2005 WL 525522
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Chad Allen ROURKE, Appellant.

No. A03-1254.

|

March 8, 2005.

|

Review Granted May 17, 2005.

Stevens County District Court, File No. K3-03-17.

Attorneys and Law Firms

Mike Hatch, Attorney General, St. Paul, MN, and Charles C. Glasrud, Stevens County Attorney, Morris, MN, for respondent.

John M. Stuart, State Public Defender, Marie Wolf, Assistant Public Defender, Minneapolis, MN, for appellant.

Considered and decided by LANSING, Presiding Judge; WILLIS, Judge; and HUDSON, Judge.

UNPUBLISHED OPINION

HUDSON, Judge.

***1** This appeal is from a sentence for first-degree assault, in violation of Minn.Stat. § 609.221, subd. 1 (2002). The supreme court has remanded appellant Chad Rourke's appeal for reconsideration of his challenge to his sentence in light of *Blakely v. Washington*, --- U.S. ----, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Although we conclude that *Blakely* does not apply to custody-status-point determinations under the Minnesota Sentencing Guidelines, the durational departure violated appellant's right to a jury trial under *Blakely*, and, therefore, we reverse and remand.

FACTS

Appellant Chad Rourke pleaded guilty in May 2003 to first-degree assault for threatening to kill his girlfriend, Erica Boettcher, while she was a passenger in his vehicle and then deliberately smashing the vehicle into a pole. The complaint charged Rourke with first-, second-, and third-degree assault, first-degree criminal damage to property, domestic assault, reckless driving, and careless driving. The plea agreement provided that the other charges would be dismissed; the parties would jointly recommend a sentence of 128 months, an upward departure from the presumptive 98-month sentence; and the state would waive its right to seek a greater departure.

The presumptive sentence of 98 months was calculated based on one criminal-history point, which consisted of a custody-status point due to Rourke being on probation at the time of the offense for his prior conviction of fifth-degree assault against Boettcher.

The district court sentenced Rourke to the agreed-on 128 months, citing appellant's two prior gross-misdemeanor convictions involving the same victim, his abuse of his position of power and control over the victim, the particular cruelty of the offense, and the plea agreement.

DECISION

Rourke argues that the upward durational departure, and the use of a custody-status point to calculate the presumptive sentence, violated his right to a jury trial under the Supreme Court's holding in *Blakely v. Washington*, ---U.S. ----, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In reviewing a constitutional challenge to a statute, this court applies a de novo standard of review. *See State v. Wright*, 588 N.W.2d 166, 168 (Minn.App.1998), *review denied* (Minn. Feb. 24, 1999).

In *Blakely*, the Supreme Court held that the greatest sentence a judge can impose is "the maximum sentence [that may be imposed] solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, --- U.S. ----, ----, 124 S.Ct. 2531, 2537, 159 L.Ed.2d 403 (2004). A defendant, it held, has a Sixth Amendment right

to a jury determination of any fact, except the fact of a prior conviction, that increases the sentence above this maximum. *Id.* at 2543.

This court has held that *Blakely* applies to upward durational departures imposed under the Minnesota Sentencing Guidelines. *State v. Conger,* 687 N.W.2d 639 (Minn.App.2004), *review granted* (Minn. Dec. 22, 2004)[1] (appeal stayed pending decision in *State v. Shattuck,* C6-03-362); *see also State v. Saue,* 688 N.W.2d 337, 345 (Minn.App.2004), *review granted* (Minn. Jan. 20, 2004). The supreme court in *Shattuck* has determined that the upward durational departure in that case violated the appellant's right to a jury trial under *Blakely. State v. Shattuck,* 689 N.W.2d 785, 786 (Minn.2004) (ordering supplemental briefing on the issue of the appropriate remedy).

1 The supreme court granted review in *Conger,* but stayed further processing of that matter pending a final decision in *State v. Shattuck,* No. C6-03-362 (Minn. argued Nov. 30, 2004). By order filed earlier, on December 16, the supreme court held that the imposition of an upward durational departure based on aggravating factors not considered by the jury violated the defendant's right to a jury trial under *Blakely. State v. Shattuck,* 689 N.W.2d 785, 786 (Minn.2004) (per curiam). The court indicated that a full opinion would follow and directed supplemental briefing addressing the appropriate remedy. *Id.*

***2** The state argues that Rourke has forfeited the *Blakely* challenge to the durational departure by failing to object to it in the district court. *See State v. Leja,* 684 N.W.2d 442, 447-48 n. 2 (Minn.2004). But in *Leja, Blakely* was not briefed on appeal, and the supreme court reversed the upward departure on other grounds, making the discussion of waiver dictum.

The rule in *Blakely* applies to all cases pending on direct review at the time the *Blakely* decision was released. *See State v. Petschl,* 688 N.W.2d 866, 874 (Minn.App.2004), *review denied* (Minn. Jan. 20, 2005). Rourke has briefed the *Blakely* issue on appeal. And in the past the supreme court has applied some new rules more narrowly to only those pending appeals in which the issue had been raised in the district court. *Friedman v. Comm'r of Pub. Safety,* 473 N.W.2d 828, 838 (Minn.1991). But the court did not announce any narrower application of *Blakely* in *Leja.*

The state also argues that because Rourke stipulated to the upward departure, he is not entitled to relief under *Blakely. See Blakely,* --- U.S. at ----, 124 S.Ct. at 2541 (noting that a sentence enhancement not based on jury findings would be proper "so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding"). But Rourke did not stipulate to the aggravating factors; he only stipulated to the departure. In any event, this court has recently held that a defendant cannot stipulate, or enter an "admission," to an aggravating factor under *Blakely* unless he waives his Sixth Amendment right to a jury trial on the issue. *State v. Hagen,* 690 N.W.2d 155, 159 (Minn.2004). Rourke did not waive his right to a jury trial on the aggravating factors.

Rourke also argues that the custody-status point used to determine his 98-month presumptive sentence violated *Blakely.* Rourke argues that because the determination that he was in a custody status when he committed the current offense increased his sentence (from a presumptive 86 months to a presumptive 98 months) was made by the court rather than by a jury and was not a finding as to a prior conviction, it violated his Sixth Amendment right to a jury trial.

This court has recently rejected the argument that *Blakely* applies to the determination of a custody-status point. *State v. Brooks,* 690 N.W.2d 160, 163 (Minn.App.2004), *pet. for review filed* (Minn. Jan. 26, 2005). That opinion concludes that the custody-status point need not be found by the jury. *Id.* (noting custody-status point is analogous to fact of prior conviction, which falls under *Blakely* exception, and is also established by court's own records). Under *Brooks,* Rourke can be assigned a custody-status point without a determination by a jury.

Because the upward durational departure violated appellant's right to a jury trial under *Blakely,* that departure must be reversed. The matter must be remanded to the district court for resentencing consistent with *Blakely.* But we reject appellant's argument that, if the appropriate remedy is imposition of the presumptive sentence, that presumptive sentence must be calculated without the use of the custody-status point.

***3 Reversed and remanded.**

All Citations

Not Reported in N.W.2d, 2005 WL 525522

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1989 WL 14919
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NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Steven John KONRARDY, Appellant.

No. CX-88-1867.

Feb. 28, 1989.

Appeal from District Court, Ramsey County; Hon. Joseph Salland, Judge.

Attorneys and Law Firms

Hubert H. Humphrey, III, Attorney General, Tom Foley, Ramsey County Attorney, Steven C. DeCoster, Asst. County Attorney, St. Paul, for respondent.

C. Paul Jones, Minnesota State Public Defender, Elizabeth B. Davies, Deputy State Public Defender, Minneapolis, for appellant.

Considered and decided by PARKER, P.J., and SCHUMACHER and SCHULTZ,* JJ., without oral argument.

UNPUBLISHED OPINION

SCHUMACHER, Judge.

FACTS

*1 Complainant in the present case, E.K., was employed by appellant as an elf in appellant's Santa Claus company. E.K.'s father worked for appellant and got E.K. the elf job.

The first incident of sexual contact between appellant, then age 30, and E.K. occurred in late December, 1984 at appellant's St. Paul apartment. During that night, appellant gave E.K., then 14, 3-4 beers and showed him an X-rated film. E.K. fell asleep and awakened when appellant began to touch E.K.'s genitals. Appellant also took nude, suggestive pictures of E.K.

