

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0497**

State of Minnesota,
Respondent,

vs.

Justin Thurmon Keltner,
Appellant.

**Filed March 14, 2022
Affirmed in part, reversed in part, and remanded
Larkin, Judge**

Hennepin County District Court
File No. 27-CR-20-10391

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Worke, Judge; and Larkin, Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant challenges his convictions of indecent exposure and fifth-degree criminal sexual conduct, arguing that the district court violated his constitutional right to present a complete defense at trial. He also challenges his sentence, arguing that the district court

abused its discretion by imposing a presumptive sentence and by including an out-of-state conviction in his criminal-history score. We affirm appellant's convictions. But we reverse and remand his sentence based on the criminal-history score calculation.

FACTS

Respondent State of Minnesota charged appellant Justin Thurmon Keltner with indecent exposure in the presence of a minor and fifth-degree criminal sexual conduct. The state alleged that Keltner exposed his penis at a Minneapolis park while a woman and her two minor daughters were walking nearby.

The case was tried to a jury, and Keltner represented himself at trial. S.D. testified that in April 2020, she and her daughters were walking at a park in Minneapolis when she heard a man making noises. The noises were "[l]ike moaning and like 'pst' so that you would turn back and look at him." S.D. turned around and saw Keltner with "his underwear down and his private parts in his hand." Based on Keltner's movements, S.D. believed that he was masturbating.

S.D.'s daughter, A.F., testified that she was 13 years old at the time of the incident, and that S.D.'s other daughter was 11 years old. A.F. was walking a few feet in front of S.D. She was approximately six feet from Keltner when she passed him, and she noticed that his pants were down. She did not see his penis, because she quickly looked away, kept walking, and crossed the street. S.D. quickly crossed the street as well and told A.F. to call the police. The police responded, found Keltner at the park with his pants down by his thighs, and arrested him.

Keltner testified in his own defense. He claimed that he could not remember exposing himself because he had blacked out on the day of the incident.

The jury found Keltner guilty of both charges. The district court received a presentence-investigation report (PSI), which included one point in Keltner's criminal-history score for a 2003 Iowa burglary conviction. Keltner objected to the presumptive 60-month prison sentence, and the district court treated his objection as a request for a downward durational departure. The district court concluded that there was no basis for a downward durational departure. The district court entered a judgment of conviction for each offense and sentenced Keltner to a presumptive sentence of 60 months' imprisonment for the indecent-exposure offense. Keltner appeals.

DECISION

I.

Keltner contends that the district court violated his constitutional right to present a complete defense. Specifically, he complains that the district court did not allow him to present evidence that his drug use and traumatic brain injury (TBI) caused him to black out on the day of the offense.

“Due process requires that every defendant be afforded a meaningful opportunity to present a complete defense.” *State v. Smith*, 876 N.W.2d 310, 331 (Minn. 2016) (quotations omitted). Accordingly, criminal defendants have the right “to give the jury an explanation of their conduct even if their motive is not a valid defense.” *State v. Thompson*, 617 N.W.2d 609, 612 (Minn. App. 2000). But “the evidence proffered in support of the defense must still comply with the rules of evidence.” *State v. Nissalke*, 801 N.W.2d 82,

102 (Minn. 2011). The district court has discretion regarding the admission of evidence, and appellate courts generally review a district court’s evidentiary rulings for an abuse of discretion. *State v. Chavez-Nelson*, 882 N.W.2d 579, 588 (Minn. 2016).

The abuse-of-discretion standard applies even if a “defendant claims that the exclusion of evidence deprived him of his constitutional right to a meaningful opportunity to present a complete defense.” *State v. Zumberge*, 888 N.W.2d 688, 694 (Minn. 2017). In such circumstances, if we discern constitutional error, we consider whether it was harmless beyond a reasonable doubt. *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994). “[T]he reviewing court must be satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, an average jury (*i.e.*, a reasonable jury) would have reached the same verdict.” *Id.* (footnote omitted). “If, on the other hand, there is a reasonable possibility that the verdict might have been different if the evidence had been admitted, then the erroneous exclusion of the evidence is prejudicial.” *Id.*

In this case, the challenged evidentiary rulings were based on relevancy. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401. Irrelevant evidence is inadmissible. Minn. R. Evid. 402. But even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Minn. R. Evid. 403.

Keltner's theory at trial was that he blacked out on the day of the incident, could not remember the incident because of his drug use and TBI, and therefore could not have formed the requisite intent to commit the charged offenses. On appeal, he acknowledges that such evidence may not have amounted to a legal defense, but he argues that he nonetheless had a due-process right to explain his conduct and to "provide the jury with a context in which his actions made sense." We address each type of evidence in turn.

