2012 WL 3263760
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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Irvin Scott COOK, Appellant.

No. A11–1332.
|
Aug. 13, 2012.
|
Rewiew Denied Oct. 24, 2012.

Dakota County District Court, File No. 19HA–CR–08–3358.

Attorneys and Law Firms

Lori Swanson, Attorney General, St. Paul, MN; and James C. Backstrom, Dakota County Attorney, Scott A. Hersey, Assistant County Attorney, Hastings, MN, for respondent.

David W. Merchant, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, MN, for appellant.

Considered and decided by SCHELLHAS, Presiding Judge; KALITOWSKI, Judge; and CHUTICH, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge.

***1** Appellant challenges his convictions of first-degree attempted murder, second-degree attempted murder, first-degree burglary, first-degree arson, and motor-vehicle theft, arguing that the district court (1) abused its discretion by allowing the victim's in-court identification of him; (2) abused its discretion by admitting *Spreigl* evidence of his 2005 second-degree-assault conviction; (3) abused its discretion by conducting part of the trial in his absence; (4) violated his Sixth Amendment right to a public trial by locking the courtroom during final jury instructions; and (5) abused its discretion by imposing a double-upward-durational-departure sentence for his conviction of first-degree arson, consecutive sentences for his convictions of first-degree arson and first-degree attempted murder, and a separate sentence for his conviction of motor-vehicle theft. Appellant also argues that he received ineffective assistance of trial counsel.

We vacate appellant's sentence for his conviction of motor-vehicle theft because the state did not satisfy its burden of proving that the offense did not arise from the same behavioral incident as his other offenses, but we otherwise affirm.

FACTS

In 2008, the victim in this case, P.T., lived in a Burnsville home that was part of a four-plex that shared common walls with three other homes. On the night of May 11, P.T. was asleep in bed and awoke to a banging sound. He observed a flashlight beam in his living room and investigated, finding a male intruder hiding in a bathroom. The intruder pretended to be looking for his mother and asked P.T. what he had done with his mother. P.T. retreated to his bedroom to call the police, where a second intruder struck him on the side of his head a couple of times, causing him to bleed "quite a lot," knocked him to the floor, and said, "You are going to die because I just stabbed you in the head." Noticing a plaque in a bedroom, the intruders asked P.T. if his son was home or coming home and threatened that they would kill his son too.

The intruders asked P.T. to identify his most expensive possession in his home, and P.T. identified his television. The second intruder then told P.T. "that this was going to be like *Saw,* the movie." He told P.T. that he would have to answer either A or B and, if he answered correctly, he would live, and if he answered incorrectly, he would die. When P.T. answered, "A," the second intruder said, "Well, that's a good letter but it's not the right letter. So will you be able to live or do I kill you?" He then asked P.T., "Well, do you think if you die, do you think you are going to go to Heaven?" P.T. answered yes, because Jesus loved him, and the second intruder said that "he was Jesus and he didn't die for any white people, he only died for black people."

Next, the second intruder told the first intruder, "I did what I had to do like a man, you got to finish it, you got to kill him." When the first intruder did nothing, the second intruder jumped on P.T.'s back and stabbed him 17 times in the back, twice in the head, and once in the cheek, soaking

P.T.'s shirt in blood. The intruders then threw mouthwash and sprayed something that sounded like aerosol on P.T.'s face and lit P.T.'s bed on fire. P.T. stood up next to his bed and, by the illumination of the flames, observed the second intruder standing in the doorway, where he said, "[Y]ou are not going anywhere, you have to get back down on the floor." P.T. obeyed. Before the intruders left, they lit seven additional fires throughout the home and turned on the gas stove. A responding firefighter found the home filled with thick smoke and substantially damaged by the fire. The intruders had set eight fires in five different rooms and turned on all four burners on the gas stove.