E.K. stated that appellant made E.K. have relations with him about once a week throughout the summer of 1985. Beginning the summer of 1986, appellant allegedly attempted anal penetration whenever he was alone with E.K.

A second boy, P.K., was also employed by appellant as an elf. P.K., then age 13, had accompanied appellant and E.K. on a trip to appellant's cabin in October, 1987. P.K. stated that during one evening of the weekend, appellant had relations with both boys.

Appellant was subsequently charged by Ramsey County with violating section 609.344, subd. 1(b) of the Minnesota Statutes for having sexually penetrated E.K. Appellant was charged in Kanabec County, Minnesota under section 609.344, subd. 1(e) for sexual penetration with E.K. while he was at appellant's cabin during the period of October 15-18, 1987.

Appellant pleaded guilty to the Kanabec County charge on March 1, 1988. Appellant was sentenced to 36 months which was the presumptive sentence. Violation of this statute is a severity level V offense. Appellant had a criminal history score of one having been convicted in July, 1977 of criminal sexual conduct in the first degree.

Appellant pleaded guilty to the charge in Ramsey County on March 14, 1988 and was sentenced to 72 months to run consecutively to the Kanabec sentence. The Ramsey County trial court filed a departure report giving the following reasons for its upward departure:

1. appellant lacks remorse for his actions

2. appellant blamed E.K. for initiating the sexual relations

3. appellant repeatedly penetrated E.K. over a two year period

4. appellant engaged in group sex with E.K. and P.K.

5. appellant admitted to having sexual contact with 30 young boys within the previous 10 years

6. appellant participated in volunteer work to gain access to young children

7. treatment had no effect on appellant's behavior

Further, from the bench the court stated:

You are a menace to any boy that is walking the streets that is thirteen years old or younger, and basically I think you ought to be taken off the streets, and that is one of the reasons why I think this thirty-six month law was passed, and that is one reason why I am departing.

It is not for the confidential part of this, (PSI), it's for the factual. I think factually you earned the seventy-two months in jail and it will be consecutive to the thirty-six months you are doing now; it will not be concurrent.

DECISION

Appellant pleaded guilty in both counties to charges of criminal sexual conduct in the third degree which is defined as:

Subdivision 1. Crime defined. A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if any of the following circumstances exists:

***2** (b) the complainant is at least 13 but less than 16 years of age and the actor is more than 24 months older than the complainant.

(e) the complainant is at least 16 but less than 18 years of age and the actor is more than 48 months older than the complainant and in a position of authority over the complainant, and uses this authority to cause the complainant to submit.

Subdivision 2. Penalty. A person convicted under subdivision 1 may be sentenced to imprisonment for not more than ten years or to a payment of a fine of not more than $20,000 or both.

Minn.Stat. § 609.344, subd. 1(b), (e), subd. 2 (1986).

Subdivision 2 of § 609.344 notwithstanding, appellant's prior conviction for criminal sexual conduct requires that he be given a minimum 36-month sentence.

Subd. 2. Subsequent offense; penalty

If a person is convicted of a second or subsequent offense under sections 609.342 to 609.345 within 15 years of the prior conviction, the court shall commit the defendant to the commissioner of corrections for imprisonment for a term of not less than three years * * *.

Minn.Stat. § 609.346, subd. 2 (1986).

The decision whether to depart from the Guidelines is a discretionary one for the trial court and will not be reversed absent an abuse of that discretion. *State v. Garcia,* 302 N.W.2d 643, 647 (Minn.1981). Appellant has the burden of "establishing on appeal that the record does not support the trial court's decision to depart." *State v. Elkins,* 346 N.W.2d 116, 117 (Minn.1984).

Departure from the presumptive sentence is permitted only when the "individual case involves substantial and compelling circumstances." *Garcia,* 302 N.W.2d at 647 (quoting Part II-D of the Guidelines). Additionally, if an upward departure in a case is justified, generally "the upper limit will be double the presumptive sentence length." *State v. Evans,* 311 N.W.2d 481, 483 (Minn.1981).

In the present case, appellant's sentence for an ongoing offense against a single victim was effectively tripled. However, in *State v. Wellman,* 341 N.W.2d 561 (Minn.1983), the court did uphold a departure greater than double the presumptive sentence because severe aggravating circumstances were present. These circumstances included breaking a three-year-old child's nose, breaking the child's arm on another occasion and in a third incident, breaking the child's leg.

The court acknowledged the principle expressed in *Evans* limiting the departure to double the presumptive sentence length, but then held that "the presence of severe aggravating circumstances * * * justified the use of both a durational departure and a departure with respect to consecutive service * * *." *Wellman,* 341 N.W.2d at 566.

Severe aggravating circumstances exist in the present case. Appellant's course of conduct is particularly appalling.

[G]enerally it is proper for the sentencing court to consider the course of conduct underlying the charge for which the defendant is being sentenced.

***3** *State v. Back*, 341 N.W.2d 273, 276 (Minn.1983).

Appellant's PSI indicates that appellant admitted to having sexual contact with 30 young boys within the previous 10 years. There having been no trial, no transcript of testimony exists. This court must then rely on documents in the record including the PSI which has been expressly permitted as part of the record on appeal. *Elkins*, 346 N.W.2d at 117.

In his pro se brief, appellant now denies making the statement and labels it as false. Appellant had the opportunity to object to the PSI at the sentencing hearing and did not do so. He has waived objection to any disagreement over statements made in the PSI.

In the present case, appellant's statement that he has had relations with 30 other boys in ten years and activities with two boys in the present case supports an upward departure.

Appellant's multiple types of penetration of E.K., both oral and anal, supports the trial court's departure. Multiple types of penetration has been found, in combination with other factors, to support an upward departure. *See Ture v. State*, 353 N.W.2d 518, 523 (Minn.1984).

Finally, appellant used his position as employer to use E.K. for appellant's gratification. According to E.K.'s statement, when he tried to avoid going with appellant, his parents forced him to go, presumably for the income. The Minnesota Supreme Court has cited the offender's position of authority as a factor supporting an upward departure. *State v. Cermak*, 344 N.W.2d 833, 839 (Minn.1984).

We find sufficient aggravating circumstances to support the trial court's sentence.

Affirmed.

All Citations

Not Reported in N.W.2d, 1989 WL 14919

Footnotes

* Acting as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 2.

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1997 WL 526313
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NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

George Edward BENNETT, Appellant.

No. C9-96-2506.

Aug. 26, 1997.

Review Denied October 14, 1997.

Ramsey County District Court File No. K6-96-417

Attorneys and Law Firms

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John M. Stuart, Minnesota State Public Defender, Susan J. Andrews, Assistant State Public Defender, 2829 University Avenue, S.E., Suite 600, Minneapolis, MN 55414 (for Appellant)

Considered and decided by LANSING, Presiding Judge, RANDALL, Judge, and HARTEN, Judge.

UNPUBLISHED OPINION

LANSING, Judge.

***1** This appeal from conviction and sentence for intentional second degree murder challenges the district court's denial of a motion to suppress evidence obtained from DNA testing and the imposition of an upward sentencing departure. We conclude that the DNA evidence resulted from a lawful arrest and that the district court did not abuse its discretion by imposing the maximum statutory sentence.

FACTS

A jury convicted George Bennett of shooting cab driver James Wildenauer. Wildenauer died from two gunshots in the back of his head and was found a short time later in his burning cab. The fire apparently started when the cab skidded out of control and the cooling line ruptured.

An investigating St. Paul police officer, Catherine Janssen, obtained the address for Wildenauer's last dispatch and the destination given by the caller. At the address where the call originated, Janssen learned that it had been made by Bennett and Terrance Price between 1:30 and 2:00 a.m. that morning. The destination address was determined to be fictitious, but Janssen ascertained that Bennett lived in a house located approximately three blocks from where the burning cab had been found. Janssen, accompanied by Sergeants Tim McNeely and Keith Mortenson, went to that address to find Bennett. Bennett's mother told them that Bennett had come home at approximately 2:45 a.m., but left to return a red Grand Prix automobile to a friend named Jesse Jackson. Bennett's mother gave the officers a description of Bennett.

When the officers arrived at Jackson's apartment complex, they observed a red Grand Prix parked outside the complex. Mortenson saw the name "Jackson" on the mailbox. McNeely and Mortenson went to the back door of Jackson's apartment, while Janssen remained by the front door. McNeely and Mortenson knocked on Jackson's back door for approximately five minutes. Mortenson heard movement within the apartment and saw someone inside approach the door, but then turn back. Jackson ultimately opened the door and admitted the officers.

At about the same time, Janssen saw a man who matched Bennett's description walking down the front stairs carrying two full plastic grocery bags. Janssen asked the man his name, and the man replied, "George Bennett." Janssen told Bennett to drop the bags and to put his hands above his head. She then searched him and radioed for assistance from McNeely and Mortenson. McNeely and Mortenson returned to the front of the apartment, and the officers placed Bennett under arrest.

Janssen observed that the grocery bags contained wet clothes. She felt the bags for weapons or other hard objects, but found

nothing. The clothing was later sent to the Bureau of Criminal Apprehension (BCA) for testing. The testing showed that a blood specimen extracted from the clothing had a pattern consistent with the profile obtained from Wildenauer's blood, but inconsistent with Bennett's.

At trial, Jackson testified that Bennett arrived at his apartment after first calling and telling him that he had killed a cab driver. Jackson saw blood on Bennett's clothing and shoes. Bennett removed his clothing, washed it in Jackson's bathtub, and put it into the two grocery bags.

***2** The district court sentenced Bennett to the statutory maximum of forty years in prison, an upward durational departure of 134 months (more than eleven years) from the presumptive sentence of 346 months (more than twenty-eight years). The district court found that Bennett acted gratuitously and egregiously by shooting the victim twice in the back of the head. The court also found that Wildenauer was vulnerable because he was facing the opposite direction from Bennett when Bennett shot him and that Wildenauer was vulnerable because, as a cab driver, he was required to pick up Bennett. Bennett appeals (1) the denial of his motion to suppress the DNA evidence and (2) the upward sentencing departure.

DECISION

I

Bennett challenges the court's decision to allow the DNA testing into evidence. He maintains that the blood specimen was obtained as the result of an unlawful arrest made without probable cause. In determining whether probable cause exists, this court asks

> whether the officers in the particular circumstances, conditioned by their own observations and information and guided by the whole of their police experience, reasonably could have believed that a crime had been committed by the person to be arrested.

State v. Moorman, 505 N.W.2d 593, 598 (Minn.1993) (citation omitted). The reasonableness of the officer's actions at the time of arrest is an objective inquiry. *Id.* The existence of probable cause is dependent on the facts of each case. *State v. Cox,* 294 Minn. 252, 256, 200 N.W.2d 305, 308 (1972). Because the decision of whether the arresting officers had probable cause affects constitutional rights, this court makes an independent review of the facts to determine the reasonableness of the police officer's actions. *Moorman,* 505 N.W.2d at 599 (quoting *State v. Olson,* 436 N.W.2d 92, 96 (Minn.1989)).

The supreme court affirmed a probable cause finding based on comparable facts in *State v. Carlson,* 267 N.W.2d 170 (Minn.1978). In *Carlson,* a twelve-year-old girl who was murdered was last seen in the company of the defendant. When the police interviewed the defendant shortly after the crime was committed, the defendant gave evasive answers to questions about a dark-colored stain on his jacket. The answers aroused the suspicions of the interviewing officers. When the defendant refused to accompany the officers to the station voluntarily, the officers placed him under arrest. The supreme court, commenting that it was a close case, held that there was sufficient probable cause to arrest the defendant. *Id.* at 174.

The officers investigating Wildenauer's death knew that Bennett was the last fare that he had picked up; that the drop-off address was fictitious; that, despite the early morning hour, Bennett was not at home; that a man matching Bennett's description was exiting through the front door while officers were seeking him in the rear of the building; that the man was carrying two large plastic grocery bags; and that the man acknowledged that he was Bennett. Based on Janssen's police experience and training, it was not unreasonable for her to conclude that Bennett was involved in the murder of Wildenauer. Janssen had probable cause to arrest Bennett, and the blood sample extracted from the clothes in the grocery bag was not the product of an unlawful arrest.

II

***3** Bennett argues the district court erred in departing from the sentencing guidelines. The court imposed the forty-year maximum permitted for second degree murder.

A sentencing court may depart from the presumptive sentence under the guidelines only if the case involves substantial and compelling circumstances. Minn. Sent. Guidelines II.D. Substantial and compelling circumstances are those that make a defendant's conduct "more or less serious than that typically involved in the commission of the crime in question." *State v. Back,* 341 N.W.2d 273, 276 (Minn.1983). If substantial and compelling aggravating or mitigating factors are present, a sentencing court has broad discretion to depart from the sentencing guidelines. *State v. Best,* 449 N.W.2d 426, 427

(Minn.1989). Absent such circumstances, the sentencing court has no discretion to depart. *Id.* When substantial and compelling circumstances are present, the sentencing court's decision to depart will be reversed only if the sentencing court abused its discretion. *State v. Garcia,* 302 N.W.2d 643, 647 (Minn.1981), *overruled in part on other grounds by State v. Givens,* 544 N.W.2d 774, 777 (Minn.1996).

The district court found that an upward durational departure was justified given Wildenauer's vulnerability because of his occupation as a taxi cab driver and because he was shot in the back of the head. On appeal, the state argues that the court's upward departure is justified when Wildenauer was "vulnerable due to his occupation," he was treated with particular cruelty because he was shot twice in the back of the head, and his murder was a random act of violence. Bennett, on the other hand, argues that the crime was not committed in a manner more serious than the typical case of second degree intentional murder.

The sentencing guidelines recognize that vulnerability due to age, infirmity, or reduced mental or physical capacity is an aggravating factor sufficient to justify an upward departure. Minn. Sent. Guidelines II.D.2(b)(1). The list of aggravating factors set forth in the sentencing guidelines is not exclusive. *See State v. Givens,* 544 N.W.2d 774, 776 (Minn.1996) (noting that the sentencing guidelines provide "a nonexclusive list of appropriate aggravating and mitigating factors to assist a trial court considering departure.")

We agree with the district court's focus on the circumstances of Wildenauer's employment as a basis for the departure, but we would describe it more as a violation of a trust relationship than as a special vulnerability. Wildenauer's occupation and duties as a cab driver allowed Bennett to create and take advantage of a defined relationship with Wildenauer. By retaining Wildenauer to transport him, Bennett was in a position to dominate and control Wildenauer; Bennett and Wildenauer were in a confined area with Bennett directing the activity. Bennett determined where Wildenauer would go and had authority to tell Wildenauer, whose driving responsibilities required him to keep his back turned to Bennett, to stop the cab at any point. This position of control gives rise to a trust relationship. Bennett relied on this trust position to manipulate the circumstances and commit the crime. Because Bennett abused his position of trust and commercial authority over Wildenauer, it was not reversible error for the district court to impose an upward departure. *See State v. Lee,* 494 N.W.2d 475, 482 (Minn.1992) (holding that defendant's abuse of authority as victims' instructor and leader in the community to maneuver victims into positions where he could sexually assault them constituted aggravating factor sufficient to justify upward departure).

***4** The district court imposed a departure that is less than fifty percent of the original sentence and does not exceed the statutory maximum. Under these circumstances we conclude that the departure was not an abuse of discretion.

Affirmed.

RANDALL, Judge (dissenting).

***4** I respectfully dissent. The intentional second-degree murder at issue is composed of facts, simply put, that place this case squarely within the rebuttable presumption of a presumptive sentence under the guidelines, here 346 months. The presumptive sentence in Minnesota for intentional second-degree murder already results in the longest number of years in the United States of America before a defendant becomes eligible for release. *See* Minn. Sent. Guidelines IV (based on a criminal history score of 2, intentional second-degree murder carries a presumptive sentence guidelines range of 339-353 months). The mandatory behind bars portion of two-thirds of 346 months is 221 months, or 18-1/2 years. That is far and away as lengthy a mandatory sentence behind bars for second-degree murder as will be found anywhere.

The trial court's departure reasons are nothing more than a reiteration of the facts that surround every crime:

> This offense has had a dramatic impact on the victim's family as well as the community. This was a totally random act of violence. It was a-you acted gratuitously and egregiously. You shot the victim twice, even though the first shot had caused the victim's death. And you picked on somebody who was facing the opposite direction of you and shot him in the back.
>
> This man was vulnerable. He was a cab driver who put himself out on the line and was in a position of having to just pick up everybody. Yes, he was vulnerable and he was in a vulnerable position, and the court finds that to be an aggravating factor.

All homicides have dramatic impacts on the victim's family and on the community. If those were grounds for upward

departure, the presumptive guidelines would be abolished overnight and statutory maximums imposed as a matter of law. That would put Minnesota's already lengthy sentences in the unenviable position of being the longest and the most unjustified in the country and would hasten the bankruptcy of state government. Statutory maximums were set decades ago at a time when it was known and understood that only a fraction of the maximum would ever actually be served behind bars, with the remainder to be served on parole or probation.

The trial court states that the defendant "acted gratuitously and egregiously." The gratuitousness lends itself to the reason why the jury came back with second-degree intentional murder, which involves only an intentional act, not a premeditated act. Murder in the first degree, which is also intentional, is usually not classified as gratuitous because it involves planning and forethought, which we call premeditation.

It is true that appellant's crime was egregious. But, by definition, all homicides and other serious crimes are egregious. I have never seen a trial court or an appellate court review a nonegregious homicide, nor will I.

***5** It is true that there were two shots, but there is no "one shot" or "one stab wound" rule in Minnesota, nor, as far as I know, in any other state. I will take judicial notice from the hundreds of case histories through the past decades in Minnesota, both before and after the passage of the Minnesota sentencing guidelines in 1980, that with gunshot or stab wound homicides, multiples like two to five for instance, are *more typical than not* when a gun or a knife is used.

Upward departures are to be reserved only for cases involving substantial and compelling circumstances. Minn. Sent. Guidelines II.D.; *accord State v. Best,* 449 N.W.2d 426, 427 (Minn.1989).

Even when there are substantial and compelling circumstances present, *the presumptive sentence remains the presumptive sentence.* We are falling into an unwarranted mentality where virtually every single assault or homicide case is accompanied by automatic requests for upward departure.

The trial court and respondent partially rely on the fact that appellant shot the victim in the back of the head and that somehow that fact produced "vulnerability" and "gratuitous cruelty." I find there is no basis for either argument. Why would it change the crime if appellant had said to the victim, "Turn toward me" and then shot the victim? Most likely the state would have been in court arguing that because the victim now knew he was going to be shot, that was "an egregious act" and "particular cruelty."

Vulnerability and gratuitous cruelty are two of the most overworked and watered down reasons used to sustain upward departures. As the supreme court stated in *State v. Johnson,* 327 N.W.2d 580 (Minn.1982), "we are all equally vulnerable in the face of a deadly weapon." *Id.* at 584 (quoting *State v. Luna,* 320 N.W.2d 87, 89 (Minn.1982)).

The trial court and the majority focus on the victim's employment as a basis for a departure from an already lengthy presumptive sentence on up to the statutory maximum. They cite no law for this. People who drive taxicabs, people who are in any business of home delivery, such as pizza delivery, dry cleaning, flower delivery, etc., are all in a "position of trust" in the sense that part of the job is answering requests, often over the telephone, for the company's services, and, as part of that job, they respond without going into a computer search or other background check of the person requesting services. Every salesperson working at night in the thousands of gas stations/convenience stores dotting this country is in a "position of trust" in that when people walk in and ask for something, they are duty-bound to respond to that customer's request. At times the customer's request is a subterfuge to pull a gun on the service person and hold up the station.

The vast majority of holdups and stickups of taxicab drivers come exactly this way. Someone calls for a cab posing as a customer. Then en route the defendant pulls a gun on the cab driver and robs him, and at times the robbery, as it did here, turns into a homicide. Unfortunately, this is not an untypical crime of homicide committed against a taxicab driver. Rather, it fits the pattern for all such previous incidents, both in this state and across the country.

***6** The Minnesota Supreme Court in *State v. Holmes,* 437 N.W.2d 58, 59-60 (Minn.1989), held that defendant's conduct in stabbing his estranged wife three times with a large hunting knife after an argument was not significantly different from that typically involved in commission of second-degree intentional murder so as to justify imposition of double presumptive sentence. I find *Holmes* controlling. Its facts and its legal analysis are directly on point and compel the conclusion, to me, that the presumptive sentence is warranted

on these facts and that it was reversible error for the trial court to depart upward.

The court stated in *Holmes:*

> "The general issue that faces a trial court in deciding whether to depart durationally is whether the defendant's conduct was significantly more or less serious than that typically involved in the commission of the crime in question."

Id. at 59 (citation omitted).

The subjectivity of this decision is apparent. As the *Holmes* court stated:

> In the final analysis, our decision whether a particular durational departure by a trial judge was justified "must be based on our collective, collegial experience in reviewing a large number of criminal appeals from all the judicial districts."

* * * *

> Cruelty is a matter of degree and it is not always easy to say when departure is or is not justified. It is true that there was no excuse for what defendant did and that his conduct was reprehensible. But the same may be said in every case in which a defendant stands convicted of second-degree intentional murder. We have no choice but to conclude that the departure was unjustified because we believe that the conduct involved in this case of intentional murder was not significantly different from that typically involved in the commission of that crime.
>
> *Id.* at 59-60 (citation omitted).

The majority points out that the departure "is less than 50% of the original sentence." That is a nonissue. The trial court could not have gone any higher, as it went all the way up to the statutory maximum. It is wrong to "assume" there is a rule of thumb in Minnesota whereby any upward departure up to but not exceeding double somehow gets less scrutiny and can be sustained with weak or minimal facts.

> We have in a series of cases established that upward departures greater than double the presumptive sentence require facts "so unusually compelling" that such a departure is justified.

State v. Givens, 332 N.W.2d 187, 190 (Minn.1983) (citations omitted).

With Minnesota's already lengthy sentences, many defendants, like appellant here, *cannot have their sentence doubled* as the law is clear that no one can be sentenced past the statutory maximum set by the legislature. Thus, when an already lengthy sentence is increased by, for instance, 20%, 30%, or 50% up to the statutory maximum, common sense and clear legal thinking tell us that it has to be scrutinized as strictly as any double or triple upward departure from a shorter sentence. Not to do so would create an unconscionable "window" wherein every defendant whose presumptive sentence exceeded half the statutory maximum could now be subject to an upward departure to the statutory maximum without meaningful appellate review on the theory that, well, after all, it is less than a double departure.

***7** This unfortunate homicide involving a taxicab driver and a customer is no less serious, but is also just as typical as the multiple-stab-wound homicide in *Holmes.*

I dissent and would have reversed the trial court and remanded with instructions to impose the presumptive sentence of 346 months (28 years, 10 months) for this crime.

All Citations

Not Reported in N.W.2d, 1997 WL 526313

End of Document

2017 WL 3864007
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Bryan BLOCKER, Appellant.

A17–0847

Filed September 5, 2017

Review Denied November 28, 2017

Dakota County District Court, File No. 19HA–CR–14–827

Attorneys and Law Firms

Lori Swanson, Attorney General, St. Paul, Minnesota; and James C. Backstrom, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

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

Considered and decided by Kirk, Presiding Judge; Rodenberg, Judge; and Florey, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

***1** Appellant challenges his sentence for kidnapping, arguing that the district court erred by using an incorrect criminal-history score and abused its discretion by imposing a statutory-maximum 480–month sentence that was not supported by severe aggravating factors. We affirm.

FACTS

Appellant Bryan Blocker was convicted of first–, second–, and third-degree assault, kidnapping, and domestic assault by strangulation involving the victim H.B. He was also convicted of second-degree assault of M.G., who intervened to help H.B. The facts of this brutal assault and kidnapping are set forth in this court's earlier opinion, *State v. Blocker*, No. A15–1607, 2016 WL 7188122 (Minn. App. Dec. 12, 2016), *review denied* (Minn. Feb. 22, 2107).

Because the state sought an upward durational departure from the presumptive sentence, a separate sentencing proceeding was held following the jury's guilty verdicts. The jury considered nine questions, answering eight of the questions affirmatively. Appellant had a criminal-history score of two from prior felony convictions.

The district court concluded that the second– and third-degree assault convictions involving H.B. were lesser-included charges and did not enter judgment of convictions on those charges. The district court sentenced appellant in the following order: (1) the first-degree assault against H.B.; (2) second-degree assault against M.G.; (3) kidnapping of H.B.; and (4) domestic assault by strangulation of H.B. The court added two criminal-history points for the first-degree assault and one for the second-degree assault, resulting in five criminal-history points for the kidnapping sentence. Relying on the sentencing jury's findings, the court concluded that the facts of the case constituted "particular cruelty and they are severe and extreme and beyond what the court has ever seen in a domestic assault. They're well beyond what is typical for this type of offense." Based on this, the district court imposed a 480–month sentence, the statutory maximum, for the kidnapping conviction. Using a five-point criminal-history score, appellant's presumptive sentence was 146 months.