Evidence of Keltner's Drug Use

Keltner asserts that the district court prevented him from testifying that his drug use caused him to black out on the day of the incident. Although the district court sustained some objections to Keltner's testimony, it permitted him to testify regarding his drug use and that he had blacked out the day of the incident.

For example, Keltner stated on direct examination, "I don't remember how I got to the park. I was under the influence of narcotics. I'm an active—I'm a drug addict. I use meth and heroin. This isn't an excuse. They're facts." He further explained that he had injected methamphetamine into his arm with a hypodermic needle the night before the incident. He said, "Well, I put air bubbles into my vein. One of the characteristics of intravenous use is blacking out." He also said, "I blacked out three times that day." The state objected to those last statements based on relevance, and the district court sustained the objection.

Keltner continued his testimony, stating that at the time of the incident, he was dehydrated and had not slept since he was released from jail several days earlier. He

testified that he had been “living on the street lately, in and out of drug treatments and stuff.” He then stated:

But, essentially, what happened was I don’t even know how I got to this park. I woke up there, and I stayed there most of the day trying to get my bearings back. And I kept blacking out throughout the day. As the air bubbles were going through my heart, they make you black out, and you don’t remember whole parts.

Keltner described what he could remember about the day of the incident. He testified that he “woke up here in a turtle suit” and speculated that he was on “suicide watch.” The district court sustained the state’s objection to that testimony and granted its motion to strike. The district court also sustained the state’s objection to Keltner’s testimony that he had been attacked the night before the incident and may have been sexually assaulted.

Keltner testified that he remembered looking for water because he was dehydrated and that he “woke up in the back of the cop car.” He testified that he had “no idea how I even got back to where I was.” He testified that he had been having difficulty keeping his pants up and opined that his pants must have fallen down because he fell to the ground. Keltner emphasized that he had no sexual intent and had “no intentions of ever masturbating that day in front of anybody or anything.” He summarized, “I didn’t even know where I was at that day at all. And, yeah. And that’s not indecent exposure. That’s a victim of circumstance, and I did the best I could to get out of there.”

In sum, the district court sustained objections to Keltner’s testimony that he woke up in a “turtle suit” because he was on “suicide watch” and that he was assaulted the night

before the incident. Those circumstances do not show that Keltner's drug use caused him to black out on the day of the offense, which is the basis for his assertion of constitutional error. Because the excluded evidence was unrelated to Keltner's theory that he blacked out due to drug use, the exclusion could not have violated his constitutional right to present a complete defense.

The district court also sustained objections to some of Keltner's testimony that his drug use caused him to black out and that he blacked out three times on the day of the incident. We need not decide whether those rulings were erroneous because the district court allowed Keltner to explain his behavior on the day of the incident and to testify that he unintentionally exposed himself because he had blacked out from drug use. Based on that testimony, we are satisfied beyond a reasonable doubt that if the excluded evidence had been admitted and the damaging potential of the evidence fully realized, a reasonable jury would have reached the same verdict.

Evidence of Keltner's TBI

After Keltner rested his case and the jury left the courtroom, he raised the possibility of presenting evidence that he had a TBI. The district court ruled that such evidence was irrelevant. The district court reasoned that it had already concluded that Keltner was competent to stand trial and that the evidence regarding his TBI was unduly prejudicial to the state because it might "garner undue sympathy" for Keltner. The district court appears to have misunderstood Keltner's reason for offering the TBI evidence, which was to support his claim that he was blacked out during the incident. Nonetheless, for the reasons that follow, we do not discern prejudicial error.

A lay witness may not testify about opinions that are “based on scientific, technical, or other specialized knowledge.” Minn. R. Evid. 701. Whereas a witness qualified as an expert may testify in the form of an opinion if “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” Minn. R. Evid. 702. Because testimony that Keltner’s TBI caused him to black out would be based on scientific, technical, or specialized knowledge, an expert was likely necessary to present that evidence.

In fact, Keltner informed the district court that he “would like to be able to call in a professional” to provide evidence regarding his TBI. But Keltner did not identify any “professional” who was available and willing to testify on his behalf. Thus, Keltner cannot establish that he was prejudiced by the district court’s refusal to allow him to call a “professional” to the stand to testify about his TBI. *See State v. Lee*, 494 N.W.2d 475, 479 (Minn. 1992) (concluding that record did not show that the district court’s exclusion of defense evidence was prejudicial because it did not “establish that the defense had such evidence”).

Moreover, Keltner cannot establish that he was prejudiced by the alleged error. Keltner offered the TBI evidence to explain why he may have blacked out on the day of the incident. As discussed above, Keltner testified at length that he had blacked out because of his drug use and that he therefore did not intend to expose himself. Given the extent to which Keltner testified about his black-out condition, we are once again satisfied beyond a reasonable doubt that if the excluded evidence had been admitted and the damaging

potential of the evidence fully realized, a reasonable jury would have reached the same verdict.

II.

Keltner contends that the district court abused its discretion by denying his request for a downward durational departure because his conduct was significantly less serious than the conduct in a typical case for felony indecent exposure. The Minnesota Sentencing Guidelines establish presumptive sentences for felony offenses. Minn. Stat. § 244.09, subd. 5 (2020). The sentencing guidelines seek to “maintain uniformity, proportionality, rationality, and predictability in sentencing” of felony crimes. *Id.* “Consequently, departures from the guidelines are discouraged and are intended to apply to a small number of cases.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). A district court may depart from the presumptive sentence only when there exist “identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent. Guidelines 2.D.1 (2019).

A durational departure must be based on factors that reflect the seriousness of the offense. *Solberg*, 882 N.W.2d at 623. “[A] downward durational departure is justified if the defendant’s conduct is significantly less serious than that typically involved in the commission of the offense.” *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985).

When substantial and compelling circumstances exist, the district court has broad discretion to depart, and we generally will not interfere with the exercise of that discretion. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). But the district court is not required to depart even if there are grounds to do so. *State v. Olson*, 459 N.W.2d 711, 716 (Minn. App. 1990), *rev. denied* (Minn. Oct. 25, 1990). Moreover, although the district court must

give reasons for a departure, “an explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence.” *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). We will not interfere with the district court’s discretion if the record shows that the district court “carefully evaluated all the testimony and information presented before making a determination.” *Id.* at 80-81.

Keltner argues that his conduct was significantly less serious than the conduct in a typical indecent-exposure case because no minor actually saw his penis, he exposed himself to only a couple people, he was “passively masturbating” and did not engage in any other sexual conduct, and the situation did not involve a captive audience. Keltner and the state discuss appellate decisions involving indecent-exposure offenses as support for their positions regarding the relative severity of Keltner’s offense. *See State v. Winchell*, 363 N.W.2d 747, 750-51 (Minn. 1985) (comparing the facts of the underlying case to other cases when determining whether the offense was more serious than a typical case). But neither party relied on case comparisons in the district court. Thus, the district court did not consider the cases that the parties cite on appeal.

Here, our role is to review the district court’s imposition of a presumptive sentence for an abuse of discretion. Engaging in a de novo comparison of cases cited for the first time on appeal would exceed our standard of review. Indeed, that approach invites us to substitute our judgment regarding whether a sentencing departure was appropriate for that of the district court, which is improper. We therefore do not engage in case comparisons.

Once again, the district court does not need to explain its reasons for imposing a presumptive sentence. *See Van Ruler*, 378 N.W.2d at 80. Even though Keltner did not

expressly ask for a downward durational departure, the district court construed his complaint regarding the length of the presumptive sentence as a request for one.¹ The district court acknowledged the proper standard for a downward durational departure and applied that standard, stating, “I find that this case is not less onerous than similarly-charged cases, and there is no basis for a durational departure in this matter.”

In sum, the record shows that the district court considered the testimony and information presented before ruling on Keltner’s objection to a presumptive sentence, as it was required to do. This is not a rare case that warrants reversal of a presumptive sentence. *See Kindem*, 313 N.W.2d at 7 (stating, “it would be a rare case which would warrant reversal of the refusal to depart”).

III.

Keltner contends that his sentence was based on an inaccurate criminal-history score. Specifically, he argues that the district court erred by including one point for a 2003 Iowa burglary in his criminal-history score because the state did not present sufficient evidence to prove the existence of that conviction. We review the district court’s determination of a defendant’s criminal-history score for an abuse of discretion. *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006). Although Keltner did not raise this issue with the district court, a defendant cannot waive or forfeit review of the calculation of his criminal-history score because a sentence based on an incorrect criminal-history score is an illegal sentence, which is correctable at any time. *State v. Maurstad*, 733 N.W.2d 141,

¹ We observe that the district court’s treatment of Keltner’s profanity-laced statements as a request for a downward departure was charitable.

147-48 (Minn. 2007); *see also* Minn. R. Crim. P. 27.03, subd. 9 (“The court may at any time correct a sentence not authorized by law.”).

When calculating a defendant’s criminal-history score, the district court must determine whether to include out-of-state convictions. Minn. Sent. Guidelines 2.B.5.a (2019). Criminal-history points are assigned to an out-of-state conviction based on the equivalent Minnesota offense with elements similar to the out-of-state offense of conviction. Minn. Sent. Guidelines 2.B.5.b (2019). An out-of-state conviction may be counted as a felony only if it would “be defined as a felony in Minnesota, and the offender received a sentence that in Minnesota would be a felony-level sentence.” *Id.*

The district court may not use out-of-state convictions when calculating the defendant’s criminal-history score “unless the state lays foundation for the court to do so.” *Maley*, 714 N.W.2d at 711. The state has the burden of “establishing the facts necessary to justify consideration of out-of-state convictions.” *Id.* (quotation omitted). “The state must establish by a fair preponderance of the evidence that the prior conviction was valid, the defendant was the person involved, and the crime would constitute a felony in Minnesota.” *Id.*

To meet its burden, the state does not need to provide certified copies of out-of-state convictions, but it must provide evidence sufficient under Minn. R. Evid. 1005 that proves the validity of the convictions. *State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983). Minn. R. Evid. 1005 states:

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise

admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

In accordance with *Griffin* and rule 1005, the district court can “rely on persuasive evidence that sufficiently substitutes for the official, certified record of conviction.” *Maley*, 714 N.W.2d at 712.

In *Griffin*, the supreme court concluded that the state met its burden by submitting “considerable documentation” that the defendant had been convicted of an out-of-state offense, even though it did not submit a certified copy of the conviction. 336 N.W.2d at 525. In another case, the state provided sufficient evidence of an out-of-state conviction based only on the unsworn “advice and testimony” of a probation officer during sentencing. *State v. Jackson*, 358 N.W.2d 681, 682-83 (Minn. App. 1984). In contrast, the state did not meet its burden in *Maley* when it listed the out-of-state convictions on the sentencing worksheet but provided no documents or evidence admissible under rule 1005 to prove the convictions. 714 N.W.2d at 710, 712.

Keltner argues that the state presented no evidence to prove the existence of the 2003 Iowa burglary conviction. He maintains that, without such evidence, there is no way to determine whether the conviction was valid, whether he was the person who received the conviction, or whether the elements of the Iowa burglary offense correspond to a Minnesota felony.

The state counters that the PSI provided sufficient information to establish the out-of-state conviction. The PSI indicated that Keltner was convicted of burglary in the third degree of a dwelling, and that the offense was committed on August 14, 2003, in Polk County, Iowa. It also indicated that Keltner was sentenced to a term of probation, he violated probation, probation was revoked, and he was sentenced to five years' imprisonment. The state argues that an online search for Iowa third-degree burglary demonstrates that the elements of that offense in 2003 correspond to a current Minnesota felony offense for third-degree burglary. It also argues that information in the PSI establishes Keltner's connections to Polk County, Iowa, so there is sufficient evidence that Keltner is the person who committed the 2003 Iowa burglary.

The state's reliance solely on statements in the PSI is similar to the approach that this court deemed inadequate in *Maley*. *See id.* (concluding that the state's reliance solely on a sentencing worksheet to prove the existence of out-of-state convictions was inadequate). The state did not offer a certified copy or other documentation regarding the 2003 Iowa conviction. And unlike *Jackson*, no probation officer provided advice or testimony regarding that conviction at Keltner's sentencing hearing. *See* 358 N.W.2d at 682-83 (concluding that the unsworn "advice and testimony" of a probation officer at the sentencing hearing was sufficient). In sum, the state did not meet its burden to establish the facts necessary to justify consideration of the Iowa conviction, and the district court abused its discretion by including that conviction in Keltner's criminal-history score. We therefore reverse Keltner's sentence and remand for resentencing.

If a defendant did not object at sentencing to the district court's inclusion of an out-of-state conviction in his criminal-history score, the proper remedy is to remand the case and permit the state "to further develop the sentencing record so that the district court can appropriately make its determination." *State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008), *rev. denied* (Minn. July 15, 2008). Keltner did not object at sentencing to the district court's inclusion of the 2003 Iowa conviction in his criminal-history score. Thus, on remand, the state shall be allowed to present evidence supporting inclusion of the Iowa conviction.

Affirmed in part, reversed in part, and remanded.