***2** After the intruders left the home in P.T.'s car, P.T. fled through the flames to a neighbor's home. He received medical care consisting of stitches in his cheek and ear and staples in his head. Doctors discovered that the tip of a knife blade had broken off in P.T.'s head but declined to remove it surgically because removing it would "probably cause more harm than good." Police recovered from P.T.'s bedroom a broken knife blade and a broken knife handle and missing tip with a piece of a shirt similar in color to P.T.'s shirt on the broken knife.

P.T. later discovered that bottles of Michael Jordan and Adidas cologne that belonged to his sons and some old coins were missing from his home. The police investigation led to Shaquen Whitfield, whose blood was on a doorknob from P.T.'s home. When police first spoke with Whitfield, he was incarcerated and denied involvement in the crime, but eventually he implicated himself and appellant Irvin Cook.

Respondent State of Minnesota charged Cook with aiding and abetting first-degree attempted murder under Minn.Stat. §§ 609.185(a)(1), 609.17, subds. 1, 4(1), and 609.05, subd. 1 (2006); aiding and abetting second-degree attempted murder under Minn.Stat. §§ 609.19, subd. 1, 609.17, subds. 1, 4(2), and 609.05, subd. 1 (2006); aiding and abetting first-degree arson under Minn.Stat. §§ 609.561, subd. 1, 609.05, subd. 1, and 609.101 (2006); aiding and abetting first-degree burglary under Minn.Stat. §§ 609.582, subd. 1(a), and 609.101 (2006); and aiding and abetting felony theft of a motor vehicle under Minn.Stat. §§ 609.52, subds. 2(17), 3(2), and 609.101 (2006).

The jury convicted Cook of all counts. Cook moved for judgment of acquittal or a new trial, based in part on the district court proceeding with trial during Cook's absence. The court conducted an evidentiary hearing, allowing both parties to call witnesses to testify. On April 20, 2011, the court denied Cook's motions in a written order and memorandum followed by written findings of fact on May 2. Cook waived his right to have a jury determine whether aggravating factors existed for purposes of sentencing. When the court sentenced Cook, it stated, among other things, "based on the experience of this court over the last 44 years ... [Cook's] conduct is significantly more cruel than conduct typically associated with the offense of Attempted Murder in the First Degree or Burglary of an Occupied Dwelling, Burglary in the First Degree" and this case was "one of the most extreme and egregious attempted murder cases this Court has ever encountered."

On May 3, the district court sentenced Cook to imprisonment of 240 months for first-degree attempted murder, which constituted a 12–month upward-durational departure; 114 months for first-degree arson, which constituted a double-upward-durational departure, consecutive to Cook's sentence for first-degree attempted murder; 27 months stayed for first-degree burglary; and 13 months stayed for motor-vehicle theft.

***3** This appeal follows.

DECISION

I. In–Court Identification

Cook argues that the district court erred by denying his motion in limine to exclude P.T.'s in-court identification of him. Cook argues that the identification was "inherently unreliable and unduly prejudicial" under Minn. R. Evid. 403. He notes that P.T. initially told police that he never saw the assailant who stabbed him; in P.T.'s second statement to police, he said that Cook was black, even though Cook is an American Indian with light skin; and P .T. was not wearing his glasses during the attack and told police and the court that his vision is poor without his glasses.

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403. "Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion." *State v. Carridine*, 812 N.W.2d 130, 141 (Minn.2012).

The United States Supreme Court recently reaffirmed in *Perry* that pretrial screenings of witness identifications are unwarranted unless "suggestive circumstances were ... arranged by law enforcement officers," and absent such circumstances,

> it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

Perry v. New Hampshire, — U.S. —, —– – ——, 132 S.Ct. 716, 720–21, 181 L.Ed.2d 694 (2012).

Here, Cook concedes that there was no "police conduct" involved in P.T.'s identification of him but argues that Minn. R. Evid. 403 may "filter" it because it is prejudicial and risks misleading the jury. