

*This opinion is nonprecedential except as provided by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
A22-0991**

State of Minnesota,
Respondent,

vs.

Gordy Lee Burkhardt,
Appellant.

**Filed May 22, 2023
Affirmed
Segal, Chief Judge**

Clay County District Court
File No. 14-CR-21-3524

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

Brian J. Melton, Clay County Attorney, Brittany Marie Davila, Assistant County Attorney,
Moorhead, Minnesota (for respondent)

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

Considered and decided by Frisch, Presiding Judge; Segal, Chief Judge; and Jesson,
Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

In this direct appeal, appellant argues that his conviction for felony domestic assault
must be reversed because the prosecutor committed plain-error misconduct by eliciting

bad-acts evidence without providing notice and by vouching for the complainant's credibility during closing arguments. Appellant further argues that the district court abused its discretion when it denied his motion for a downward durational departure. We affirm.

FACTS

On an evening in October 2021, L.K. was in her apartment in Moorhead when her neighbor, B.K., knocked on her door. When she opened the door, L.K. observed that B.K. was “[v]ery distraught, very shaken, crying, and just bruised up on her face.” B.K. asked L.K. to call 911, which L.K. did. During the 911 call, L.K. told the dispatcher that B.K. was with her at L.K.’s apartment. L.K. also stated that appellant Gordy Lee Burkhart had been “beating the crap out of [B.K.]” and that Burkhart had B.K.’s dog. With assistance from B.K., L.K. provided the dispatcher with Burkhart’s name and information about what he was wearing, where he had gone, and what B.K.’s dog looked like. B.K. then took the phone from L.K. and told the dispatcher that Burkhart had been beating her for days and that she had been trying to call 911 but Burkhart kept taking the phone. She indicated that Burkhart had assaulted her before and that she had been in her apartment with Burkhart for three days.

An officer with the Moorhead Police Department responded to the 911 call. While on his way to the apartment complex, the officer saw an individual matching Burkhart’s description. The officer lost sight of the individual, but later relocated him and confirmed it was Burkhart. Burkhart told the officer that he was in the area visiting a friend and had been getting cigarettes, but was not willing to provide additional information. The officer then met with B.K., and observed that she “was crying, had a ripped or torn shirt in the

front region, . . . [and] swelling and blood on her front facial region.” She identified Burkhart as the individual who caused her injuries, and stated that Burkhart had hit her with both a closed and open hand and had choked her multiple times. The officer took photographs of B.K.’s injuries, and B.K. ultimately went to the hospital. Respondent State of Minnesota charged Burkhart with two felony counts—domestic assault under Minn. Stat. § 609.2242, subd. 4 (2020),¹ and domestic assault by strangulation under Minn. Stat. § 609.2247, subd. 2 (2020).

The case was tried to a jury. Consistent with her prior statement to the officer, B.K. testified at trial that Burkhart “had hurt [her] by both hitting [her] and holding [her] down and . . . choking [her].” While B.K. was on the stand, the state had the audio recording of her prior statement to the officer played for the jury. The prosecutor then asked B.K. if she had ever provided a statement with a different explanation for her injuries. B.K. said no, but after the prosecutor asked if she had ever spoken to a defense investigator, she acknowledged that she told the defense investigator that her dog had caused the injuries. The prosecutor asked B.K. why she told the investigator that, and B.K. responded: “Because that’s what I was told to say.” The prosecutor asked who told her to say that, and she said that “Gordy did, on the phone,” referencing Burkhart. The prosecutor asked if Burkhart said why he made that request. B.K. then testified that Burkhart had asked her to say the dog caused her injuries “[s]o that he could get out of jail because his father got

¹ The domestic-assault charge was enhanced to a felony because the alleged assault occurred within ten years of Burkhart being convicted of two or more previous qualified domestic violence-related offenses.

cancer and he didn't want to be locked up and [have] his dad die." She claimed that Burkhart made this request during a phone call while he was in jail. She testified that she initially agreed to the request, but decided prior to trial that she would instead testify that Burkhart caused the injuries.

