N.W.2d at 183, 186. *Ness* left open the possibility of as-applied challenges, but appellant has not made such a challenge. *See id.* at 183 n. 4.

The separation-of-powers issue was argued to the district court but not addressed in *Ness,* and we therefore analyze it here. *Id.* at 181. The legislature declares what acts are criminal and establishes the punishment for such acts as substantive law. ***State*** *v. Lindsey,* 632 N.W.2d 652, 658 (Minn.2001). The judiciary decides "the method by which the guilt or innocence of one who is accused of violating a criminal statute is determined." *Id.*

Appellant argues that the legislature has imposed a procedural regulation on the courts by mandating that a DANCO be issued in a proceeding separate from the criminal proceeding from which the DANCO arises. Appellant contends that the Minnesota Supreme Court has the sole authority to issue rules of procedure for the **state** courts. Therefore, he argues, the legislature has impinged on a judicial function in enacting the DANCO statute.

As part of his separation-of-powers challenge, appellant argues that, by prohibiting the issuance of a DANCO as part of the hearing to set conditions of release, the statute encroaches on the district court's ability to regulate procedure. This argument ignores a defendant's constitutional right to unconditional bail in a criminal proceeding. *See* ***State*** *v. Pett,* 253 Minn. 429, 435, 92 N.W.2d 205, 209 (1958) ("[U]nder our constitution the court [has] no discretion except in fixing the amount of bail."). The DANCO statute provides a mechanism for protecting victims of domestic violence separate and apart from bail, and with the evident purpose of ensuring that a defendant will not have contact with a victim, whether or not bail is posted. The legislature provided that a DANCO shall be issued in a proceeding separate from the criminal case, thereby ensuring that, even if a defendant makes unconditional bail in the criminal case, a procedure is available by which an enforceable no-contact order may exist and which may give rise to a separate criminal charge in the event of a violation.[1] Minn.Stat. § 629.75, subd. 1(c).

Appellant's separation-of-powers argument fails. Contrary to appellant's assertion, the statute does not require a district court to issue a DANCO. Rather, the express language of the statute provides that a DANCO "*may* be issued as a pretrial order before final disposition of the underlying criminal case...." Minn.Stat. § 629.75, subd. 1(b) (emphasis added). Although Minn.Stat. § 629.75, subd. 1(c), **states** that a DANCO "shall be issued," the words that follow make evident that *if* a DANCO is issued, it must be issued in a proceeding separate from the criminal case. The entire sentence reads: "A no contact order under this section shall be issued in a proceeding that is separate from but held immediately following a proceeding in which any pretrial release or sentencing issues are decided." Minn.Stat. § 629.75, subd. 1(c). Because the DANCO statute does not deprive the district court of discretion to issue the order, we discern no violation of separation-of-powers principles.

4** Appellant's substantive due process and First Amendment arguments were not raised below and we therefore decline to consider them. *Williams,* 794 N.W.2d at 874; ***State *v. Kager,* 357 N.W.2d 369, 370 (Minn.App.1984) (declining to rule on the constitutionality of a statute when the issue was not raised or ruled upon by the district court). Appellant's constitutional challenges to the validity of the DANCO therefore fail.

II.

Appellant also contends that the district court committed reversible error by failing to instruct the jury that he must have "knowingly violated" the DANCO in order to be convicted. The district court is afforded considerable latitude in selecting the language of its instructions to the jury. ***State*** *v. Ihle,* 640 N.W.2d 910, 916 (Minn.2002). We review jury instructions "in their entirety to determine whether they fairly and adequately explain the law of the case." *Id.* In conducting this review, we apply an abuse-of-discretion standard. ***State*** *v. Mahkuk,* 736 N.W.2d 675, 682 (Minn.2007).

When a defendant fails to propose specific jury instructions or object to instructions before they are delivered to the jury, a challenge to the instructions has not been preserved for appeal. ***State*** *v. Cross,* 577 N.W.2d 721, 726 (Minn.1998). However, appellate review is still available when jury instructions are plainly erroneous. *Id.* A "plain error" is defined as (1) an error, (2) that is plain, and (3) that affects the substantial rights of a party. ***State*** *v. Griller,* 583 N.W.2d 736, 740 (Minn.1998). A jury instruction that omits an element of an offense is an error that is plain. *Ihle,* 640 N.W.2d at 916–17; ***State*** *v. Gunderson,* 812

N.W.2d 156, 161–62 (Minn.App.2012). Such an error affects a defendant's substantial rights when there is a reasonable likelihood that it had a significant effect on the jury verdict. ***State*** *v. Gomez,* 721 N.W.2d 871, 880 (Minn.2006).