In his direct appeal, appellant challenged the sufficiency of the evidence supporting the kidnapping conviction, as well as the sufficiency of the evidence supporting the eight aggravating sentencing facts, the calculation of his criminal-history score, and the imposition of the statutory maximum for the kidnapping conviction. *Blocker*, 2016 WL 7188122, at *1. Appellant argued that there was insufficient evidence to show that H.B. suffered great bodily harm during the kidnapping, because the great bodily harm had occurred before he kidnapped her.[1] *Id.* at *3. This court concluded that

a jury could reasonably have found that appellant's restraint of H.B. while he assaulted her outside the truck constituted kidnapping. *Id.* at *3–4. Appellant also asserted that the evidence did not demonstrate that great bodily harm occurred while he held H.B. captive in the truck, but this court also concluded that a jury could reasonably find that great bodily harm occurred during the kidnapping in the truck. *Id.* at *4.

***2** This court also ruled that the district court had improperly calculated appellant's criminal-history score for purposes of the kidnapping sentence because the Minnesota Sentencing Guidelines do not permit an increase in a criminal-history score when multiple convictions arise from a single course of conduct and one of the convictions is for kidnapping. *Id.* at *7. This court remanded to the district court to reduce appellant's criminal-history score from five to three for the kidnapping sentence. *Id.*

Finally, appellant challenged the district court's imposition of the statutory-maximum sentence of 480 months. This court acknowledged that an upward durational departure of greater than double the presumptive sentence must be based on "severe aggravating factors." *Id.* This court noted that the departure had been 2.74 times the presumptive sentence with the improper criminal-history score, and it would be 3.28 times the presumptive sentence with the proper criminal-history score. *Id.* Without holding that the imposed sentence was improper, this court ordered the district court "[i]n light of our remand for a redetermination of [appellant's] criminal-history score ... to reconsider [appellant's] sentence for his kidnapping conviction." *Id.* at *8.

On remand, the district court vacated the prior sentence, applied the correct criminal-history score of three, and reviewed the jury-found aggravating factors. Stating that the situation "was far beyond anything the court had seen in the past," the district court determined that "[t]he jury's findings on the aggravating facts clearly support a finding of severe aggravating circumstances and severe aggravating facts to justify greater ... than a double upward departure." The district court resentenced appellant to 480 months' imprisonment. In addition to challenging the sentence in this appeal, appellant alleges that his criminal-history score for purposes of the kidnapping conviction should be two.

DECISION

I.

Appellant argues that the district court abused its discretion in calculating his criminal-history score, which he asserts should be two, not three. The state has the burden of establishing a defendant's criminal-history score. *See State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006) (discussing the state's burden of proof to justify consideration of a defendant's out-of-state conviction). "[M]ultiple offenses are sentenced in the order in which they occurred." *State v. Williams*, 771 N.W.2d 514, 522 (Minn. 2009) (quotation omitted); Minn. Sent. Guidelines 2.B.1(e) (Supp. 2013). If a sentencing dispute involves interpretation of a statute and the sentencing guidelines, it raises a question of law subject to de novo review. *Williams*, 771 N.W.2d at 520. Here, the issue is a factual matter: the district court had to determine which offense occurred first in time. "[I]t is the [district] court's role to resolve any factual dispute bearing on the defendant's criminal history score." *State v. Campa*, 390 N.W.2d 333, 336 (Minn. App. 1986) (quotation omitted), *review denied* (Minn. Aug. 27, 1986); *see also State v. Critt*, 554 N.W.2d 93, 95 (Minn. App. 1996) (stating that judicial findings of fact are subject to review for clear error), *review denied* (Minn. Nov. 20, 1996).

The district court sentenced appellant in the following order: (1) first-degree assault against H.B.; (2), second-degree assault against M.G.; and (3) kidnapping of H.B. On resentencing after remand, the district court sentenced in the same order. According to a description of the incident, appellant arrived at the location where H.B. was and hugged H.B., who rebuffed him. *Blocker*, 2016 W.L. 7188122, at *1. M.G. attempted to intervene, but appellant struck H.B. on the head with a baton, leaving her with a ringing in her ears, a warm liquid running down her face, and temporary loss of vision. *Id.* Appellant struck H.B. repeatedly while she was on the ground, and then struck M.G. with the baton. *Id.* After this, appellant dragged H.B. by her hair to his truck and imprisoned her in the truck for the next six hours, beating her, strangling her, and stepping on her neck. *Id.* at *1–5. The district court's determination of the order in which the offenses occurred is supported by clear and convincing evidence.

***3** Appellant argues that this court's earlier opinion established that appellant kidnapped H.B. when he initially arrived on the scene and restrained her and, therefore, the kidnapping occurred before the assault. Appellant challenged his conviction by alleging that great bodily harm occurred

before he kidnapped H.B. so he could not be given an enhanced penalty because the harm did not occur during the kidnapping; he argued in the alternative that no great bodily harm occurred after he restrained H.B. in the truck, and he could not be given an enhanced sentence for that reason. This court rejected both contentions, concluding that a jury "could reasonably find beyond a reasonable doubt that his kidnapping of H.B. occurred when he restrained her against her will before she entered the truck" and that a jury could "reasonably conclude that H.B. suffered great bodily harm during the kidnapping in the truck." *Id.* at *3–4. This court did not conclusively determine that the kidnapping with great bodily harm occurred in just one location. Moreover, the offense of kidnapping continued until H.B. was released. Kidnapping is defined as the confinement or removal of a person from one place to another without consent. Minn. Stat. § 609.25, Subd. 1 (2012). Appellant removed H.B. and confined her until he left her at the hospital, and acts of great bodily harm occurred during this period of time.

The district court, which heard the evidence and observed the witnesses, found that the offenses occurred in the order in which it sentenced the appellant. "Findings of fact are clearly erroneous if, on the entire evidence, [an appellate court is] left with the definite and firm conviction that a mistake occurred." *State v. Diede*, 795 N.W.2d 836, 846–47 (Minn. 2011). The district court's findings are not clearly erroneous and, therefore, its determination of appellant's criminal-history score was not an abuse of discretion. We therefore affirm the district court's calculation of appellant's criminal-history score.

II.

Appellant argues that the district court abused its discretion by imposing the statutory maximum sentence, which represented more than a double-durational departure from the presumptive sentence, arguing that (1) the district court relied on facts not found by the jury; (2) the aggravating circumstances were not severe; and (3) the sentence was disproportionate when compared to similar offenses.

Guidelines sentences are presumed to be appropriate, and departures should be made "only when substantial and compelling circumstances can be identified and articulated." Minn. Sent. Guidelines 1.A. (2014). "[T]he question of whether the district court's reason for the departure is 'proper' is treated as a legal issue." *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

> This court reviews a district court's decision to depart from the presumptive guidelines sentence for an abuse of discretion. If the reasons given for an upward departure are legally permissible and factually supported in the record, the departure will be affirmed. But if the district court's reasons for departure are improper or inadequate, the departure will be reversed.

State v. Edwards, 774 N.W.2d 596, 601 (Minn. 2009) (quotation and citations omitted).

The upper limit for a sentencing departure is the statutory-maximum sentence. *Dillon*, 781 N.W.2d at 596. This court has "generally deferred entirely to the district court's judgment on the proper length of departures that result in sentences of up to double the presumptive term." *Id.* But a sentence of greater than double the presumptive sentence must be supported by severe aggravating circumstances. *Id.*

In his first appeal, appellant challenged the sentencing jury's factfinding, arguing that the evidence was either insufficient, overlapped with elements of the charged offenses, or did not provide a basis for aggravating his sentence. *Blocker*, 2016 WL 7188122, at *5–6. This court rejected appellant's arguments, concluding that the evidence to support the aggravating facts was sufficient and any aggravating factor that makes the offense significantly more serious than the typical offense can be used, even if it relates to another offense committed in the same course of conduct. *Id.* This court remanded to the district court to apply the proper criminal-history score, and to reconsider appellant's aggravated sentence for kidnapping. *Id.* at *8. But this court did not rule that imposition of the statutory maximum was improper.

