STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0116

State of Minnesota,
Respondent,

vs.

Melvin Charles Kingbird,
Appellant.

Filed December 27, 2022
Affirmed in part, reversed in part, and remanded
Segal, Chief Judge

Stearns County District Court
File No. 73-CR-20-7785

Keith Ellison, Attorney General, Lydia Villalva Lijó, Assistant Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Gaïtas, Presiding Judge; Segal, Chief Judge; and Kirk, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

In this direct appeal from the judgments of conviction for second-degree assault and a fifth-degree controlled-substance crime, appellant argues that (1) he was denied his right to a fair trial when the state elicited improper and unfairly prejudicial testimony, (2) his sentence for second-degree assault must be corrected because the district court erred in calculating his criminal-history score and, (3) the district court erred in ordering him to pay restitution. We affirm in part, reverse in part, and remand.

FACTS

In November 2020, law enforcement responded to a call that an individual at an apartment complex in St. Cloud had been assaulted. After speaking with the caller, an officer made contact with the victim, R.S. When R.S. opened the door, the officer saw that R.S. had black eyes and appeared to have been "in some type of physical altercation." R.S. identified his assailant as appellant Melvin Charles Kingbird and reported that Kingbird had assaulted him using a bat and stabbed him with a six-inch knife. R.S. suffered a laceration to the abdomen and bruising. The officer took photographs of R.S.'s apartment and injuries. R.S. received medical care at the scene but needed to go to the hospital for treatment two days after the stabbing.

Law enforcement later located Kingbird and took him into custody. Kingbird was transported to the Stearns County Jail, where an officer searched him as part of the booking process. During the search, the officer found a knife and a clear baggie containing a white crystalline substance. The substance was tested and determined to be methamphetamine.

Respondent State of Minnesota charged Kingbird with one count of second-degree assault and one count of fifth-degree controlled-substance crime. The case was tried to a jury in August 2021.

At trial, R.S. testified that he had known Kingbird and his wife for approximately two years, and that he occasionally let Kingbird and his wife stay at his apartment because Kingbird and his wife lacked stable housing. In November 2020, Kingbird asked R.S. if his wife could stay with R.S. for a few days to get out of the cold and R.S. agreed. R.S. testified that, on the night of the assault, Kingbird's wife and R.S. were at the apartment and Kingbird's wife asked him to buy methamphetamine. R.S. testified that he said no because he planned to spend the money he had on food. According to R.S., Kingbird's wife called Kingbird and Kingbird then showed up at R.S.'s apartment. R.S. testified that, when Kingbird arrived, Kingbird announced that he had just beaten up someone uptown and that R.S. was next. Kingbird then beat and stabbed R.S., stole R.S.'s money and phone, and "left [R.S.] for dead." R.S. subsequently spoke with two of his neighbors; one of the neighbors then spoke with a friend of R.S., who called law enforcement to report the assault. Various law-enforcement personnel, R.S.'s neighbors, and the physician who examined R.S. testified at trial.

The jury found Kingbird guilty on both counts. The district court sentenced Kingbird to 54 months in prison for second-degree assault and to a concurrent 19 months in prison for fifth-degree controlled-substance crime. The district court also ordered him to pay $500 in restitution to R.S.

DECISION

Kingbird raises three issues on appeal. First, Kingbird argues that he was deprived of a fair trial because of improper testimony by R.S. and the arresting officer. Second, Kingbird claims that his sentence was in error because it was based on an incorrect criminal-history score. Third, Kingbird maintains that the district court erred in ordering him to pay restitution. We address each below.

I. Kingbird was not denied his right to a fair trial by improper other-acts testimony.

Kingbird argues that he was denied his right to a fair trial because the arresting officer and R.S. provided improper other-acts testimony that impacted the jury's decision to convict him of second-degree assault. Kingbird concedes that he did not object to the testimony at trial and therefore the plain-error standard of review applies. *See Moore v. State*, 945 N.W.2d 421, 433 (Minn. App. 2020) (stating that we review unobjected-to error for plain error), *rev. denied* (Minn. Aug. 11, 2020).