During the state's closing argument, the prosecutor acknowledged that "credibility is certainly something that [the jury] will need to weigh" and that B.K. had provided different explanations for the cause of her injuries. The prosecutor observed that B.K. "testified [Burkhart] told her to change her story and she—she did. But ultimately, when the time came where she needed to sit under oath before you, she stood up here and she told you the truth." The jury found Burkhart guilty of domestic assault and the lesser-included offense of fifth-degree assault, but not guilty of domestic assault by strangulation.

Prior to sentencing, Burkhart filed a motion for a downward durational departure. At the sentencing hearing, the parties agreed that Burkhart's criminal-history score was five, resulting in a presumptive sentencing range of between 23 and 32 months. Burkhart requested a downward durational departure from the presumptive sentence to a sentence of one year and one day in prison. Burkhart argued that the departure was appropriate because B.K. did not suffer "substantial bodily harm," which is the level of harm required for a third-degree assault conviction. *See* Minn. Stat. § 609.223, subd. 1 (2020). And third-degree assault carries that same maximum sentence as Minn. Stat. § 609.2242, subd. 4, the enhanced domestic-assault offense of which Burkhart was convicted. *See id.*

Burkhart argued that comparing the injuries in this case to those in a typical felony-level assault, using third-degree assault as the comparator, was an adequate basis for

departure because the injuries in this case did not rise to the level of “substantial bodily harm,” and because the charge in this case was a felony based on Burkhart’s prior qualifying convictions, not the severity of the injuries. He noted that if B.K. had suffered more severe injuries, the charge would still be a felony and would result in the same presumptive sentence. The district court responded to that argument:

I’m also not going to grant the departure on the basis that . . . the injuries here were less severe than in a normal or standard domestic assault. The testimony before the Court at the trial by the victim was very clear, unequivocal, that she was in an apartment for days with Mr. Burkhart, that his words grew more aggressive over that time period, and ultimately resulted in assaulting her. And to weigh the injury that Mr. Burkhart inflicted against what other victims might receive in a domestic assault case, I do not find to be important, relevant, or of any significance as it relates to the sentence because, Mr. Burkhart, you committed a domestic assault offense.

The district court denied Burkhart’s motion for a downward durational departure, explaining:

I want to be clear that I’m looking at this case and looking at the testimony of the victim. I heard the testimony of the victim, of her testimony that there were days spent in an apartment, unable to leave, ongoing violence, that ultimately, she went to the neighbors because she was so afraid to call 911 herself in order to get help. . . . There have been no substantial or compelling reasons presented to the Court to deviate from the Guidelines.

The district court instead sentenced Burkhart to 32 months in prison—the upper end of the presumptive guidelines range.

DECISION

Burkhart raises two issues on appeal. First, he argues that he is entitled to a new trial because the prosecutor engaged in misconduct that rises to the level of plain error by eliciting testimony from B.K. concerning prior bad-acts evidence that was not noticed by the state and by vouching for B.K.'s credibility during closing arguments. Second, he argues, in the alternative, that he is entitled to be resentenced because the district court failed to exercise its discretion in denying his motion for a downward durational departure.

I. Burkhart was not denied his right to a fair trial due to prosecutorial misconduct.

Regarding his argument that he is entitled to a new trial based on two instances of alleged prosecutorial misconduct, Burkhart concedes that he did not object to the challenged conduct at trial. We review claims of unobjected-to prosecutorial misconduct 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.* If a defendant establishes that plain-error misconduct occurred, the state then bears the burden of proving that the misconduct did not affect the defendant’s substantial rights. *Id.* If these three elements are satisfied, this court then “assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *Id.*

In our analysis, we first address whether the two instances of alleged prosecutorial misconduct involve plain errors and then consider whether any error affected Burkhart’s substantial rights.

