

*This opinion is nonprecedential except as provided by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
A21-1415**

State of Minnesota,
Respondent,

vs.

Nathanael John Prevo,
Appellant.

**Filed April 10, 2023
Affirmed in part, reversed in part, and remanded
Wheelock, Judge**

Meeker County District Court
File No. 47-CR-19-519

Keith Ellison, Attorney General, Ed Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Brandi Schiefelbein, Meeker County Attorney, Litchfield, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Gaïtas, Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

Appellant challenges his convictions after a jury found him guilty of felony domestic assault and false imprisonment, arguing that the district court abused its discretion by admitting expert-witness testimony on typical behaviors of victims and abusers in

relationships in which domestic violence is present. Appellant also challenges his sentence, arguing that the district court abused its discretion by imposing (1) an upward dispositional sentencing departure based on the presence of a child as an aggravating factor for count one—domestic assault, (2) a consecutive sentence for count two—false imprisonment, and (3) sentences using a guidelines range for counts two and three—false imprisonment. We affirm appellant’s convictions and the district court’s sentencing determinations on counts one and three. But because the district court erred by making the sentence for count two consecutive to the presumptively stayed sentence for count one, we remand for resentencing on count two with instructions to impose a sentence concurrent with the executed sentence for count one.

FACTS

Respondent State of Minnesota charged appellant Nathanael John Prevo with one count of felony domestic assault under Minn. Stat. § 609.2242, subd. 4 (2018), and two counts of felony false imprisonment under Minn. Stat § 609.255, subd. 2 (2018). The following summarizes the evidence received at Prevo’s jury trial and references other parts of the record as necessary.

At trial, J.P. testified that she and Prevo were married at the time of the incident but had separated and were attempting to reconcile. She testified that she and Prevo were arguing, and Prevo became upset that she was using her phone to communicate with a male friend. She stated that Prevo pushed her several times, hard enough that she fell to the floor. J.P. testified that Prevo followed her to the bedroom where her seven-year-old nonjoint daughter, B.P., was and began choking J.P. in an effort to take her phone from

her. J.P. explained that once Prevo took her phone, he stopped choking her. She attempted to leave through the front door with B.P., but Prevo prevented them from leaving by leaning against the door. J.P. and B.P. were then able to retreat to the bedroom, lock the door, and climb out the window. They ran to a neighbor's home, and the neighbor dialed 911.

At Prevo's trial, the state presented the testimony of the responding police officers, the 911 dispatcher, the neighbor, J.P., B.P., and expert witness Detective Rueckert. Prevo testified on his own behalf.

Before trial, the state moved to allow Detective Rueckert to testify as an expert about potentially counterintuitive victim behavior within the dynamics of domestic violence in order to contextualize J.P.'s testimony for the jury. At a pretrial hearing, the district court denied the motion as untimely but ruled that it would allow the motion to be raised again on the morning of trial to provide the defense time to prepare to address the issue and to permit the parties to argue the motion. On the day of trial, the state renewed the motion to allow the expert testimony, and Prevo objected on the grounds of timeliness and undue prejudice. The district court granted the motion.

The jury returned a verdict of guilty on all three counts and, in a special-verdict form for count one, found that B.P. was seven years old at the time of the domestic assault, that Prevo knew B.P.'s age when he committed the assault, and that B.P. was present in the room when Prevo committed the assault. Prior to sentencing, the state moved for an upward dispositional departure for the domestic-assault sentence on the basis of B.P.'s presence at the time of the assault, and the parties filed memoranda on whether counts one through three were part of the same behavioral incident.

At the sentencing hearing, the district court determined that the offenses were not committed as part of a single behavioral incident and sentenced Prevo to a 21-month executed sentence for count one—the domestic assault of J.P.—which was an upward dispositional departure; a 14-month consecutive sentence for count two—the false imprisonment of J.P.; and a 14-month consecutive sentence for count three—the false imprisonment of B.P.

Prevo appealed directly from the judgment of conviction but stayed this appeal to petition the district court for postconviction relief, arguing that the district court erred by imposing 14-month sentences for counts two and three. The district court denied Prevo's petition, and we reinstated this appeal.