Claims of improper testimony by prosecution witnesses are treated as a form of prosecutorial misconduct because it is the state's responsibility to prepare witnesses to avoid improper testimony. *See State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003) (noting that "the state has an absolute duty to prepare its witnesses to ensure that they are aware of the limits of permissible testimony"). We review such claims under a modified plain-error standard, considering whether there is "(1) error, (2) that is plain, and (3) affects substantial rights." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Error is plain if it "contravenes case law, a rule, or a standard of conduct." *Id.* On the third element, the

state bears the burden of proving that the misconduct did not affect the defendant's substantial rights. *Id*. When deciding whether the state has met this burden, we consider "(1) the strength of the evidence against the defendant; (2) the pervasiveness of the improper conduct; and (3) whether the defendant had an opportunity (or made efforts) to rebut the prosecutor's improper suggestions." *State v. Hill*, 801 N.W.2d 646, 654-55 (Minn. 2011). Even where misconduct occurs, this court will reverse only when the defendant was denied a fair trial. *State v. Porter*, 526 N.W.2d 359, 365 (Minn. 1995).

Minnesota Rule of Evidence 404(b) governs Kingbird's challenge to the statements made at trial by the arresting officer and R.S. Under that rule, evidence of another crime, wrong, or act is generally not admissible to show action in conformity with a person's character. Minn. R. Evid. 404(b)(1). Such evidence, however, "may be admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," if each of the following conditions are met:

> (1) the state must give notice of its intent to admit the evidence; (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and convincing evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material to the state's case; and (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

State v. Ross, 732 N.W.2d 274, 282 (Minn. 2007) (quotation omitted); *see also* Minn. R. Evid. 404(b)(2).

The first step in our analysis is to determine whether the challenged testimony by the arresting officer and R.S. constitutes "[e]vidence of another crime, wrong, or act." Minn. R. Evid. 404(b)(1).

The Arresting Officer's Statements

Turning first to the challenged testimony of the arresting officer, the officer testified that he received information a few days after the assault that Kingbird was panhandling at a certain location. The officer testified that, when he arrived at the location, he "did recognize Mr. Kingbird from previous contacts with him." Kingbird argues that it was error for the officer to testify that he knew Kingbird from "previous contacts." We agree.

In *State v. Valentine*, this court held that "admission of the officer's testimony that he knew [the appellant] from prior contacts was error because appellant's identity was not at issue in the case." 787 N.W.2d 630, 641 (Minn. App. 2010), *rev. denied* (Minn. Nov. 16, 2010). In doing so, we relied on *State v. Strommen*, in which the supreme court determined that an arresting officer's testimony that he recognized the appellant from "prior contacts and incidents" constituted plain error; the supreme court noted that the appellant's "identity does not appear to have been an issue in this case." 648 N.W.2d 681, 687-88 (Minn. 2002). Here too, Kingbird's identity was not at issue, and we therefore agree that it was plain error for the arresting officer to testify that he recognized Kingbird from "previous contacts."

R.S.'s Statements

We next address Kingbird's argument that the challenged testimony of R.S. constituted other-acts evidence under Minnesota Rule of Evidence 404(b). The challenged testimony was repeated several times. First, during direct examination, R.S. testified that Kingbird "came in, [and] said he'd just beat up [a guy] uptown." The prosecutor then asked R.S. what happened after Kingbird entered R.S.'s apartment and R.S. repeated the

testimony for a second time, stating: "He was irate. Said he just beat a guy uptown and I was next." After asking some clarifying questions about the layout of the apartment, the prosecutor again asked R.S. to describe what happened after Kingbird entered the apartment and R.S. answered, in relevant part, that Kingbird "said he beat up [a guy] uptown, and [R.S.] was next." R.S. repeated the statement once more when being cross-examined by Kingbird's counsel.

R.S.'s testimony that Kingbird said he had just beaten up another person is evidence of another crime, wrong, or act under rule 404(b). The state argues that R.S.'s testimony is nonetheless admissible as either immediate-episode or intrinsic evidence. *See State v. Fardan*, 773 N.W.2d 303, 315-16 (Minn. 2009) (recognizing the admissibility of "evidence which relates to offenses that were part of the immediate episode for which [a] defendant is being tried" (quotation omitted)); *State v. Hollins*, 765 N.W.2d 125, 131 (Minn. App. 2009) (stating that "a rule 404(b) analysis is unnecessary if the evidence of another crime is intrinsic to the crime charged"). These are distinct bases for admission of the evidence apart from rule 404(b). *See State v. Leecy*, 294 N.W.2d 280, 282 (Minn. 1980) (stating that the state was not required to give notice of its intent to use immediate-episode evidence); *Hollins*, 765 N.W.2d at 132 (stating that intrinsic evidence may be admitted "without regard to Minn. R. Evid. 404"). We need not determine, however, whether the testimony was admissible as either immediate-episode or intrinsic evidence because we conclude that the testimony did not affect Kingbird's substantial rights.