B.K.'s Statement

Burkhart asserts that the state engaged in prosecutorial misconduct by eliciting testimony from B.K. that Burkhart told her to say that her dog caused her injuries so that he could get out of jail. Claims of improper testimony by prosecution witnesses are treated as a form of prosecutorial misconduct because it is the state's responsibility to prepare its 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"). Burkhart argues that B.K.'s testimony was improper because it constituted other-acts evidence for which the state provided no notice of its intent to admit.

Under Minn. R. Evid. 404(b)(1), evidence of another crime, wrong, or act is generally not admissible to show action in conformity with a person's character. Such evidence, however, may be admissible for other purposes, including "to explain a witness's prior inconsistent statements." *State v. Scruggs*, 822 N.W.2d 631, 643 (Minn. 2012). To be admissible, however, the following conditions must be 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 constitutes “[e]vidence of another crime, wrong, or act.” Minn. R. Evid. 404(b)(1). We conclude that it does. As Burkhart notes, Minnesota law prohibits a person from using or attempting to use intimidation to dissuade or influence a witness. *See* Minn. Stat. § 609.498 (2020). Additionally, at Burkhart’s first appearance, the district court granted the state’s request for a domestic-abuse no-contact order (DANCO) that prohibited Burkhart from contacting B.K. At a minimum, the challenged testimony is evidence that could be used to prove that Burkhart violated the DANCO. *See* Minn. Stat. § 629.75, subd. 2 (2020) (establishing criminal penalties for DANCO violations). Accordingly, the challenged testimony is “[e]vidence of another crime, wrong, or act” under Minn. R. Evid. 404(b)(1) and, since the state failed to give notice of its intent to admit the evidence, the state failed to satisfy the conditions necessary to admit it for the purpose of explaining B.K.’s prior inconsistent statements. *See Scruggs*, 822 N.W.2d at 643. Eliciting this testimony thus constituted error. Because the law on this issue is settled, we also conclude that Burkhart has established that the error was plain.

Vouching Statement

Burkhart next argues that the prosecutor committed plain error by vouching for B.K.’s credibility during the state’s closing argument. Assessing credibility is “strictly the domain of the jury.” *State v. Blanche*, 696 N.W.2d 351, 374 (Minn. 2005). Accordingly, a prosecutor may not “vouch for the veracity of any particular evidence.” *State v. McArthur*, 730 N.W.2d 44, 53 (Minn. 2007). “[V]ouching occurs when the government implies a guarantee of a witness’s truthfulness, refers to facts outside the record, or

expresses a personal opinion as to a witness's credibility." *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998) (quotation omitted). A prosecutor may "argue that the state's witnesses were worthy of credibility" but "may not express a personal opinion about the witnesses' credibility." *State v. Yang*, 627 N.W.2d 666, 679 (Minn. App. 2001), *rev. denied* (Minn. July 24, 2001).

The prosecutor here, during closing argument, acknowledged that B.K.'s credibility was an issue for the jury. But while attempting to explain B.K.'s inconsistent statements about the cause of her injuries, the prosecutor argued to the jury that "ultimately, when the time came where [B.K.] needed to sit under oath before you, she stood up here and she told you the truth." In *State v. Hobbs*, this court determined that a prosecutor committed misconduct when the prosecutor told the jury during closing arguments that a witness "told you the truth." 713 N.W.2d 884, 889 (Minn. App. 2006), *vacated in part* (Minn. Dec. 12, 2006).² Here too, the prosecutor told the jury that a witness "told you the truth," and we agree that this statement constitutes improper vouching. In addition, because the law on this question is also clearly established, we conclude that Burkhart has established that the error was plain.

Effect on Substantial Rights

Having concluded that Burkhart established that both of the cited instances involve plain error, we must next address the question of whether the state has met its burden of

² Specifically, the Minnesota Supreme Court, in an order, vacated part II of this court's decision in *Hobbs*, which involved an unrelated sentencing issue. The supreme court did not review or in any way modify this court's analysis and decision relating to the prosecutorial-misconduct issue.

demonstrating that the misconduct did not affect Burkhart's substantial rights. 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).