DECISION

I. The district court did not abuse its discretion by allowing the state's expert to testify about the common behaviors of abusers and victims in relationships in which domestic violence is present.

Prevo argues that the district court improperly admitted the testimony of Detective Rueckert, the state's expert witness, because the testimony included opinions about behaviors common to domestic abusers and was overly reliant on gender stereotypes, thus encouraging the jury to draw inferences about Prevo's behavior and character rather than helping the jury to understand J.P.'s behavior. We disagree that the district court's admission of the expert testimony was an abuse of discretion.

A. The abuse-of-discretion standard of review applies.

The parties disagree on which standard of review applies here because they disagree as to whether Prevo’s objections to the expert testimony adequately preserved the issue for appeal.

When evidentiary rulings, including the admissibility of expert testimony, have been preserved for review, appellate courts review them for an abuse of discretion. *State v. Thao*, 875 N.W.2d 834, 840 (Minn. 2016). “A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *State v. Garland*, 942 N.W.2d 732, 742 (Minn. 2020) (quotation omitted). If the district court abused its discretion in admitting the evidence, appellate courts then review for harmless error. *State v. Vang*, 774 N.W.2d 566, 576 (Minn. 2009). To show prejudice under harmless-error review, the appellant must establish “a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” *State v. Peltier*, 874 N.W.2d 792, 802 (Minn. 2016) (quotation omitted); *see also State v. Nunn*, 561 N.W.2d 902, 907 (Minn. 1997) (stating that on appeal the defendant has the burden to establish both that the district court abused its discretion in admitting evidence and that the defendant was prejudiced as a result).

In contrast, appellate courts review unobjected-to evidentiary rulings—rulings that have not been preserved for review—for plain error. *State v. Vasquez*, 912 N.W.2d 642, 650 (Minn. 2018). An appellant “is entitled to relief from a plain error if ‘(1) there was an error, (2) the error was plain, and (3) the error affected the defendant’s substantial rights.’” *Id.* (quoting *State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016)). An error is plain if it

“contravenes case law, a rule, or a standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). “If the three prongs of the plain error test are met, we then consider whether we should address the error to ensure fairness and the integrity of the judicial proceedings.” *Vasquez*, 912 N.W.2d at 650 (quotation omitted).

Prevo first objected to the untimeliness of the state’s pretrial motion to admit expert testimony; the district court denied the motion on that basis at a pretrial hearing but notified the parties that it would permit the state to raise the motion again at the outset of trial. When the state renewed its motion, Prevo objected on the grounds that the notice was untimely and that the expert’s testimony would be unduly prejudicial. The district court granted the motion over Prevo’s objection. During the expert’s testimony at trial, Prevo objected twice on foundation grounds and again on foundation and relevance grounds.

Once the district court “makes a definitive ruling” on the admissibility of evidence, before or during trial, “a party need not renew an objection . . . to preserve a claim of error.” Minn. R. Evid. 103(a). But “a renewed objection and perhaps a different ruling” is justified when “the context at trial is more developed and may be different than what was anticipated at the time of the former ruling.” *Id.* 2006 comm. cmt. Prevo argues that because he objected to the expert testimony both before and at trial, abuse-of-discretion review should apply. The state contends that Prevo’s objections were insufficient to preserve the issue because Prevo did not object on the grounds that the expert testimony went beyond the purpose for which the district court initially allowed the testimony, as he argues now.

The state cites *State v. Word*, 755 N.W.2d 776 (Minn. App. 2008), to support its position. In *Word*, we concluded that plain-error analysis applied in cases in which a

defendant filed a motion in limine objecting to relationship evidence at the outset of the proceeding, and the district court deemed the evidence admissible on a limited basis, but the defendant did not renew the objection when that evidence was introduced at trial and exceeded the scope of the court's limited ruling on its admissibility. 755 N.W.2d at 782-83 (holding that pretrial evidentiary objections "should be renewed at trial when an in limine or other evidentiary ruling is not definitive but rather provisional or unclear, or when the context at trial differs materially from that at the time of the former ruling"). This case is distinguishable from *Word*, however, because (1) Prevo objected again at trial, but the defendant in *Word* did not, and (2) the district court here issued a definitive pretrial ruling on the admissibility of the expert testimony, unlike the "qualified ruling" incorporating statutory limits on the evidence's scope in *Word*. *See id.*