*4 Appellant argues that the district court relied on facts not admitted by the appellant or found by the sentencing jury. The district court addressed all eight aggravating facts found by the jury. The district court stated that "the horrific nature of this assault was shocking and shocking to the court who has seen domestic assaults on a regular basis in my practice of law and being a judge. This was far beyond anything the court had seen in the past." The court also noted that H.B. testified that she had been assaulted for years and suffered multiple broken bones, strangulations, and "constant intimidation and degradation." These are not facts found by the sentencing jury or admitted to by appellant. But in sentencing appellant, the district court stated that "[t]he jury's

findings on the aggravating facts clearly support a finding of severe aggravating circumstances and severe aggravating facts to justify greater than ... double upward departure." The district court also adopted all the statements the court made at the original sentencing. At the original sentencing hearing, the court said, "There are severe, substantial and compelling aggravating factors in this case, and the court finds that in particular with the kidnapping, that the factors found by the jury ... constitute particular cruelty. And those factors are severe. They are beyond anything this court has ever seen in a domestic assault."

A sentencing jury must find facts beyond a reasonable doubt that provide substantial and compelling reasons for a court to impose an aggravated sentence. *State v. Rourke*, 773 N.W.2d 913, 919 (Minn. 2009). But "the district court must explain why the circumstances or additional facts found by the jurors in a *Blakely* trial provide the district court a substantial and compelling reason to impose a sentence outside the range on the grid." *Id.* at 920. The district court explained that the additional facts found by the sentencing jury showed that appellant acted with particular cruelty toward H.B. The supreme court concluded in *Rourke* "that the particular cruelty aggravating factor is a reason that explains why the additional facts found by the jury provide the district court a substantial and compelling basis for imposition of a sentence outside the range on the grid." *Id.*

The district court acknowledged other evidence presented at trial that it found differentiated this case from similar assault offenses. But at the sentencing hearing, the court cited the jury-found facts to support an upward departure. And, ultimately, an upward departure is permissible when the facts of a particular offense differ markedly from similar offenses. The district court's statements that this offense was "shocking" and "beyond anything the court had seen in the past" reflect this standard.

Appellant argues that the factors were not severe enough and not similar to those found in other cases that supported a greater than double departure. "A greater than double departure is warranted only in the rare case where severe aggravating circumstances exist." *State v. Ayala–Leyva*, 848 N.W.2d 546, 558 (Minn. App. 2014) (quotation omitted), *review denied* (Minn. Aug. 11, 2015). "Although the supreme court acknowledged early on ... that there is no clear line that marks the boundary between 'aggravating circumstances' justifying a double departure and 'severe aggravating circumstances' justifying a greater than double departure, the [appellate] court has not been greatly deferential to the district court's severity determinations." *Dillon*, 781 N.W.2d at 596 (quotation and citation omitted). An appellate court draws on its "broader, multijurisdictional perspective" to conduct a "less deferential" review of a district court's decision to impose a sentence representing more than a double upward departure. *Id.* at 598.

In *Dillon*, this court affirmed the imposition of the statutory maximum for a first-degree assault conviction, reciting the severe nature of the aggravating factors, including permanent injuries, and the prolonged nature of the assault of a vulnerable victim. *Id.* at 601–02. This matter shares some of the same features as *Dillon*: a prolonged assault over a period of hours, a victim vulnerable because of being held captive in appellant's van, differing types of assault, including beating and strangulation, and a certain degree of taunting: Dillon asked his victim "how does that feel?" in between each blow, and appellant made H.B. look for the baton he had beaten her with. *Id.* at 593. *Dillon* suggests that this court can exercise its discretion in its review of the severely aggravated sentence and can "find an abuse of discretion and reduce a sentence for uniformity's sake when the departure results in a term that is longer than sentences for similar or more serious crimes." *Id.* at 598.

***5** We see no abuse of discretion. The circumstances of this kidnapping were brutal and shocking far beyond those we have reviewed in other kidnapping matters. The district court properly relied on severe aggravating facts found by a sentencing jury and properly concluded that appellant acted with particular cruelty.

All Citations

Not Reported in N.W. Rptr., 2017 WL 3864007

Footnotes

1 If great bodily harm occurs during a kidnapping, the statutory maximum sentence is 40 years, rather than 20 years. Minn. Stat. § 609.25, subd. 2(2) (2012).

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1994 WL 233606
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

Enrique BRIVIESCA, petitioner, Appellant,

v.

STATE of Minnesota, Respondent.

No. C3-94-21.

|

May 31, 1994.

|

Review Denied July 8, 1994.

Appeal from District Court, Meeker County; John J. Weyrens, Judge.

Attorneys and Law Firms

John M. Stuart, State Public Defender, Susan K. Maki, Asst. State Public Defender, Minneapolis, for appellant.

Hubert H. Humphrey, III, Atty. Gen., Robert A. Stanich, Asst. Atty. Gen., St. Paul, Michael J. Thompson, Meeker County Atty. Gen., Litchfield, for respondent.

Considered and decided by LANSING, P.J., and FORSBERG and DAVIES, JJ.

UNPUBLISHED OPINION

DAVIES, Judge.

*1 Appellant challenges the denial of postconviction relief from his first degree criminal sexual conduct conviction. He alleges prosecutorial failure to make a necessary disclosure, error in jury instruction, and improper sentence. We affirm.

FACTS

Appellant Enrique Briviesca, Jr., who lived with his girlfriend and her young children from July to December 1991, was convicted of first degree criminal sexual conduct for sexually abusing the girlfriend's eight-year-old daughter. Appellant controlled the house while he lived there, required the victim to call him "dad," and attacked her on several occasions while her mother was away. On each occasion, appellant covered the victim's face with a blanket or towel and penetrated her vagina with his penis and his finger.

After appellant's arrest, a jailer asked him to speak with an investigator about the case, and appellant refused. Because there was no record of this conversation, the prosecutor did not disclose it to appellant's counsel, who did not learn of the conversation until trial.

Appellant was charged with four counts of first degree and three counts of second degree criminal sexual conduct. The court instructed the jury separately on each count, and submitted separate verdict forms for each count. The jury was not, however, given the final sentence of CRIMJIG 3.20, advising how uncertainty in multi-charge cases should be handled. The jury found appellant guilty on all counts.

For convenience in sentencing, the trial court vacated all convictions except for one count of first degree criminal sexual conduct. The sentencing court departed from the presumptive sentence of 86 months, and sentenced appellant to 116 months based on the multiple acts, and the victim's age and particular vulnerability. Appellant, who did not appeal his conviction, sought postconviction relief under Minn.Stat. § 590.01-.06 (1992), which relief was denied.

DECISION

I.

Appellant alleges that his conversation with the jailer was an "oral statement," and that the prosecutor's failure to disclose the conversation was prejudicial. Appellant relies on *State v. Kaiser*, 486 N.W.2d 384, 387 (Minn.1992), and contends that the postconviction court should have ordered a new trial as a sanction for the nondisclosure. We disagree.

A prosecutor must disclose "the substance of any oral statements which relate to the case." Minn.R.Crim.P. 9.01, subd. 1(2). In *Kaiser*, the prosecutor deliberately withheld information that should have been disclosed. *Kaiser*, 486 N.W.2d at 387. Here, however, the prosecutor did not disclose

the information based on a good-faith interpretation of rule 9.01.

Furthermore, the prosecution did not exploit the nondisclosure and made almost no use of the undisclosed conversation. After appellant presented evidence that no one had questioned him while in custody, the prosecutor asked appellant whether he remembered his conversation with the jailer. After appellant responded "No, I don't recall," the prosecutor did not cross-examine, call any witnesses, or offer other evidence to rebut appellant's testimony. Nor did the prosecutor refer to the issue in closing argument.

***2** Thus, appellant's conversation with the jailer was, at most, a marginal issue at trial. The postconviction court did not abuse its discretion by finding that there was not a reasonable probability that the outcome would have been different if the conversation had been disclosed.

II.

Appellant argues that the trial court erred by failing to instruct the jury under CRIMJIG 3.20, which states that if the jury finds the defendant committed a crime, but is unsure which crime, the jury should find the defendant guilty of only the lesser crime. 10 *Minnesota Practice,* CRIMJIG 3.20 (1990).

