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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0242**

State of Minnesota,
Respondent,

vs.

Ricardo Ramirez,
Appellant.

**Filed January 16, 2018
Affirmed
Jesson, Judge**

Steele County District Court
File No. 74-CR-15-440

Lori Swanson, Attorney General, Karen McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Dan McIntosh, Steele County Attorney, Owatonna, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica M. Surges, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Jesson, Judge; and Florey, Judge.

UNPUBLISHED OPINION

JESSON, Judge

Without permission, appellant Ricardo Ramirez entered the home of his ex-girlfriend, whom he suspected stole his cellphones, and threatened her. The state charged

him with first-degree burglary and fifth-degree assault. During the bench trial, there were numerous incidents where the state's witnesses testified about prior bad acts and relationship evidence. Ramirez was convicted, and at his sentencing hearing, he moved for both durational and dispositional departures based on his crime being less serious than typical and his amenability to probation. The district court denied the motions. Now on appeal, Ramirez argues that he is entitled to a new trial because the prosecution committed misconduct by not adequately preparing its witnesses and by eliciting improper testimony, and that the district court abused its discretion in denying his sentencing-departure motions. We affirm.

FACTS

In March 2015, officers responded to a reported domestic assault in progress at the home of appellant Ricardo Ramirez's ex-girlfriend, T.W., and her boyfriend, H.B. Officers spoke with H.B., who stated that Ramirez entered the home without permission and accused the ex-girlfriend of stealing his cell phones. Officers also spoke with the ex-girlfriend, who said that Ramirez threatened her several times and grabbed her hood at one point. Ramirez stated that he did not touch his ex-girlfriend and was there looking for his cell phones. The police squad car video and audio showed Ramirez asking law enforcement to retrieve his cell phones, and stating, "I didn't touch that f-cking b-tch, but I will when I get out. Watch. I'm gonna send someone to f-ck her up."

The next day, Ramirez was charged with first-degree burglary, second-degree burglary, and fifth-degree assault – fear of bodily harm or death. Minn. Stat. §§ 609.582, subds. 1(c) (first-degree burglary), 2(a)(1) (second-degree burglary), .224, subd. 1(1) (fifth-

degree assault – fear of bodily harm or death) (2014). Ramirez elected to have a bench trial. Prior to trial, the state filed a notice of its intent to introduce relationship evidence between Ramirez and his ex-girlfriend, under Minnesota Statutes section 634.20 (2016).¹

On the morning of trial, the district court considered the parties’ motions in limine, including the state’s request to admit relationship evidence. The relationship evidence included incidents where Ramirez locked T.W. in a bedroom, attempted to poison her, intimidated her with knives, and hit her. The court denied the state’s motion to include relationship evidence because the case did not involve domestic abuse.² After this ruling, the state requested a break to “discuss the motions in limine and what can and cannot come out.” Both parties assert this break was for the prosecution to prepare its witnesses. This break lasted three minutes, after which the trial began.

The bench trial lasted two days, and Ramirez, T.W., and H.B. all testified, in addition to law enforcement. Ramirez and the witnesses gave contradicting testimony, but the following facts are from the district court’s findings of fact, which are uncontested on appeal.

At the time of the incident, T.W. was recovering from a major surgery to repair her carotid artery and was living with her boyfriend. She went to Ramirez’s home one night

¹ Minnesota Statutes section 634.20 states, “Evidence of domestic conduct by the accused against the victim of domestic conduct, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

² Because it was not raised on appeal, we decline to determine if it was correct for the district court to determine that the case here did not involve domestic abuse.

to smoke methamphetamine and took a few of his cell phones when she left. After realizing his cell phones were gone, Ramirez went to T.W.'s home and entered without permission. Ramirez began to yell once inside the apartment, and when he found her, he grabbed her throat while threatening to harm her. Moments later, Ramirez pulled her hood backwards, which caused her to fall onto a staircase. Police arrived and witnessed Ramirez acting irate and threatening to harm T.W.

During trial, T.W. and H.B. testified to prior incidents that were prohibited by the district court's order. This testimony included past incidents of Ramirez being violent, locking T.W. in a bedroom, and assaulting her. Much was unsolicited, but some was arguably elicited by the prosecutor's questions. For example:

Q [Prosecutor]: Was Mr. Ramirez outside the bedroom at that time?