Here, the district court ruled that the expert testimony was admissible based on the state's representation that the testimony would describe "general traits and characteristics that are common in a victim of domestic abuse and the dynamics of a relationship" in order to "aid the jury." Prevo renewed his objection to the expert's testimony at trial, and although the objections raised during trial on grounds of foundation and relevance differ somewhat from Prevo's argument on appeal, the district court's rationale at the time of its previous ruling admitting the testimony anticipated concerns about undue prejudice and the permissible scope of the testimony. Additionally, the district court itself interjected more than once during the testimony, calling bench conferences or stopping the questioning

when the expert's testimony was poised to stray outside its permissible scope.¹ If Prevo did not object on those grounds at the appropriate moments, it is reasonable to conclude that it was because the district court preempted Prevo's potential objections.

Because Prevo renewed his pretrial objections to the admission of the expert testimony at trial, we conclude that Prevo's objections to the district court's ruling were sufficient to preserve the issue, and we review the admission of the testimony for an abuse of discretion.

B. Admitting the expert testimony was not an abuse of discretion, and any error was harmless.

When considering the admission of expert testimony, a district court must determine whether the testimony will aid the jury in resolving factual questions presented at trial. Minn. R. Evid. 702; *State v. Grecinger*, 569 N.W.2d 189, 195 (Minn. 1997). A district

¹ A review of the transcript demonstrates three such instances during direct examination of Rueckert. The first example is as follows:

COUNSEL FOR STATE: Now, what about minimizing, blaming, or deflecting? Is that at all a tactic of abusers?

COUNSEL FOR PREVO: Your honor, I'm gonna object on foundation grounds and if I could—

THE COURT: I'll have you approach, counsel.

In the second example, the transcript reads as follows:

COUNSEL FOR STATE: And, how do—what determines on the part of the victim, what method they're gonna use to save the relationship?

THE COURT: I'm gonna stop you there. Counsel, approach.

In the third example, the transcript reads as follows:

COUNSEL FOR STATE: [D]o abusers use all the same tactics that we just went through? Or does—do they use all of them or can it be just one?

THE COURT: I'm gonna stop you.

COUNSEL FOR STATE: Okay.

THE COURT: This is beyond the Court's ruling.

court must also balance the relevance and probative value of the testimony against the danger of creating unfair prejudice and the potential for confusing or misleading the jury. Minn. R. Evid. 403. Expert testimony on the reactions of victims of domestic abuse may therefore be admissible if it helps the jury evaluate the facts and understand behavior that might otherwise undermine a victim's credibility. *State v. Obeta*, 796 N.W.2d 282, 293 (Minn. 2011); *State v. Vance*, 685 N.W.2d 713, 718 (Minn. App. 2004), *rev. denied* (Minn. Nov. 23, 2004). But to ensure that a defendant is not unfairly prejudiced by such testimony, an expert may not express an opinion on whether the defendant is a domestic abuser. *Vance*, 685 N.W.2d at 718.

Prevo first asserts that Rueckert's testimony impermissibly focused on the behaviors of perpetrators of domestic abuse rather than on the behaviors of victims, and therefore, the district court abused its discretion by admitting the testimony. Prevo argues that admitting this testimony served only to encourage the jury to draw an impermissible inference—that Prevo's conduct fit that of the typical domestic abuser, and therefore, Prevo must be guilty of domestic assault.

Evidence is inadmissible if it invites the jury to infer that a defendant is guilty because they exhibit traits typical of those who have been found guilty of that crime. *State v. Williams*, 525 N.W.2d 538, 547-48 (Minn. 1994) (stating that such evidence “seems akin to character evidence” (quotation omitted)). And we have cautioned that expert testimony may be overly prejudicial when the probative value is based on “generalizations that [the defendant] is part of a ‘guilty class’ of spouse-abusers, and the victim is part of a ‘victim

class' of abused women.” *State v. Vue*, 606 N.W.2d 719, 723 (Minn. App. 2000), *rev. denied* (Minn. May 16, 2020).