Effect on Substantial Rights

As noted above, Kingbird is only entitled to relief if the improper testimony affected his substantial rights. *Moore*, 945 N.W.2d at 433. We conclude that Kingbird's substantial rights were not affected by either the statement by the officer that he had previous contacts with Kingbird or the statement by R.S. that Kingbird said he had just beaten up someone else.

Here, the arresting officer made only one reference to his previous contacts with Kingbird. In *State v. Atkinson*, the supreme court held that a police officer's references to the appellant's previous arrests did not affect the appellant's substantial rights because the references were "fleeting, nonspecific, and minimally prejudicial, if at all." 774 N.W.2d 584, 596 (Minn. 2009). The reference in this case by the arresting officer was also nonspecific and was even less prejudicial than the references to prior arrests in *Atkinson* because the officer did not say that Kingbird had been arrested, just that he had previous contact with the officer.

Turning to the challenged testimony by R.S., Kingbird argues that the statements affected his substantial rights because the evidence against him was weak and rested primarily on the testimony of R.S. We are not persuaded. First, Kingbird notes that R.S. "was impeached with omissions and inconsistencies between his statements," was impeached with a felony conviction, and was an admitted methamphetamine user. This impeachment evidence would be effective to cast doubt on all of R.S.'s testimony, including R.S.'s testimony that Kingbird told him he had just beaten up someone. In addition, the challenged testimony was not repeated—or even mentioned—by any other

witness, and therefore did not hinder Kingbird's ability to challenge R.S.'s credibility. And while the statement was repeated several times by R.S., the prosecutor did not repeat or emphasize the information during closing arguments. Moreover, the defense had the opportunity to rebut the suggestion and challenge R.S.'s credibility, which it did quite thoroughly. We therefore conclude that the testimony, even if improper, did not affect Kingbird's substantial rights. *See Hill*, 801 N.W.2d at 654-55 (stating that the pervasiveness of the improper assertion and opportunity to rebut it are relevant when evaluating whether a defendant's substantial rights were affected).

Accordingly, Kingbird was not denied his right to a fair trial due to the challenged testimony and we affirm his conviction of second-degree assault.

II. Kingbird is entitled to be resentenced for his conviction of second-degree assault.

Kingbird next argues that he is entitled to be resentenced on his conviction of second-degree assault because the district court sentenced him based on an incorrect criminal-history score.[1] The sentencing worksheet indicates that Kingbird was assigned two and one-half felony points, one misdemeanor/gross-misdemeanor point, and one-half custody-status point. The district court added the points, including the half-points, and used a criminal-history score of four in determining Kingbird's sentence.

[1] Kingbird acknowledges that this argument does not apply to his sentence for fifth-degree controlled-substance crime. The district court sentenced Kingbird for fifth-degree controlled-substance crime based on the correct criminal-history score, and our opinion does not impact that sentence.

Kingbird contends, and the state agrees, that his two and one-half felony points should have been rounded down to two before being added to the other points. The sentencing guidelines provide: "The felony point total is the sum of the felony weights. If the sum of the weights results in a partial point, the point value must be rounded down to the nearest whole number." Minn. Sent'g Guidelines 2.B.1.i (2020). Here, the sum of the felony weights is two and one-half points. Because the sum of the weights resulted in a partial point, the point value should have been rounded down to two—the nearest whole number—before being combined with the points from other categories. We therefore agree with the parties that Kingbird was sentenced based on an incorrect criminal-history score and is entitled to be resentenced.

The parties disagree, however, whether the correct criminal-history score is three or three and one-half points. After the felony point total is properly rounded down to two, Kingbird has an additional point for his prior misdemeanor/gross-misdemeanor convictions and one-half of a custody-status point. Kingbird argues that the district court must disregard the one-half custody status point and that he should be resentenced based on a criminal-history score of three. The state argues that the one-half custody-status point should not be disregarded and that Kingbird should be resentenced based on a criminal-history score of three and one-half points, even though the guideline ranges are only in full-point increments. We agree with Kingbird.