The state argues that the misconduct did not affect Burkhart's substantial rights because the misconduct was not pervasive, the prosecutor stressed that credibility determinations were ultimately up to the jury, and the state had ample evidence to support its case. Burkhart "acknowledges that the misconduct in this case appeared on only a handful of transcript pages" and was therefore not pervasive, but argues that it nonetheless affected his substantial rights because credibility was a central issue in the case and the misconduct was "difficult for the defense to counter."

Burkhart is correct that B.K.'s credibility was a central issue in this case because no other witnesses were present when the assault allegedly took place. L.K. testified that she heard yelling and screaming coming from B.K.'s apartment on the night of the assault, but did not see the incident because she was inside her own apartment. The case thus hinged on whether the jury believed B.K.'s testimony that she was assaulted by Burkhart. But even though the two errors may have helped bolster B.K.'s credibility, we are nevertheless persuaded that the state has satisfied its burden of demonstrating that the errors did not interfere with Burkhart's substantial rights.

We reach this conclusion for the following reasons. First, the state's case contained not just the testimony of B.K., but also a significant amount of corroborating evidence. In

addition to B.K.'s testimony, the jury heard testimony from both L.K. and the responding officer regarding B.K.'s demeanor on the night of the assault, the audio recording of the statement B.K. made to the officer on the night of the assault, and the 911 call. L.K. placed the 911 call and initially answered the dispatcher's questions with assistance from B.K., but B.K. ultimately took the phone and provided a description of what happened. The state also submitted photographs of B.K.'s injuries into evidence.

Second, the defense was aware before trial not only that B.K.'s credibility was at issue, but also that B.K. had made inconsistent statements about the cause of her injuries because she had told a defense investigator that her dog had caused the injuries. The defense was therefore aware of the statement and in fact relied on the argument that the dog actually caused the injuries during its own closing argument. The defense was also able to counter B.K.'s assertion that Burkhart asked her to change her story by observing that jail calls are recorded and that no such recording was put into evidence, thereby suggesting to the jury that there was no such call.

Third, the jury acquitted Burkhart of domestic assault by strangulation despite B.K.'s testimony that he had "choked" her. This further persuades us that the jury thoroughly reviewed the evidence and evaluated B.K.'s credibility, and that there is no reasonable likelihood that the verdict was influenced by the misconduct.

Finally, we note that the impact of the improper vouching was at least mitigated by the fact that the prosecutor stressed during closing arguments that it was up to the jury to evaluate credibility.

We thus conclude that Burkhart was not denied his right to a fair trial due to the errors, and we affirm his conviction of felony-level domestic assault. In doing so, however, we caution that plain errors, like vouching for a witness's credibility, should not have occurred and are not to be repeated.

II. The district court did not abuse its discretion in denying Burkhart's motion for a downward durational departure.

The Minnesota Sentencing Guidelines establish presumptive sentences for felony offenses in an effort “to maintain uniformity, proportionality, rationality, and predictability in sentencing.” Minn. Stat. § 244.09, subd. 5 (2020). A district court may depart from these guidelines only when there are “identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent’g Guidelines 2.D.1 (Supp. 2021); *see also State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). “[D]epartures 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). Even if substantial and compelling circumstances exist, a district court is not required to depart from the guidelines. *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984).

A downward durational departure is a sentence that is shorter than the presumptive range provided by the sentencing guidelines. Minn. Sent’g Guidelines 1.B.5.b (Supp. 2021). “A downward durational departure is justified only if the defendant’s conduct was significantly less serious than that typically involved in the commission of the offense.” *Solberg*, 882 N.W.2d at 624 (quotation omitted). When a defendant’s actions fit squarely

within the conduct prohibited by the statute, the offense is not significantly less serious than typical. *Id.* at 626-27; *see also State v. Rund*, 896 N.W.2d 527, 534 (Minn. 2017).