Prevo points us to general opinions Rueckert provided about typical behaviors of domestic abusers, including intimidation through means other than violence; emotional abuse; deflecting blame to the victim; isolating the victim and cultivating the victim’s dependency; and controlling the victim’s use of cell phones and social media. Specific examples Prevo cites include Rueckert’s testimony that “[a] lot of times it’s the suspect, a male calling a female victim a—a sl-t, a wh-re. And they’ll—and they’ll do that . . . in front of the police officer . . . loud enough to where the victim can hear it,” and that “a male will tell a female that they’re not good parents.” Rueckert also testified that “often in domestic assaults that I’ve been involved in that when you show up they right away say—a person will say, ‘Don’t listen to her, she’s crazy,’ or, you know, ‘She’s drunk.’”

Rueckert testified that in his experience when abusers isolate victims, cases “tend to be a guy removing—a guy abuser . . . not allowing them to have friends. Not allowing them to have friends on social media.” His testimony continued:

You know, the abuser will say—well, control again. It’s a power and control. I’ll control who you talk to, when you talk to them, um, that’s—that’s kind of how the isolation occurs.

Q. So, do the abusers tend [to] monitor calls, social media accounts?

A. Correct. I’ve seen where the abuser has all the passwords to every account, um, and again also ones where it’s, “You can have Snapchat, but I have to see every snap that you get.” And, again, Facebook, monitor all—they have a joint account. They won’t allow the female to have an individual account.

Q. And how does that go let's say the opposite direction? Do the abusers tend to repeatedly call or text the alleged victims?

A. Yeah. So, I've had cases where when a female does get to go out with coworkers it's as if they don't really escape the abuser. The abuser will call, text many times. There'll be a lot of excuses on, "I can't get the kids to sleep. I need you to come home now." There just tends to be a, you know, "Where are you? Who are you with?"

In support of his argument, Prevo relies on *Williams*, in which the supreme court held that evidence describing profiles of behavior common to drug couriers was inadmissible because it impliedly urged the jury to infer that a defendant's conduct fitting the drug-courier profile is probative evidence that the defendant is a drug courier. 525 N.W.2d at 548. Prevo also cites *Vue*, in which expert testimony about gender dynamics and cultural practices in the Hmong community exceeded the permissible scope of explaining the alleged victim's behavior and linked the defendant's conduct to stereotypes and generalizations about Hmong men and women. 606 N.W.2d at 723. Ruckert's testimony, however, differs from that in *Williams* and *Vue* in two respects.

First, unlike that in *Williams*, Rueckert's testimony was offered to explain J.P.'s behavior, and Rueckert's corresponding descriptions of typical domestic-abuser behaviors served that purpose. Rueckert's depiction of the dynamics present in an abusive relationship provided context for his testimony on why victims of abuse become reliant on their abusers, why they commonly do not call police, and why they attempt to reconcile with their abusers. Second, while Rueckert opined that domestic abusers tending to use emotional abuse and isolation as tactics were more frequently male perpetrators with female victims and explained how women react differently to domestic violence than men

do, this does not rise to the same level of reliance on cultural gender stereotypes as those in *Vue* that this court concluded “directly implied to the jury that because defendant was Hmong, he was more likely to have assaulted his wife.” *Id.* Rather, Rueckert’s testimony here was relevant to J.P.’s credibility, explaining that in Rueckert’s professional experience, he had observed that female domestic-violence victims often behave in ways that would preserve the relationship and placate the abuser.

Importantly, Prevo presented evidence to the jury about J.P.’s behavior that may have been counterintuitive and damaging to J.P.’s credibility. Prevo questioned J.P. on cross-examination about her attempts to have the charges against Prevo dismissed, her intent to reconcile with Prevo and work on their marriage at the time of the alleged incident, and the fact that she supported B.P., her nonjoint daughter, taking Prevo’s last name. These circumstances contrast starkly with those in *Williams*, in which the supreme court observed that the defendant “did nothing at trial to invite” the introduction of drug-courier profile evidence and determined that the profile evidence was offered as evidence of the defendant’s guilt. 525 N.W.2d at 548.

While Rueckert’s expert testimony may have come close to the line that we caution district courts to avoid, given the occasions when the district court stepped in to intervene or redirect, we conclude that the testimony here did not cross that line. Our review shows that Rueckert’s expert testimony provided context to help the jury understand J.P.’s behavior and evaluate her credibility. *See Obeta*, 796 N.W.2d at 293. Further, we conclude that if the district court’s admission of the expert testimony constituted error, any such error was harmless.

Under the harmless-error standard, an appellant who alleges error in the admission of expert testimony must establish “a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” *Peltier*, 874 N.W.2d at 802 (quotation omitted). Among the factors that determine whether testimony significantly affected a verdict are the manner in which the state presented the testimony, whether the testimony was highly persuasive, and whether the state used the testimony in closing argument. *Id.*

Though the expert testimony may have been persuasive as to J.P.’s credibility, the state presented ample evidence of Prevo’s guilt beyond the expert’s and J.P.’s testimonies. The jury heard B.P.’s testimony of what she observed in the home that evening as well as the testimony of the 911 dispatcher who spoke with J.P., the neighbor, and the police officers who responded to the call. The jury received photographic exhibits showing bruises to J.P.’s knees and throat consistent with her account of being shoved to the floor and choked.

Although the state summarized the expert testimony about counterintuitive behavior of victims in its closing argument, that reference comprises a single paragraph out of 15 transcript pages of closing argument. In its fleeting reference to Rueckert’s testimony, the state attempted to explain J.P.’s reconciling with Prevo in the context of witness credibility, but the vast majority of its closing argument highlighted the other evidence supporting conviction. The state did not attempt to connect the expert testimony with Prevo’s behavior or actions in its closing argument, and it did not rely on the expert testimony to establish any element of the crimes with which Prevo was charged.

Because the state did not dwell on the expert's testimony in its closing argument, and because the expert's testimony comprised a small portion of the considerable evidence against Prevo, Prevo has not demonstrated a reasonable possibility that the testimony had a significant effect on the jury's verdict. *See id.* We therefore conclude that the district court's admission of the expert testimony was not an abuse of discretion, and any error in its admission was harmless.

II. The district court did not abuse its discretion by imposing an upward dispositional departure when sentencing Prevo for his domestic-assault conviction in count one.

Prevo next argues that the district court erred by imposing a 21-month executed sentence instead of the presumptive guidelines sentence based on the aggravating factor of the presence of a child because B.P.'s age was an element of count three's false-imprisonment conviction, thus rendering her presence an impermissible aggravating factor for count one's domestic-assault conviction. We disagree.

Appellate courts review a district court's decision to depart from the presumptive guidelines sentence for an abuse of discretion. *Taylor v. State*, 670 N.W.2d 584, 588 (Minn. 2003). An upward dispositional departure may be based on offense-related aggravating factors. *State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995). We will reverse a departure if the district court's reasons for an upward departure are improper or inadequate and the evidence in the record is insufficient to justify the departure. *State v. Jackson*, 749 N.W.2d 353, 357 (Minn. 2008). But "if the reasons given for an upward departure are legally permissible and factually supported in the record, the departure will be affirmed." *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009).

Under the Minnesota Sentencing Guidelines, Prevo's presumptive sentence for count one—felony domestic assault—was a 21-month stayed sentence based on Prevo's criminal-history score and the offense's severity level. However, upon providing reasonable notice to the defendant and the district court, the state may seek to prove that an aggravating factor or factors exist to justify a departure from the guidelines. Minn. Stat. § 244.10, subds. 4, 5(a) (2018). When the offense was committed in the presence of a child, that constitutes an aggravating factor supporting an upward departure from the presumptive sentence. *Id.*, subd. 5a(a)(13) (2018). The jury may determine the existence of an aggravating factor by use of a special-verdict form. *Id.*, subd. 5(b) (2018).

Here, the jury answered, “Yes,” to the aggravating-factor questions on the special-verdict form for domestic assault. The district court relied on the jury's findings that B.P. was seven years old and present in the room at the time of the domestic assault and that Prevo knew of B.P.'s age to determine that the domestic-assault offense involved an aggravating factor. The district court also determined that the false-imprisonment offenses and the domestic-assault offense were not part of the same behavioral incident because the criminal objective of the domestic assault of J.P. was different from the criminal objective of the false imprisonment of J.P. and B.P. The district court then applied the aggravating factor of B.P.'s presence during the domestic assault to depart dispositionally and order the execution of Prevo's sentence for domestic assault.

Prevo argues that because he was convicted of and sentenced for the false imprisonment of B.P. and because an element of that offense was B.P.’s age,² the same conduct cannot be used to support an upward departure for a different conviction. Prevo cites *State v. McIntosh*, 641 N.W.2d 3 (Minn. 2002), to support his argument. In *McIntosh*, the supreme court held that evidence of drug transactions for which the appellant received separate convictions could not support a finding of an aggravating factor for a conviction based on a drug transaction on another date. 641 N.W.2d at 9 (citing *State v. Spaeth*, 552 N.W.2d 187, 196 (Minn. 1996)). Prevo also relies on *State v. Osborne* to explain the rationale for prohibiting the use of conduct underlying one conviction for which a defendant was sentenced to support an upward sentencing departure for a separate conviction—that “a defendant should not be punished twice for the same conduct.” 715 N.W.2d 436, 446 (Minn. 2006).

We disagree that Prevo’s conduct in falsely imprisoning B.P. is the same conduct as assaulting J.P. in B.P.’s presence. And *McIntosh* and *Osborne* do not support Prevo’s arguments. In those cases, the actual conduct underlying the aggravating factor—the individual drug transactions—had already been used as the basis of separate convictions. See *McIntosh*, 641 N.W.2d at 9; *Osborne*, 715 N.W.2d at 446. *McIntosh* and *Osborne* are inapposite because the aggravating factor of B.P.’s presence during Prevo’s assault of J.P. is not “conduct” for which Prevo was convicted. Instead, B.P.’s presence is an objective

² Minn. Stat. § 609.255, subd. 2, states that “[w]hoever, knowingly lacking lawful authority to do so, intentionally confines or restrains someone else’s child under the age of 18 years without consent of the child’s parent or legal custodian, or any other person without the person’s consent, is guilty of false imprisonment.”

circumstance that existed at the time of the assault; in other words, the presence of a child is a fact similar to other objective circumstances such as where the assault took place or whether the victim was particularly vulnerable. *See* Minn. Stat. § 244.10, subd. 5a(a) (2018) (listing situations and circumstances available as aggravating factors). Prevo points to no authority and offers no explanation to persuade us otherwise.³

The aggravating factor of B.P.’s age and presence during the domestic assault was the sole reason the district court gave for dispositionally departing from the guidelines by executing Prevo’s sentence for count one. The commission of an offense in the presence of a child is a legally permissible aggravating factor. Minn. Stat. § 244.10, subd. 5a(a)(13); Minn. Sent’g Guidelines 2.D.3.b.13 (2018). The reason the district court gave for the upward dispositional departure is legally permissible and factually supported. *Edwards*, 774 N.W.2d at 601. We therefore discern no abuse of discretion in the district court’s

³ The state, by contrast, suggests that we apply *Edwards*, in which the supreme court concluded that although the availability of facts underlying a separate offense to support an upward departure is limited, a district court may “use ‘overlapping’ facts of those offenses as the basis for an upward departure, provided that those facts show that the defendant committed the offense being sentenced in a particularly serious way.” 774 N.W.2d at 606-07. The state contends that this principle applies here, as the fact of B.P.’s age when present during the domestic assault of J.P. shows that Prevo’s domestic-assault offense was committed in a particularly serious way and is an “overlapping fact” with an element of the charge for false imprisonment of B.P. in count three.