A [T.W.]: Yes. He continued to scream. He continued to swear. He continued to try to taunt me, and I was -- I don't know. I wanted to fight him back. I was sick of -- I was sick of being the victim. I wanted a good slap at him, but I ended up getting scared. And I just wanted to get out of the house, and that's when he grabbed my coat or my hoodie.

....

Q: Okay. All right. *So when you said you were sick of it, can you explain that a little bit more.*

A: Because, well, he had -- he's assaulted me a lot in the past, you know, and I've just -- it was my turn. I wanted to hit him for once. He's gotten away with a lot of crimes I guess, you know.

Similarly, there were multiple incidents during trial where H.B. and T.W. testified about Ramirez's prior drug use, but the state did not provide notice of its intent to use prior bad acts evidence in accordance with Minnesota Rules of Evidence 404(b). For example:

Q [Defense]: Why did you ask to go over to Mr. Ramirez's residence that evening?

A [T.W.]: Because I didn't have any painkillers and I was in a lot of pain and I needed some meth. And he sells meth so that's where I went.

None of the testimony regarding prior bad acts or relationship evidence was objected to at trial.

The district court convicted Ramirez of first-degree burglary, second-degree burglary, and fifth-degree assault.³ After trial, but before sentencing, Ramirez's counsel filed a motion requesting that the court order a rule 20.01 examination to determine whether Ramirez was competent to assist counsel, in light of learning that he was not receiving his medication in jail. The court granted the motion. A forensic psychologist diagnosed Ramirez with posttraumatic stress disorder, major depressive disorder, inhalant-induced psychotic disorder (by history), and cannabis use disorder. The psychologist determined that Ramirez was not competent to continue with the legal proceedings and recommended medication and inpatient treatment to treat his mental illnesses.⁴ The district court agreed and ordered civil commitment proceedings against Ramirez to be commenced by the end

³ Ramirez initially argued that the district court erred by convicting him of both first-degree and second-degree burglary. But the district court subsequently vacated the second-degree burglary conviction, and Ramirez withdrew the issue from this appeal.

⁴ The evaluator also stated Ramirez expressed a desire to seek revenge on those who helped get him incarcerated.

of November 2015. In May 2016, Ramirez was evaluated again and determined to be competent, and in June 2016, the district court ordered Ramirez to be sentenced.

After he was determined to be competent, Ramirez filed a motion requesting both a durational and dispositional departure from the sentencing guidelines. At the sentencing hearing, Ramirez argued for a downward durational departure because his offense was less serious than the typical burglary-assault case. Ramirez also contended a dispositional departure should be granted under Minnesota Statutes section 609.1055 (2014), which could allow him to be sentenced to a secured, inpatient treatment facility, based on his mental illness. The court denied the durational departure request, stating the crime was not significantly less serious than typical, but arguably more serious. The court also denied the dispositional departure request because it determined Ramirez was not particularly amenable to probation and that placement in a treatment facility would be inconsistent with public safety. The court sentenced Ramirez to a middle-of-the-box presumptive sentence of 88 months in jail for the first-degree-burglary conviction. This appeal follows.

D E C I S I O N

On appeal, Ramirez argues that he is entitled to a new trial because of prosecutorial misconduct, and that the district court abused its discretion in denying his motion for a downward sentencing departure. We address each argument in turn.

I. Ramirez is not entitled to a new trial because of prosecutorial misconduct.

Ramirez argues that he is entitled to a new trial because the prosecution committed misconduct by failing to adequately prepare its witnesses and intentionally eliciting inadmissible and prejudicial statements. Because Ramirez did not object at trial, this court

applies the modified plain-error test. *State v. Ramey*, 721 N.W.2d 294, 301 (Minn. 2006). Under this test, Ramirez has the burden to demonstrate the alleged misconduct constitutes (1) an error (2) that was plain. *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010). If Ramirez meets both of these prongs, then the burden shifts to the state to demonstrate that the error did not affect Ramirez’s substantial rights. *Id.* If all three prongs are satisfied, this court then assesses whether the error should be addressed to ensure fairness and integrity. *Id.* Because the state can satisfy its burden by showing Ramirez’s substantial rights were not affected, assuming a plain error occurred, we determine that Ramirez fails the modified plain-error test, without reaching the issue of whether a plain error was made.⁵

To show Ramirez’s substantial rights were not affected, the state must show “that there is no ‘reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury.’” *Matthews*, 779 N.W.2d at 551 (quoting *Ramey*, 721 N.W.2d at 302). Here, we conclude that Ramirez’s substantial rights were not affected because (1) there was an overwhelming amount of evidence to support his conviction, and (2) it was a bench trial with a low risk of unfair prejudice, and the potentially impermissible evidence was not relied on by the district court.

⁵ Courts often resolve this analysis by determining whether the state can meet its burden to show no substantial rights were affected. *See State v. Mosley*, 853 N.W.2d 789, 801 (Minn. 2014) (“Assuming without deciding the reference to drugs in [witness]’s direct examination was plain error, we conclude that the testimony did not affect [defendant]’s substantial rights.”). Even though we do not reach the issue of whether a plain error was made, we do not minimize the responsibility that prosecutors have in preparing witnesses and ensuring impermissible testimony does not come out during trial.

First, there was a wealth of evidence that Ramirez impermissibly entered the residence and threatened his ex-girlfriend. This is similar to *State v. McNeil*, where this court determined that the substantial rights of the appellant were not affected when there was an overwhelming amount of evidence supporting the conviction. 658 N.W.2d 228, 232-33. To be convicted of first-degree burglary – assault, the state must establish that (1) Ramirez entered his ex-girlfriend’s home without consent; (2) Ramirez intended to commit a crime at time of entry or Ramirez committed a crime while in the building; and (3) Ramirez assaulted his ex-girlfriend within the building. *See State v. Mitchell*, 881 N.W.2d 558, 562 (Minn. App. 2016), *review denied* (Minn. Aug. 23, 2016). Fifth-degree assault – fear of bodily harm, requires the state to show Ramirez “commit[ted] an act with intent to cause fear in another of immediate bodily harm or death.” Minn. Stat. § 609.224, subd. 1(1).

Here, both T.W. and H.B. testified that Ramirez did not have permission to enter the home. Ramirez testified that H.B. invited him into the home, but the district court determined this was not credible, and we defer to the district court’s credibility determinations. *State v. Kramer*, 668 N.W.2d 32, 38 (Minn. App. 2003), *review denied* (Minn. Nov. 18, 2003). T.W. and H.B. also testified that Ramirez threatened T.W. and attempted to harm her, to the point where she became fearful. Because the prosecution put forth an overwhelming amount of evidence to support the required elements, the state’s case was strong, and the impermissible testimony did not have a significant effect on the outcome.

Second, this was a bench trial, and the district court was already aware of the inadmissible evidence by virtue of ruling on the motions in limine. As a result, the risk of unfair prejudice was considerably lower than if it were a jury trial. In *State v. Burrell*, the Minnesota Supreme Court emphasized the distinction between a jury trial and bench trial is “important,” stating “[t]he risk of unfair prejudice . . . is reduced because there is comparatively less risk that the district court judge, as compared to a jury of laypersons, would use the evidence for an improper purpose or have his sense of reason overcome by emotion.” 772 N.W.2d 459, 467 (Minn. 2009). This is particularly true here, where the district court’s finding of fact and conclusions of law do not reference the inadmissible evidence. See *Mosley*, 853 N.W.2d at 803 (stating that when the district court made detailed findings of fact with significant evidence pointing to the defendant’s guilt, and did not include references to the inadmissible evidence, there was no reasonable likelihood that the inadmissible evidence had a significant effect on the judge’s conclusion). Given the absence of any findings on the inadmissible evidence, it is unlikely that the district court relied on any of the inadmissible evidence or used it for improper purposes when determining Ramirez was guilty.

Because there was no reasonable likelihood that the alleged misconduct by the prosecutor had a significant effect on the guilty verdict, Ramirez’s substantial rights were not affected and he is not entitled to a new trial based on prosecutorial misconduct.

II. The district court did not abuse its discretion by denying Ramirez’s motions for durational and dispositional sentencing departures.

Ramirez contends that the district court abused its discretion by denying his motions for both durational and dispositional departures and imposing a presumptive sentence. This court will reverse sentencing decisions only for an abuse of discretion, and district courts are afforded great discretion. *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014). Only in a rare case will this court reverse a district court’s refusal to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). And “as long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination,” this court will not interfere with the district court’s decision. *State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011).