Here, however, appellant did not request any such instruction at trial and did not object to the lack of that instruction. Where a defendant fails to object at trial he cannot challenge the jury instructions on appeal. *State v. Dahlstrom,* 276 Minn. 301, 310-11, 150 N.W.2d 53, 60-61 (1967). Furthermore, the court instructed the jury separately on each count. Accordingly, we find no error.

III.

This court reviews a sentencing departure for abuse of discretion. *State v. Garcia,* 302 N.W.2d 643, 647 (Minn.1981). This court will affirm a departure if sufficient evidence to justify departure appears in the record, even if the stated reason is invalid. *Williams v. State,* 361 N.W.2d 840, 844 (Minn.1985).

But a court may not depart upward from the sentencing guidelines for conduct that is an element of the offense. *State v. Brusven,* 327 N.W.2d 591, 593 (Minn.1982). Here, the trial court sentenced appellant for a violation of Minn.Stat. § 609.342, subd. 1(h)(v) (1990). The elements of this crime are: (1) sexual penetration; (2) by a person with a significant relationship to the victim; (3) while the victim is under 16 years of age; and (4) the sexual abuse involves multiple acts committed over an extended period of time. Minn.Stat. § 609.342, subd. 1(h)(v) (1990). A significant relationship includes an adult who resides in the same house as the victim. Minn.Stat. § 609.341, subd. 15 (1990).

At sentencing, the trial court based its upward departure on, among other things, the victim's particular vulnerability. In affirming the trial court's sentence, the postconviction court found that the victim was particularly vulnerable based on: (1) her age, (2) because appellant covered her face with a blanket or towel during the offenses, and (3) because appellant had a significant relationship with her and lived in the same house.

We believe the postconviction court did not abuse its discretion because the record supports the finding that the victim was particularly vulnerable, and particular vulnerability is not an element of this offense. A victim can be particularly vulnerable because of age, even if age is an element of the offense. *State v. Partlow,* 321 N.W.2d 886, 887 n. 1 (Minn.1982) (victim two years old). Moreover, the record indicates that appellant physically restrained the victim during the assaults, and dominated both the victim and her household. Thus, a basis for the departure-the victim's particular vulnerability-appears in the record. *See State v. Kobow,* 466 N.W.2d 747, 753 (Minn.App.1991) (holding that victim's particular vulnerability, alone, is sufficient to support upward departure), *pet. for rev. denied* (Minn. Apr. 18, 1991).

***3** Nor do we believe that the extent of the departure is disproportionate. The court deviated upward by only 35 percent. The sentencing court did not abuse its discretion in sentencing appellant to 116 months in prison.

IV.

Appellant raises several issues in his supplemental pro se brief. Because appellant did not raise these issues in his petition for postconviction relief, they are not before this court at this time.

Affirmed.

All Citations

Not Reported in N.W.2d, 1994 WL 233606

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1989 WL 131588
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Aldridge TAYLOR, Jr., Appellant.

No. C1-89-164.
|
Nov. 7, 1989.
|
Review Denied Dec. 15, 1989.

Appeal from District Court, Hennepin County; Hon. Robert Lynn, Judge.

Attorneys and Law Firms

Hubert H. Humphrey, III, Attorney General, St. Paul, Thomas L. Johnson, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, for respondent.

C. Paul Jones, State Public Defender, Michael F. Cromett, Assistant State Public Defender, St. Paul, for appellant.

Considered and decided by WOZNIAK, C.J., and SCHUMACHER and GARDEBRING, JJ.

UNPUBLISHED OPINION

SCHUMACHER, Judge.

FACTS

***1** Appellant was convicted by jury of two counts of criminal sexual conduct in the first degree in violation of Minn.Stat. §§ 609.342 1(d)(e) (1988). The trial court sentenced appellant to the statutory maximum sentence of 240 months, two and one-half times the presumptive sentence.

DECISION

I.

Appellant contends there was insufficient evidence to convict him. In reviewing appellant's claim of insufficient evidence this court limits its inquiry to whether the fact finder could have reasonably found the appellant guilty on the evidence adduced at trial. *State v. Merrill,* 274 N.W.2d 99, 111 (Minn.1978). This court must review the evidence in the light most favorable to the state. *Id.* A review of the facts clearly indicate that there was sufficient evidence to convict defendant of both counts.

II.

Appellant contends that the facts do not justify the upper durational departure. Generally, when aggravating circumstances are present, the upper limit on a durational departure is double the Sentencing Guidelines maximum presumptive sentence. *State v. Glaraton,* 425 N.W.2d 831, 834 (Minn.1988); *State v. Evans,* 311 N.W.2d 481, 483 (Minn.1981). But when the aggravating circumstances are severe, the doubling limit does not apply. *State v. Glaraton,* 425 N.W.2d at 834; *State v. Stumm,* 312 N.W.2d 248, 249 (Minn.1981).

The trial court by written findings concluded that the victim was particularly vulnerable, that the crime was committed with particular cruelty, and that the conviction was for an offense where the victim was injured and concluded that these facts justified the upward departure. We agree.

The victim was 17 years of age at the time and living alone in an apartment with her 15-month-old son. The trial court found that her zone of privacy was invaded when she was handcuffed and raped at knife point in her apartment in the presence of her son. *See State v. Winchell,* 363 N.W.2d 747, 751 (Minn.1985). Appellant handcuffed the victim from behind to render her helpless. *See State v. Winchell,* 363 N.W.2d at 751 (binding victim may be considered in determining whether offense committed in particularly serious way). Appellant committed multiple acts of penetration on the victim both vaginally, and orally, ejaculating in the victim's mouth. *See State v. Glaraton,* 425 N.W.2d at 834 (multiple acts of penetration constitute

aggravating factor for more than double departure). Appellant committed the rape in the presence of the victim's 15-month-old son. *See State v. Gaines,* 408 N.W.2d 914, 918 (Minn.Ct.App.1987), *pet. for rev. denied* (Minn. Sept. 18, 1987) (commission of sexual assault in presence of child aggravating factor justified two and one-half times presumptive sentence. Furthermore, the victim suffered injury to her wrists from the handcuffs.

We conclude the trial court was justified in departing more than double the presumptive sentence.

Appellant further contends that the trial court's departure was in part a punitive measure for his electing to go to trial. We find no merit in this claim. *See State v. Mollberg,* 310 Minn. 376, 246 N.W.2d 463, 471 (1976). The trial court clearly and thoroughly stated on the record the evidence justifying an upward departure. Moreover, the court clearly considered the presentence investigation report and the prosecutor's request in determining whether to depart from the guidelines.

***2** Affirmed.

All Citations

Not Reported in N.W.2d, 1989 WL 131588

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2008 WL 5136978
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

Jude Wilson HALTER,
petitioner, Appellant,
v.
STATE of Minnesota, Respondent.

No. A08-0029.
|
Dec. 9, 2008.

West KeySummary

1 **Sentencing and Punishment** Scope, Seriousness, and Gravity of Offense

Sentencing and Punishment Use of Weapon or Destructive Device

Sentencing and Punishment Vulnerability of Victim

There existed several aggravating factors in the trial court's record to support an upward sentencing departure. The court listed several factors for the upward departure, including, the fact that the sexual assault was committed in the victim's bedroom, which was a zone of privacy, and the fact that the defendant threatened the victim with a gun and knife during the assault. Additional factors that existed in the record to support the upward departure included the fact that the defendant penetrated the victim multiple times, that the defendant committed the crime with particular cruelty, and that the assault was made upon a particularly vulnerable victim. 49 M.S.A., Rules Crim.Proc., Rule 27.03.

Winona County District Court, File No. 85-CV-07-2304.

Attorneys and Law Firms

Lawrence Hammerling, Chief Appellate Public Defender, Ngoc Nguyen, Assistant Public Defender, St. Paul, MN, for appellant.

Lori Swanson, Attorney General, St. Paul, MN, Charles MacLean, Winona County Attorney, Thomas E. Gort, Assistant County Attorney, Winona, MN, for respondent.

Considered and decided by ROSS, Presiding Judge; BJORKMAN, Judge; and HUSPENI, Judge.*

UNPUBLISHED OPINION

BJORKMAN, Judge.

*1 Appellant challenges the district court's denial of his petition for postconviction relief, arguing that the sentencing court failed to state on the record the factors supporting his upward sentencing departure. Because there is a sufficient basis in the record to support the departure, we affirm.