In ***State*** *v. Watkins,* the defendant was charged with a felony DANCO violation. 820 N.W.2d 264, 265 (Minn.App.2012), *review granted* (Minn. Nov. 20, 2012). The district court failed to include the knowingly violated element. *Id.* at 267. Because we found plain error affecting the defendant's substantial rights, we reversed and remanded for a new trial. *Id.* at 271.

Appellant argues that, because the jury instructions here also omitted the knowingly violated element, *Watkins* requires us to reverse his conviction and remand for a new trial. However, the present case is distinguishable from *Watkins* because the jury in that case was not presented with a special verdict question that included the knowingly violated element. 820 N.W.2d at 266. Rather, the district court's jury instructions here are more akin to those given in *Ihle.*

In *Ihle,* the defendant was charged with gross misdemeanor obstruction of legal process. 640 N.W.2d at 914. When instructing the jury on the elements of the charge, the district court failed to include additional language in the element of the offense required by applicable caselaw. *Id.* at 914, 916. But the jury instructions included a special verdict question that required the jury to find the omitted elements beyond a reasonable doubt. *Id.* at 914, 917. The jury found the defendant guilty of obstruction of legal process and answered the special verdict question in the affirmative. *Id.* at 915.

5** We held in *Ihle* that, "without the special verdict question," the elements recited in the jury instructions "materially misstated the law," which was an error that was plain. *Id.* at 916–17. Because the special verdict question required the jury to find the omitted elements beyond a reasonable doubt, it was "not reasonably likely that the error had a significant effect on the verdict in view of the jury's answer to the special verdict question." *Id.* at 917. It is just so in this case. The jury was required to find that appellant committed a knowing violation of the DANCO beyond a reasonable doubt in order to answer the special verdict question in the affirmative. Therefore, the district court's error in instructing on the elements did not relieve the **state** of the burden of proving that appellant knowingly violated the DANCO. *See Mahkuk,* 736 N.W.2d at 683; ***State *v. Hall,* 722 N.W.2d 472, 479 (Minn.2006). Because it was "not reasonably likely that the error had a significant effect on the verdict," the error in the jury instructions here did not affect appellant's substantial rights. *Ihle,* 640 N.W.2d at 917. We therefore affirm appellant's conviction of the felony DANCO violation.

III.

Appellant also urges us to reverse his conviction of direct criminal contempt. The contempt power is meant to summarily punish offenses that undermine the dignity of courtroom proceedings. ***State*** *v. Tatum,* 556 N.W.2d 541, 547 (Minn.1996). A finding of direct contempt is reviewed for "arbitrariness, capriciousness and oppressiveness." *Id.* We employ this deferential standard of review because "the sneering, sarcastic and insolent manner in which words are spoken is obvious to those who hear them, but is shown very imperfectly, if at all, by the printed record." *In re Cary,* 165 Minn. 203, 207, 206 N.W. 402, 403 (Minn.1925).

Appellant makes several arguments as to why his contempt conviction should be reversed. He first argues that his comments were neither profane nor contemptuous, and that he was merely attempting "to make a record of issues that were important to him" because of his (self-imposed) absence from trial.[2] In his reply brief, appellant also argues that his behavior immediately prior to the return of the verdict should be viewed separately and not as part of a continuing pattern of contemptuous behavior because his behavior earlier in the proceedings was used as a basis to determine that he was waiving his right to be present for trial. We find appellant's arguments unpersuasive.

Throughout the proceedings before the district court, appellant repeatedly refused to answer the judge's questions, refused to stand before the judge, and made continued threats to disrupt the proceedings. When asked whether he would like to be present for the return of the verdict, appellant repeatedly interrupted the judge while she was speaking, despite warnings that he could be held in contempt. From our review of the record, the judge appears to have been commendably patient with appellant throughout the entirety of the proceedings. The conviction of direct contempt here was not reflexive or hasty. It followed multiple warnings from the judge. Although appellant maintains that he was attempting to protect his legal rights immediately prior to the finding of contempt, the finding of contempt was, from our careful review of the record, not based on an isolated instance of contemptuous behavior. The district court judge was much better situated than are we to discern the overall effect of appellant's behavior, but in this case even the printed record reveals clearly contemptuous behavior. *Cf. id.* We therefore affirm appellant's conviction of and sentence for direct contempt.

***6 Affirmed.**

All Citations

Not Reported in N.W.2d, 2013 WL 6152174

Footnotes	
1	We question whether the district court complied with Minn.Stat. § 629.75 in issuing the DANCO here. The record does not clearly reveal that a separate proceeding was held for the purpose of issuing the order. The hearing at which the DANCO was issued began as a rule 5 hearing. After the DANCO was issued, the parties and the district court dealt with scheduling a rule 8 hearing, seemingly as a continuation of that rule 5 hearing. This issue was not raised on appeal, and so we do not address it. ***State*** *v. Williams,* 794 N.W.2d 867, 874 (Minn.2011). However, we note that noncompliance with the separate proceedings requirement may cause a defendant to conflate a DANCO with a condition of release. But again, appellant does not advance that argument in this appeal.
2	Appellant does not argue on appeal that his removal from the courtroom for obstreperous behavior was error.

2014 WL 1660641
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Alfredo Jesse **ROSILLO**, Appellant.

No. A13–0502.
|
April 28, 2014.
|
Review Denied July 15, 2014.

Mower County District Court, File No. 50–CR–11–1563.

Attorneys and Law Firms

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, MN; and Kristen Nelsen, Mower County Attorney, Austin, MN, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Charles F. Clippert, Special Assistant Public Defender, St. Paul, MN, for appellant.

Considered and decided by ROSS, Presiding Judge; BJORKMAN, Judge; and HOOTEN, Judge.

UNPUBLISHED OPINION

ROSS, Judge.

***1** Police found Alfredo **Rosillo** hiding in a slough after he assaulted his girlfriend, broke into her home, assaulted her again and stole money from her purse, and fled on foot while tossing bags of methamphetamine into a neighbor's yard. During **Rosillo's** trial, the **state** introduced evidence of five of his prior felony convictions. The jury found him guilty of first-degree burglary, first-degree aggravated robbery, fifth-degree possession of methamphetamine, and domestic assault. After a *Blakely* hearing during which a probation officer testified about **Rosillo's** criminal history, including incidents that did not result in convictions, the jury found **Rosillo** to be a danger to public safety. The district court sentenced **Rosillo** under the dangerous-offender statute to 240 months' imprisonment, the statutory maximum sentence for his burglary and robbery convictions. Because the district court did not err by admitting the evidence of **Rosillo's** prior convictions, allowing the probation officer to present **Rosillo's** criminal history, and imposing the 240–month prison sentence, we affirm.

FACTS

A jury heard evidence of the following episode. In June 2011, Alfredo **Rosillo** and his girlfriend A.A. were at A.A.'s rental home in Austin with two of **Rosillo's** friends. **Rosillo** was holding A.A.'s cell phone while she mowed the lawn. He noticed that A.A.'s former boyfriend had been sending her text messages. This made **Rosillo** angry. He and his friends decided to

leave, but their vehicle got stuck in a large hole left by a construction crew. A.A. made a "smart remark" to **Rosillo**, and **Rosillo** became angry again. He chased her around the yard, "freaking out" and throwing things, and they had a "scuffle" inside. A.A. then asked a neighbor to help free the vehicle. This also upset **Rosillo**. He and A.A. had another scuffle, and he took $50 from her purse.

A.A. attempted to put her car in the garage. She said that **Rosillo** stopped her and fired three shots from a .22–caliber handgun into the floorboard behind the driver's seat. The two went back inside the house, and A.A. made another remark that offended **Rosillo**. A.A. testified that **Rosillo** struck her, cornered her in her bedroom, put his gun to her head, and choked her. He ran away when A.A.'s friend pulled into the driveway.

Rosillo soon returned. He ran toward the house, and A.A. fled inside and locked the door. **Rosillo** argued with A.A. through the door. A.A. testified that he put his gun to her friend's head and told her to let him in. She refused, and **Rosillo** kicked the door until it broke, reached inside, and unlocked it. **Rosillo** threw her against a couch. A.A. testified that he fired a shot next to her, and he pistol-whipped her. She fell to the floor and wet herself. A.A.'s friend testified that **Rosillo** pointed the gun at him and said, "[I]t wouldn't kill you but it would bounce around inside you ." **Rosillo** saw police cars coming and fled again. Police officers found him lying in tall marshy grass nearby. They also found cash and bags of methamphetamine in the yard of a neighbor who had seen a man throw something there while running.

***2** Mower County charged **Rosillo** with two counts of first-degree burglary, two counts of second-degree assault with a dangerous weapon, and one count of first-degree aggravated robbery, possession of a firearm by a convicted violent felon, fifth-degree possession of methamphetamine, and domestic assault. During trial, the **state** introduced evidence of five of **Rosillo's** prior felony convictions—two for controlled-substance crimes involving methamphetamine, two for terroristic threats, and one for domestic assault. The prosecutor presented certified copies of the convictions and read to the jury the portions of the plea transcripts that supported the terroristic threats and domestic assault convictions. The district court instructed the jury that it could consider the prior drug convictions "for the limited purpose of establishing [**Rosillo's**] familiarity with methamphetamine" and the other convictions as relationship evidence and "part of the elements of the current charge of felony domestic assault," but not as character evidence.

The jury found **Rosillo** guilty of one count of first-degree burglary, first-degree aggravated robbery, fifth-degree possession of methamphetamine, and domestic assault. It acquitted him of the remaining counts. The district court held a *Blakely* sentencing hearing to determine whether **Rosillo** was a danger to public safety under Minnesota Statutes section 609.1095, subdivision 2 (2010). A probation officer testified about **Rosillo's** extensive criminal history and disciplinary record. The jury found **Rosillo** to be a danger to public safety, and the district court sentenced him to 240 months' imprisonment. **Rosillo** appeals.

DECISION

I

Rosillo first claims that he was unfairly tried. He argues that the district court erred by admitting evidence of his felony convictions. He initially contends that the district court improperly admitted his convictions of terroristic threats and domestic assault as relationship evidence under Minnesota Statutes section 634.20 (2012). We review the district court's admission of evidence under section 634.20 for an abuse of discretion. ***State*** *v. Matthews,* 779 N.W.2d 543, 553 (Minn.2010). Section 634.20 provides the framework in which evidence of prior abuse may be admissible:

> Evidence of similar conduct by the accused against the victim of domestic abuse, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rosillo asserts that the relationship evidence admitted in his trial had "absolutely no probative value" because the incidents involved others, not A.A., and no evidence indicated that A.A. knew about them. His position is contrary to ***State*** *v. Valentine,* 787 N.W.2d 630 (Minn.App.2010), *review denied* (Minn. Nov. 16, 2010).

***3** In *Valentine,* we held that section 634.20 permits "the admission of similar-conduct evidence against the accused's (not the

victim's) family or household members." *Id.* at 637. This evidence "illuminate[s] the relationship between the defendant and the alleged victim and ... put[s] the alleged crime in the context of that relationship." *Id.* For example, evidence that shows how a defendant treated his former girlfriends "sheds light on how the defendant interacts with those close to him, which in turn suggests how the defendant may interact with the victim." *Id.* The evidence of **Rosillo's** past domestic abuse therefore had probative value regardless of whether A.A. was involved in or aware of it. The statute does not require the family or household member to have been the victim of the charged offense or require the victim of the charged offense to have been aware of the conduct. *See* Minn.Stat. § 634.20.

Rosillo contends that *Valentine* is wrong, pointing to Minnesota Rule of Evidence 404(a), which generally prohibits character evidence. But published decisions of this court are precedential, ***State*** *v. M.L.A.,* 785 N.W.2d 763, 767 (Minn.App.2010), *review denied* (Minn. Sept. 21, 2010), and evidence admitted under section 634.20 is treated differently from other bad-act evidence, ***State*** *v. Word,* 755 N.W.2d 776, 783–84 (Minn.App.2008); *see also* ***State*** *v. McCoy,* 682 N.W.2d 153, 161 (Minn. 2004) (**stating** that Minnesota courts treat evidence offered under section 634.20 differently from "other, 'collateral' *Spreigl* evidence"). **Rosillo's** reliance on Rule 404 is misplaced.