Durational Departure

Ramirez argues that the district court abused its discretion in denying his motion for a durational departure because his crime was less serious than the typical burglary – assault crime. We disagree. The sentencing guidelines state that “convicted felons with relevant sentencing criteria substantially different from a typical case should receive different sanctions.” Minn. Sent. Guidelines 1.A (2014). But the seriousness of this crime is not less than a typical burglary case – Ramirez entered a home without permission, threatened to harm an individual, and had to be restrained. The district court explicitly considered, and rejected, this argument, stating:

[T]here might be an argument that this is more serious than your typical crime given the vulnerability of the victim and the . . . intensity of Mr. Ramirez’s desire to get at [T.W.] and the luck of [T.W.] to have a couple people in the apartment who

stopped him on a couple of occasions from really getting to [T.W.] . . . But the Court found that [Ramirez] was yelling threats at [T.W.], stating that he would kill her, beat her ass, he'd rip her throat out. And it goes without saying that [T.W.] had recently undergone major surgery to repair her carotid artery and was in stitches at that point and was really physically quite vulnerable.

Ramirez contends that the district court abused its discretion because Ramirez did not injure T.W. and because he entered the home to retrieve his stolen property. But neither of these reasons make the crime significantly less serious than typical. While Ramirez is correct that there is no evidence in the record suggesting T.W. was injured, this does not change the fact that he violently and repeatedly threatened her. And Ramirez's explanation that he entered the home without permission to retrieve stolen property is similarly unpersuasive, because, as the district court sensibly explained, Ramirez could have called the police instead of entering someone's home without consent and threatening the person. Given that the district court explicitly considered this argument and explained why it was rejected, the district court acted within its wide discretion.

Dispositional Departure

Ramirez argues that the district court abused its discretion in denying his motion for a dispositional departure under Minnesota Statutes section 609.1055 because he has severe and persistent mental illnesses, and he is particularly amenable to secured treatment in a probationary setting. When an offender has "a serious and persistent mental illness," district courts may, when consistent with public safety, "place the offender on probation or continue the offender's probation and require as a condition of the probation that the offender successfully complete an appropriate supervised alternative living program

having a mental health treatment component.” Minn. Stat. § 609.1055. But this court has held that, even if the offender meets the requirements of Minnesota Statutes section 609.1055, the district court still has discretion whether to grant the departure. *State v. Abdi*, 855 N.W.2d 546, 548 (Minn. App. 2014), *review denied* (Minn. Jan. 20, 2015).

The district court offered a thorough and detailed explanation as to why it denied Ramirez’s motion. The court explained that Ramirez was not particularly amenable to probation; granting the departure was inconsistent with public safety; Ramirez historically has not sought treatment or services provided to him unless it was after being charged with a crime; and Ramirez’s prior record, remorse levels, attitude, and cooperation weighed against him. The court considered the presentence investigation report (PSI), which acknowledged Ramirez’s mental-health issues, but stated that he refused to utilize available resources to help him in the past. The report also mentioned that Ramirez had no remorse and wishes harm on the victim. And the district court emphasized its concern that it would have no control over how long Ramirez would be in a treatment facility.

Ramirez further contends that the district court erred by failing to attribute his poor conduct to his mental illnesses. Ramirez points to the district court’s orders regarding the civil commitment proceeding and the rule 20.01 report to show that he had severe and persistent mental-health issues. But the district court was within its discretion to determine Ramirez was responsible for his actions, and this court will not substitute its judgment in place of the trial court. *See State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001) (“A district court has great discretion in sentencing, and we may not substitute our own judgment for that of the district court.”).

Finally, Ramirez argues that a mental health facility would be much better suited for him than a prison term. While there may be an argument that a treatment facility would be more beneficial to Ramirez, the district court determined placing Ramirez in a treatment facility would be inconsistent with public safety, which is a requirement to grant a departure under Minnesota Statutes section 609.1055. And even if the district court determined Ramirez was amenable to treatment, it is still within the district court's discretion to deny the motion. *See Abdi*, 855 N.W.2d at 548.

Because the district court thoroughly explained numerous reasons for its decision and determined Ramirez was not particularly amenable to individualized treatment in a probationary setting, it acted appropriately. Ramirez is not entitled to be resentenced.

Affirmed.