Though we agree with the state that B.P.’s age and presence during the assault of J.P. is available as an aggravating factor supporting the upward sentencing departure, we disagree that is *Edwards* is apposite caselaw. In *Edwards*, as in *McIntosh* and *Osborne*, the “overlapping fact” in question was the defendant’s own conduct and not an objective circumstance present at the time of that conduct. *See id.* at 604.

basing an upward dispositional departure for count one on the aggravating factor of B.P.'s presence during Prevo's domestic assault of J.P.

III. The district court abused its discretion by making count two's sentence for false imprisonment of J.P. consecutive to count one's sentence for domestic assault of J.P.

Prevo next argues that the district court erred by making count two's sentence for false imprisonment of J.P. consecutive to count one's sentence for domestic assault. Prevo asserts that permissive consecutive sentences are available only if the presumptive disposition of both offenses is an executed sentence. The state correctly agrees and concedes this issue on appeal. Because the presumptive disposition for the domestic-assault offense was a stayed sentence, consecutive sentencing for the false-imprisonment offense related to J.P. was not available except as an upward departure from the guidelines. We therefore remand to the district court with instructions to impose a presumptive guidelines sentence for count two, which must be concurrent with the sentence for count one.

The Minnesota Sentencing Guidelines define permissive consecutive sentences as those that may be given without departure. Minn. Sent'g Guidelines 2.F.2.a (2018). The guidelines provide that "[c]onsecutive sentences are permissive *if the presumptive disposition for the current offense(s) is commitment*, as outlined in section 2.C, and paragraph (i), (ii), or (iii) applies." Minn. Sent'g Guidelines 2.F.2.a(1) (emphasis added). Our court has held this to mean that "[p]ermissive consecutive sentencing is available under this exception only when the presumptive disposition for the offenses is commitment to the commissioner of corrections." *State v. Rannow*, 703 N.W.2d 575, 578 (Minn. App.

2005). Imposing consecutive sentences in any situation not described by the guidelines constitutes an upward departure. Minn. Sent’g Guidelines 2.F (2018).

Here, the district court specified that it was ordering a permissive consecutive sentence of 14 months for count two—false imprisonment of J.P.—to run consecutive to the executed 21-month sentence for count one—domestic assault. While the presumptive disposition for count two was a commitment to the commissioner of corrections for 19 months, the presumptive disposition for count one was a stayed sentence of 21 months, as previously discussed. Therefore, the district court’s imposition of a consecutive sentence for count two constitutes an upward departure. *See id.*

When exercising its discretion to depart from the presumptive sentence, the district court “must disclose in writing or on the record the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence.” Minn. Sent’g Guidelines 2.D.1.c (2018). And “absent a statement of the reasons for the sentencing departure placed on the record at the time of sentencing, no departure will be allowed.” *State v. Geller*, 665 N.W.2d 514, 517 (Minn. 2003). Because the district court did not provide reasons on the record for departing when making the sentence for count two consecutive to count one, we must remand with instructions to impose a presumptive guidelines sentence for count two. *See id.* (holding that this court may not remand “to allow reasons for departure to be given after the fact”).

IV. The district court did not err by imposing a 14-month consecutive sentence for count three.

Finally, Prevo argues that the district court erred by using a sentencing range to impose 14-month sentences for his two convictions for false imprisonment rather than assigning the fixed duration of one year and one day displayed in the applicable shaded cell of the sentencing-guidelines grid. Minn. Sent’g Guidelines 4.A (2018). Prevo petitioned the district court for postconviction relief with a motion to correct his sentence on this issue, and the district court denied Prevo’s petition.

The decision whether to grant postconviction relief is reviewed for an abuse of discretion. *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013). The postconviction court’s findings of fact are reviewed for clear error, and its legal determinations are reviewed de novo. *Id.* Interpretation of the Minnesota Sentencing Guidelines is a legal question that appellate courts review de novo. *State v. Scovel*, 916 N.W.2d 550, 554 (Minn. 2018).

The district court sentenced Prevo to an executed 21-month sentence for domestic assault, a 14-month consecutive sentence for false imprisonment of J.P., and a 14-month consecutive sentence for false imprisonment of B.P. In its sentencing order, the district court explained that it was applying a criminal-history score of zero to the two counts of false imprisonment, and the 14-month sentence was “a little less than twenty percent higher under the guidelines, which is 2.C.1.” Prevo argues that the district court erred in interpreting the sentencing guidelines to permit the use of a sentencing range rather than the fixed duration reflected on the sentencing grid for his sentences on counts two and three.

Section 2.C.1 of the sentencing guidelines explains how the presumptive sentence is to be found using the grid:

Each cell on the Grids provides a fixed sentence duration. Minn. Stat. § 244.09 requires that the Guidelines provide a range for sentences that are presumptive commitments. For cells above the solid line, the Guidelines provide both a fixed presumptive duration and a range of time for that sentence except as provided in section 2.C.3.c(1). The shaded areas of the grids do not display ranges. *If the duration for a sentence that is a presumptive commitment is found in a shaded area, the standard range—15 percent lower and 20 percent higher than the fixed duration displayed—is permissible without departure*, provided that the minimum sentence is not less than one year and one day, and the maximum sentence is not more than the statutory maximum.

Minn. Sent’g Guidelines 2.C.1 (2018) (emphasis added). Thus, when the presumptive disposition is commitment to prison for an offense found on a shaded area of the grid, the district court is permitted to calculate the range based on the fixed duration, and a sentence within that range is the presumptive duration. We have held that “the presumptive disposition for a permissive consecutive sentence is *always* an executed sentence.” *State v. Watkins*, 650 N.W.2d 738, 742 (Minn. App. 2002) (interpreting the language in Minn. Sent’g Guidelines 2.F).

The placement of an offense on the grid is determined by its severity level and the criminal-history score. Minn. Sent’g Guidelines 4.A. When finding the presumptive duration of a permissive consecutive sentence, the district court “must use a Criminal History Score of 0, or the mandatory minimum for the offense, whichever is longer, to determine the presumptive duration. A consecutive sentence at any other duration is a departure.” Minn. Sent’g Guidelines 2.F.2.b.

Here, the district court properly used a criminal-history score of zero to determine the presumptive duration of the permissive consecutive sentence in count three⁴ for false imprisonment, an offense with a severity level of three. Minn. Sent’g Guidelines 5.A (2018). This places the offense in a shaded area of the guidelines grid. Minn. Sent’g Guidelines 4.A. The presumptive disposition for a permissive consecutive sentence is an executed sentence. *See Watkins*, 650 N.W.2d at 742. Because the sentence here is a presumptive commitment with a duration found in a shaded cell of the grid, applying the standard range is permissible under the guidelines. *See* Minn. Sent’g Guidelines 2.C.1.

Prevo claims first that the language from Minn. Sent’g Guidelines 2.C.1 applies only to offenses with statutory mandatory-minimum sentences of one year and one day but cites no authority for this proposition. We therefore reject this argument as waived and decline to consider it. *See State v. Bartylla*, 755 N.W.2d 8, 22-23 (Minn. 2008) (deeming claim waived because it was unsupported by argument or legal authority). Second, Prevo argues that using a criminal-history score of zero and applying the standard range rather than the fixed duration means he is “essentially being sentenced using a higher criminal history score,” and this is contrary to the purpose of the guidelines. In fact, the district court followed the provisions of the guidelines and our current caselaw on permissive consecutive sentences, see, e.g., *Watkins*, 650 N.W.2d at 742, which comports with the purpose of the guidelines in considering both public safety and establishing rational and

⁴ Because we are remanding the sentence for count two with instructions for the district court to impose a sentence in the presumptive guidelines range concurrent with the sentence for count one, Prevo’s argument is moot with respect to count two. The sentence for count three will be consecutive to the presumptive executed sentence for count two.

consistent sentencing standards. Minn. Sent’g Guidelines 1.A (2018). The district court did not err by using a sentencing range in imposing Prevo’s permissive consecutive sentence for count three—the false imprisonment of B.P.

Affirmed in part, reversed in part, and remanded.