Rosillo also asserts that the relationship evidence posed a substantial risk of unfair prejudice by improperly influencing the jury to convict him because of his prior domestic-related offenses involving third parties, not because the **state** proved him guilty of the charged crimes. He complains about the use of relationship evidence generally but offers no reason that the relationship evidence admitted here risked unfair prejudice. His argument therefore fails.

Rosillo next argues that the district court erred by admitting his two controlled-substance convictions as *Spreigl* evidence. We review the district court's admission of *Spreigl* evidence for an abuse of discretion. ***State*** *v. Scruggs,* 822 N.W.2d 631, 643 (Minn.2012). "Evidence of another crime ... is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). It is admissible, however, "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

Rosillo argues that the conviction evidence was irrelevant and unfairly prejudicial. "Relevant evidence" is evidence that tends to make a material fact more or less probable. Minn. R. Evid. 401. **Rosillo** insists that his prior drug convictions were irrelevant because they say nothing about whether the methamphetamine found in the neighbor's yard was put there by him. But one element of the charged crime of controlled-substance possession is that the defendant knew he possessed a controlled substance. ***State*** *v. Ali,* 775 N.W.2d 914, 918 (Minn.App.2009), *review denied* (Minn. Feb. 16, 2010). The district court admitted **Rosillo's** prior convictions "for the limited purpose of establishing [his] familiarity with methamphetamine." The evidence made it more likely that, if **Rosillo** tossed the bags as he fled, he knew the substance in them was methamphetamine. **Rosillo** has not established that the evidence is irrelevant.

***4 Rosillo** also fails to show how admitting his prior drug convictions unfairly prejudiced him. The district court gave a limiting instruction before the prosecutor read the convictions to the jury, and the prosecutor afterward mentioned the convictions only briefly. Because the evidence was relevant and not unfairly prejudicial, the district court did not abuse its discretion by admitting it.

Rosillo finally argues that the cumulative effect of admitting five prior felony convictions deprived him of his right to a fair trial. But because we have concluded that the district court acted within its discretion by admitting these convictions as relationship and *Spreigl* evidence, the argument fails. The cumulative effect of admitting the evidence therefore cannot warrant reversing **Rosillo's** convictions. *See* ***State*** *v. Davis,* 820 N.W.2d 525, 538 (Minn.2012) ("[I]n rare cases ... the cumulative effect of trial *errors* can deprive a defendant of his constitutional right to a fair trial." (emphasis added)).

II

Rosillo argues next that we must vacate the jury's finding that he is a danger to public safety because the **state** elicited improper testimony during the *Blakely* hearing. **Rosillo** did not object to the testimony in the district court. We therefore review only for plain error. *See* Minn. R.Crim. P. 31.02; ***State*** *v. Dao Xiong,* 829 N.W.2d 391, 395 (Minn.2013). **Rosillo** fails to identify an error.

A district court may depart upward from the presumptive sentence if, among other things, the offender is a danger to public safety. Minn.Stat. § 609.1095, subd. 2 (2010). To determine whether an offender is a danger to public safety, the fact finder may consider "the offender's past criminal behavior, such as the offender's high frequency rate of criminal activity." *Id.,* subd. 2(2)(i).

Rosillo argues without legal support that the terms "criminal activity" and "criminal behavior" mean only criminal convictions. He maintains that the probation officer's testimony about dismissed charges, probation and parole violations, missed court appearances, and his prison disciplinary record was therefore improper. The controlling statute belies **Rosillo's** argument. Section 609.1095 does not define "criminal activity" or "criminal behavior," but it does define "conviction" and "prior conviction" and uses those terms numerous times. It also refers to "juvenile adjudication." That the legislature distinguished between convictions, adjudications, and other criminal incidents informs us that it knew how to direct courts to base dangerous-offender findings solely on criminal "convictions," if it wanted to. The terms "criminal behavior" and "criminal activity" have a broader scope than "conviction." *Cf.* ***State*** *v. Gorman,* 546 N.W.2d 5, 9 (Minn.1996) (defining "pattern of criminal conduct" under the career-offender statute and recognizing that "[n]othing in the statute limits the sentencing court's consideration to prior felony convictions, nor even to convictions at all"). **Rosillo** does not show that the district court committed any error applying the statute.