We review a district court’s refusal to depart from the sentencing guidelines for abuse of discretion. *State v. Givens*, 544 N.W.2d 774, 776 (Minn. 1996). An appellate court “may not interfere with the [district] court’s exercise of discretion” in imposing a presumptive sentence “as long as the record shows the [district] court carefully evaluated all the testimony and information presented before making a determination.” *State v. Van Ruler*, 378 N.W.2d 77, 80-81 (Minn. App. 1985). Though a district court is required to give reasons for granting a departure, it need not explain its decision not to depart, so long as it has considered reasons for departure but elects to impose the presumptive sentence. *State v. Curtiss*, 353 N.W.2d 262, 263 (Minn. App. 1984).

Burkhart argues that the district court abused its discretion in denying his motion for a downward durational departure because the statement made by the district court—that a comparison of the injuries suffered by B.K. to those in other domestic-assault cases was not “important, relevant, or of any significance . . . to the sentence”—demonstrates that the district court failed to consider the grounds for his motion. Burkhart maintains that the sentence must therefore be reversed and the matter remanded for resentencing.

Burkhart cites *Curtiss* in support of his contention. In *Curtiss*, we reversed a district court’s decision not to depart from the sentencing guidelines when the district court stated it found “no justifiable reason to deviate,” when the record contained “significant” reasons supporting departure—mainly that the defendant, convicted of first-degree burglary, had entered only the breezeway of a home to take a case of beer with no further intrusion. *Id.*

We held that, because the district court appeared to consider *no* factors in support of or against departure, it had failed to exercise its discretion in considering the defendant's departure motion. *Id.* at 264. We therefore remanded the matter to the district court to reconsider the departure motion. *Id.* But *Curtiss* presents quite a different scenario from this case.

Here, the district court cited several offense-related reasons for sentencing Burkhart within the presumptive range. The district court noted that Burkhart kept B.K. confined in her own apartment for days, that Burkhart's words grew more aggressive over that time, that the particular incident was spurred by Burkhart's suspicion of B.K.'s infidelity, and that he ultimately assaulted her because of that suspicion. The record thus indicates that the district court did consider the circumstances of this offense and concluded that they did not warrant a downward departure. *Curtiss* is therefore distinguishable.

We are also not persuaded by Burkhart's argument that the district court erred when it declined to compare the severity of B.K.'s injuries to those of a "typical" domestic-assault victim. The offense of which Burkhart was convicted carries the same maximum sentence as a third-degree assault. *Compare* Minn. Stat. § 609.223, subd. 1 (establishing the offense of third-degree assault based on substantial bodily harm), *with* Minn. Stat. § 609.2242, subd. 4 (domestic-assault enhancement provision). Burkhart argued to the district court that, because third-degree assault requires proof of substantial bodily harm, and B.K. did not suffer that level of injury, this was a less serious offense that warranted a

downward durational departure.³ *See* Minn. Stat. § 609.02, subd. 7a (2020) (defining substantial bodily harm). The district court’s statement that comparing severity of injury was not necessarily relevant was in response to this argument by Burkhart.

We discern no abuse of discretion by the district court in making this statement. First, as noted above, the district court made its decision based on other relevant factors. Second, because this case was enhanced to a felony by reason of Burkhart’s prior convictions for qualified domestic violence-related offenses, not the severity of the bodily harm caused, it was well within the district court’s discretion to consider the severity of B.K.’s physical injuries as less relevant.

In sum, the district court considered relevant factors in denying Burkhart’s motion for a downward durational departure and we discern no abuse of discretion in sentencing Burkhart to a presumptive sentence under the sentencing guidelines.

Affirmed.

³ Burkhart was convicted of and sentenced under Minn. Stat. § 609.2242, subd. 4, which provides for the enhancement of a misdemeanor-level assault if the offender has been convicted, within the prior ten years, “of two or more previous qualified domestic violence-related offense convictions.” Because of Burkhart’s prior qualifying convictions, the state only had to prove “bodily harm,” not “substantial bodily harm,” the severity of injury for a misdemeanor-level domestic assault, to establish that Burkhart committed an offense punishable as a felony. *See* Minn. Stat. § 609.2242, subs. 1, 4 (2020).