FACTS

In the early morning on July 4, 2000, appellant Jude Halter forcefully entered a private residence in Winona and sexually assaulted a female who was asleep in the home. Halter handcuffed the victim and threatened her with a gun during the assault. On July 24, Halter entered a different residence in Winona with the intent to sexually assault another sleeping female. As Halter approached the bed, the female awoke and yelled out. Halter fled from the residence.

Halter was subsequently apprehended and charged with multiple counts of burglary, first-degree criminal sexual conduct, kidnapping, and fourth-degree criminal sexual conduct related to the two incidents. Halter pleaded guilty to first-degree criminal sexual conduct and first-degree burglary for the July 4 incident and to first-degree burglary and first-degree attempted criminal sexual conduct for the July 24 incident. The state agreed to dismiss the remaining charges.

The plea agreement also contained a joint sentencing recommendation, including a 129-month executed sentence for the first-degree criminal-sexual-conduct charge, which represented the presumptive sentence of 86 months plus a

50% aggravated durational departure. Halter acknowledged at the plea hearing that he understood the joint recommendation and that it was what he expected to happen at sentencing.

At the sentencing hearing on April 1, 2003, the state outlined the bases for the agreed-to upward departure, explaining that the joint sentencing proposal

> presupposes a 50 percent aggravated durational departure for the completed offense on July 4th, 2000, and that upward durational departure is supported by the following aggravated factors:
>
> First, the defendant committed the crime within the victim's zone of privacy; right in the victim's bedroom; in the middle of the night; it was a violation of a place where she had every right to feel protected and safe;
>
> Second, the defendant committed this crime while threatening the use of both a semiautomatic handgun and a knife;
>
> Third, the defendant committed this crime with multiple penetrations; he twice entered her and twice ejaculated;
>
> Fourth, the defendant committed this crime with particular cruelty; you've heard the words: "Have a nice 4th of July." "You've made Winona proud tonight." "Thanks for leaving the window open for me." "I'll kill you if you report this to the police."
>
> And finally ... this defendant committed this crime against a particularly vulnerable victim. As I said, he entered the [ ] victim's bedroom as she slept; he threatened her with a knife and a gun; he racked [a round] into the chamber of his semiautomatic handgun that he then pressed against her temple; and the defendant put handcuffs on the victim before the rape even began.

***2** Defense counsel stated he did not "disagree with any of the aggravating factors that [the state] cited." The sentencing court did not restate the departure grounds on the record but stated it would do so in its written departure report and that the reasons "will essentially be for the same or similar reasons as have been expressed in the recommendations that I have heard here today."

On July 20, 2007, Halter filed his second petition for postconviction relief,[1] arguing that the sentencing court failed to state on the record findings of fact to support its upward departure and erred in imposing a ten-year conditional-release period. The postconviction court affirmed the upward departure but amended the conditional-release period to five years. This appeal follows.

DECISION

On appeal from a decision by a postconviction court to deny relief, we review whether the court's findings are supported by sufficient evidence in the record and will not disturb the court's decision unless it constitutes an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn.2001). But we review issues of law, including the interpretation of procedural rules, de novo. *Leake v. State*, 737 N.W.2d 531, 535 (Minn.2007).

Minn. R.Crim. P. 27.03, subd. 4(C), requires the district court to state, on the record, the factual basis for any sentence that departs from the sentencing guidelines applicable to the case. The rule is consistent with our supreme court's direction to comply with the sentencing guidelines: "If no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed." *Williams v. State*, 361 N.W.2d 840, 844 (Minn.1985). The requirement enables reviewing courts to meaningfully examine departures on appeal. *State v. Peterson*, 405 N.W.2d 545, 547 (Minn.App.1987).

Halter argues that the postconviction court erred in denying his postconviction challenge to the upward sentencing departure because the sentencing court failed to state on the record the factors supporting the departure. We disagree. This is not a case in which we are left to speculate as to the departure grounds. The sentencing court stated that it was "inclined to adopt the joint recommendation that has been made in substantially all of its respects," and that

> although I have not specified the grounds that I'm relying upon [ ] for the aggravated durational departure ..., I will do so in the departure reports to be filed with the Guidelines Commission, and they will essentially be for the same or similar reasons as have been expressed in the recommendations that I have heard here today.

The district court further stated, when confirming Halter's agreement to the recommended sentence:

> [G]iven everything that was presented in support of the [s]tate's position on sentencing here [and] given the number and nature of the identified aggravating circumstances that might be considered in determining the duration of your sentence for the most serious of these offenses here today, that there is a showing of grounds that would support

substantially longer than a[50%] durational aggravated departure from the sentencing guidelines.

***3** These statements identify the reasons for the departure with the requisite specificity to permit us to review them.

Moreover, the record evidence is sufficient to affirm the departure. *Williams,* 361 N.W.2d at 844; *see also State v. Martinson,* 671 N.W.2d 887, 894 (Minn.App.2003) ("Even if the [sentencing] court's express findings were not explained with particularity, this court must affirm the departure if the record contains valid and sufficient reasons to support the departure."), *review denied* (Minn. Jan. 20, 2004).[2] Halter does not address this aspect of the analysis-that an aggravated sentencing departure may be affirmed even when the departure grounds are not expressed with particularity so long as there is sufficient evidence in the record to justify the departure. Instead, Halter cites *State v. Geller,* 665 N.W.2d 514, 517 (Minn.2003), in which the supreme court reversed this court's decision to remand and allow the sentencing court to place its departure grounds on the record after the fact. But Halter's reliance on *Geller* is misplaced; there is no indication that the record in *Geller* contains any expression of the reasons justifying the sentencing departure.

By contrast, here, the state explicitly outlined numerous factors justifying the upward departure at the sentencing hearing, including: (1) the assault was committed within the victim's zone of privacy; (2) the defendant threatened the victim with a gun and knife during the assault; (3) there were multiple penetrations; (4) the defendant committed the crime with particular cruelty; and (5) the assault was made upon a particularly vulnerable victim. These factors are sufficient to support departure. *See State v. Van Gorden,* 326 N.W.2d 633, 635 (Minn.1982) (upward departure justified because rape occurred within victim's zone of privacy); *State v. Herberg,* 324 N.W.2d 346, 350 (Minn.1982) (upward departure justified where rapist forced victim to submit to multiple penetrations); Minn. Sent. Guidelines II.D.2.b.(1)-(2) (fact that victim was particularly vulnerable and treated with particular cruelty included among nonexclusive list of aggravating factors that justify departure).

Additionally, defense counsel stated on the record at the sentencing hearing: "I don't disagree with any of the aggravating factors that [the state] cited to the Court. There's no way to minimize what happened, no way to minimize what he did." And Halter responded "yes" when asked by the sentencing court: "Today do you wish this Court to confirm your convictions and go forward for sentencing now as scheduled with the expectation that the sentencing will be substantially as recommended?" Based on this record, there is no doubt that the district court, prosecutor, defense attorney, and Halter himself were aware of the aggravating factors that justified the durational departure. Because Halter was able to evaluate his case and prepare his appeal, and we are likewise able to meaningfully review the departure, we conclude that the *Williams* requirements are met. *See Peterson,* 405 N.W.2d at 547.

***4** Because the record plainly establishes the existence of aggravating factors to support the upward sentencing departure, the postconviction court did not err in denying Halter's petition.

Affirmed.

All Citations

Not Reported in N.W.2d, 2008 WL 5136978

Footnotes

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

1 Halter filed his first postconviction petition in December 2004, seeking a reduction of his sentence to the presumptive guidelines sentence pursuant to *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The postconviction court postponed its consideration of Halter's petition pending the supreme court's decision in *State v. Houston,* 702 N.W.2d 268, 273-74 (Minn.2005) (holding that *Blakely* is not a "watershed" rule requiring retroactivity). Following *Houston,* Halter agreed that he was not entitled to postconviction relief pursuant to *Blakely* and dismissed his petition.

2 We note that if *Blakely* applied here, this court could not review the sufficiency of the evidence to justify the departure. *See State v. Jones,* 745 N.W.2d 845, 851 (Minn.2008) (holding that pursuant to *Blakely,* when the district court states inadequate or improper reasons for a departure on the record, appellate courts no longer follow the past practice of independently reviewing the record for sufficient evidence to justify the departure because that is now a function for the jury, unless waived by the defendant).

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