In *State v. Beganovic*, this court explained that in 2019 the sentencing guidelines were amended such that it was possible for a defendant to "receive[] only a partial, not a full, custody-status point." 974 N.W.2d 278, 288 (Minn. App. 2022), *rev. granted* (Minn.

June 29, 2022).[2] This court observed that "[t]he guidelines provide that partial felony points are rounded down but do not indicate whether partial custody-status points are rounded down as well." *Id.* The Minnesota Sentencing Guidelines Commission subsequently "issued interim guidance instructing courts to follow [a nonprecedential opinion of this court] and disregard a partial custody-status point when determining the presumptive sentence." *Id.* This court adopted this guidance in *Beganovic* and held "that a partial custody-status point should be disregarded when calculating the presumptive sentence." *Id.*

The state argues that the guidelines commission overstepped its authority in issuing its interim guidance and that this court should not have adopted the interim guidance in *Beganovic*. But *Beganovic* is a precedential opinion of this court, and we are bound by its decision. *State v. Chauvin*, 955 N.W.2d 684, 689-90 (Minn. App. 2021), *rev. denied* (Minn. Mar. 10, 2021). Applying our holding in *Beganovic*, we conclude that Kingbird is entitled to be resentenced for second-degree assault based on a criminal-history score of three. We therefore reverse and remand for resentencing.

III. The district court failed to make a finding on Kingbird's ability to pay when ordering restitution.

Kingbird argues that the district court erred when it ordered him to pay restitution to R.S. The restitution amount was based on R.S.'s victim impact statement, which

[2] We note that the supreme court did not grant review on the issue of how to factor partial custody-status points into a criminal-history score. Neither party petitioned for further review on that issue, and the supreme court granted Beganovic's petition for further review on one issue—a substantive issue related to the statute establishing the crime of arson—and denied review on all other issues.

indicated that Kingbird took R.S.'s phone that R.S. had purchased for $120 and stole $380 in cash from R.S.'s apartment. Defense counsel asked that the district court not order restitution because there was "no affidavit or proof of those losses." The district court ordered Kingbird to pay $500 in restitution, stating:

> I will order $500 in restitution. It was my intent to do so prior to [the prosecutor] even making that request. I recall the victim's testimony during the trial with regard to his phone being broken, as well as $380 cash taken from him. This was also reiterated in the victim impact statement that was signed by [R.S.]. And I think $120 for a phone is a relatively conservative amount.

"A victim of a crime has the right to receive restitution as part of the disposition of a criminal charge . . . if the offender is convicted . . . ." Minn. Stat. § 611A.04, subd. 1(a) (2020). The district court "may order restitution only for losses that are directly caused by, or follow naturally as a consequence of, the defendant's crime." *State v. Boettcher*, 931 N.W.2d 376, 381 (Minn. 2019). This court reviews a district court's "broad discretion to award restitution" for "abuse of that discretion." *State v. Andersen*, 871 N.W.2d 910, 913 (Minn. 2015). "A [district] court abuses its discretion when its decision is based on an erroneous view of the law." *Boettcher*, 931 N.W.2d at 380 (quotation omitted).

An offender may challenge a restitution award using the procedure established in Minn. Stat. § 611A.045, subd. 3 (2020). As relevant here, the statute provides that "[a]n offender may challenge restitution, but must do so by requesting a hearing . . . within 30 days of sentencing" and "may not challenge restitution after the 30-day time period has passed." Minn. Stat. § 611A.045, subd. 3(b). Kingbird did not challenge the restitution award within 30 days of sentencing but argues that he, nonetheless, may challenge the

award on appeal because his argument goes to the legal issue of the district court's authority to award restitution. *See State v. Gaiovnik*, 794 N.W.2d 643, 649 (Minn. 2011) (stating that the 30-day time period in Minn. Stat. § 611A.045, subd. 3(b) "does not preclude [an offender] from challenging in a direct appeal the district court's legal authority to award restitution when he raised this legal issue with the district court at the sentencing hearing").