III

5 Rosillo** also argues that his sentence must be reduced because the district court erred by imposing the statutory maximum prison term, a near double departure from the presumed sentence. When a district court departs from the presumptive guidelines sentence, we review for an abuse of discretion. *Vickla v.* ***State, 793 N.W.2d 265, 269 (Minn.2011). We will affirm the departure if the district court's reasons for departing are "legally permissible and factually supported in the record." *Id.* (quotation omitted).

The district court imposed separate 240–month prison sentences for **Rosillo's** aggravated robbery and burglary convictions to be served concurrently. The court considered these sentences to be double departures. They were also statutory maximums. *See* Minn.Stat. §§ 609.245, subd. 1, 609.582, subd. 1 (2010). **Rosillo** contends that the district court erred because his offenses did not involve aggravating factors, his sentence exaggerates the severity of his crimes, and his criminal history was already factored into the guidelines calculation of the presumptive sentence. We are not persuaded.

Rosillo relies primarily on *Neal v.* ***State,*** 658 N.W.2d 536 (Minn.2003). In *Neal,* the supreme court held that "a finding of severe aggravating factors is not required for a district court to impose more than a double durational departure under the dangerous-offender statute." *Id.* at 546. It added, however, that "courts should use caution when imposing sentences that approach or reach the statutory maximum sentence" to avoid disproportionate sentences. *Id.* It reasoned that "when severe aggravating circumstances are not present, imposing more than a double durational departure under the dangerous-offender statute may artificially exaggerate the defendant's criminality because the defendant's criminal record is considered twice." *Id.*

The district court appropriately accounted for *Neal's* concerns. It explained its rationale for not imposing consecutive sentences for **Rosillo's** aggravated robbery and burglary convictions even though the guidelines permitted it. It **stated**, "A durational departure is more appropriate [because] full consecutive sentencing overly exaggerates the criminality of the offenses and any sentence mixing and matching consecutive and concurrent sentences is essentially arbitrary." The district court expressly relied on the jury's finding that **Rosillo** is a danger to public safety and on his criminal record. It explained that **Rosillo's** six previous felonies "involve personal violence or the threat of violence and/or sale of controlled substances," that **Rosillo** maintained only about 12 months of freedom in the 11 years since he turned 21, and that he committed the underlying felonies only three months after his last release from prison. The district court observed that **Rosillo** is a "self-proclaimed member of the 'Mexican mafia' " and has chosen prison over rehabilitative treatment.

***6** It is true that the district court relied on **Rosillo's** criminal history, which already somewhat factored into his guidelines calculation of the presumptive sentence. But **Rosillo's** claim that the district court overemphasized his prior convictions is unconvincing. **Rosillo's** initial seven-point criminal history score was based on six prior felony convictions. But because the guidelines grid contemplates a maximum of six criminal history points, at least one of those prior felonies was a nonfactor when calculating his presumptive sentence. Furthermore, **Rosillo's** initial criminal history score did not include his four felony convictions from the present case. It also did not include his five felony convictions for violating a domestic-abuse no-contact order with the purpose of intimidating A.A. into changing her testimony. Nor did it include a pending charge for felony possession of a firearm. These incidents were, however, considered during the sentencing process. So while the convictions used to calculate **Rosillo's** criminal history score were also partly considered in the decision to depart, the district court based its decision on circumstances beyond the previously applied convictions.

Once the jury found **Rosillo** to be a danger to public safety, **Rosillo** qualified as a dangerous offender. *See* Minn.Stat. §

609.1095, subd. 2. The district court could therefore depart from the presumptive sentence up to the statutory maximum. *Id.; Neal,* 658 N.W.2d at 545 ("[Section 609.1095] authorizes the court to impose a durational departure of any length, up to the statutory maximum, in all cases where the offender satisfies the statute's criteria."). Because the district court's reasons for departing were legally permissible and supported by the record, it did not abuse its sentencing discretion.

IV

Rosillo presents additional arguments in his pro se supplemental brief but fails to cite any facts from the record or legal authority in support. Arguments in supplemental briefs unsupported by legal authority are waived. ***State** v. Palmer,* 803 N.W. 2d 727, 741 (Minn.2011). **Rosillo's** separate arguments are waived.

Affirmed.

All Citations

Not Reported in N.W.2d, 2014 WL 1660641