Kingbird argues that the district court erred in ordering him to pay restitution because the loss of the phone and cash were not directly caused by his assault of R.S., the crime for which Kingbird was convicted. Kingbird characterizes this as a legal challenge that goes to the district court's authority to award restitution. We disagree. Determining whether a victim's loss was directly caused by, or followed naturally as a consequence of, a crime is a fact-based challenge.[3] And, as such, we conclude that this claim is not properly before this court.

Kingbird next argues that the district court erred in ordering him to pay restitution because R.S. did not submit an affidavit. The relevant restitution statute provides that when deciding whether to order restitution "[t]he court or its designee shall obtain the

[3] We have consistently reached this conclusion in a series of nonprecedential opinions. While we are not bound by these opinions, we are persuaded by their reasoning on this issue. *See, e.g.*, *State v. Makuac*, No. A21-0111, 2022 WL 17125, at *6 (Minn. App. Jan. 3, 2022) ("Because a challenge to the causal connection between the offense and [the victim's] loss raises a factual challenge, not a legal one, [appellant] has forfeited appellate review . . . ."), *rev. denied* (Minn. Mar. 29, 2022); *State v. Miles*, No. A19-1178, 2020 WL 3172803, at *2 & n.1 (Minn. App. June 15, 2020) (stating that appellant's assertion that his conduct did not directly cause the victim's loss "raises a factual challenge, not a legal one" and noting that "[w]ere this court to conclude otherwise, every challenge could be considered a legal challenge"), *rev. denied* (Minn. Aug. 25, 2020); *see also* Minn. R. Civ. App. P. 136.01, subd. 1(c) ("[N]onprecedential opinions may be cited as persuasive authority.").

information from the victim in an affidavit form or by other competent evidence." Minn. Stat. § 611A.04, subd. 1(a). Here, R.S. submitted a victim impact statement requesting $380 for the stolen cash and $120 for the phone. In ordering restitution, the district court stated that it considered the victim impact statement as well as R.S.'s trial testimony. Kingbird argues that, "[i]f the [district] court was going to entertain [R.S.'s] restitution request, an affidavit from [R.S.] was required and a hearing was necessary to evaluate the true extent of any possible losses."

We again disagree. The statute requires that the district court obtain the information "in affidavit form *or* by other competent evidence." *Id.* (emphasis added). The district court considered both R.S.'s signed victim impact statement and his trial testimony, and Kingbird cites to no legal authority establishing that such sources of information are insufficient to constitute "competent evidence." And as noted above, Kingbird could have requested a hearing to challenge the restitution order in district court, but he did not do so. The district court therefore did not commit legal error by relying on the victim impact statement and trial testimony to order restitution.

Finally, Kingbird argues that the district court did not consider his ability to pay. Under Minn. Stat. § 611A.045, subd. 1(a)(2) (2020), the district court must consider "the income, resources, and obligations of the defendant" when determining whether to award restitution. In *State v. Wigham*, the supreme court held that a district court fulfills this statutory requirement "when it expressly states, either orally or in writing, that it considered the defendant's ability to pay." 967 N.W.2d 657, 664 (Minn. 2021). The district court is not required to "make specific findings about the defendant's income, resources, and

obligations," but "the record must include sufficient evidence about the defendant's income, resources, and obligations to allow a district court to consider the defendant's ability to pay the amount of restitution ordered." *Id.* at 665.

The state contends that "[t]he district court's statements indicated its consideration of record information bearing on Kingbird's income, resources, and obligations" because the district court stated that it had reviewed "the presentence investigation report, the sentencing worksheet, the victim impact statement by R.S., [and] the proposed restitution order." The state argues that "the court expressly said that it had reviewed the PSI and other documents in preparation for imposing [a] sentence and ordering restitution, again in conformance with *Wigham*." *Wigham*, however, states that a district court fulfills the statutory obligation of Minn. Stat. § 611A.045, subd. 1(a)(2), "when it expressly states . . . that it considered the defendant's ability to pay." *Id.* at 664.

Here, the district court did not state that it expressly considered Kingbird's ability to pay. Thus, while the record may contain information relating to Kingbird's ability to pay, it does not establish that the district court expressly considered Kingbird's ability to pay. We therefore remand to the district court to consider whether Kingbird has the ability to pay the $500 in restitution. We emphasize the narrow scope of this remand and reiterate that the record supports the $500 order. The sole issue related to restitution on remand is whether Kingbird has the ability to pay.

Affirmed in part, reversed in part, and remanded.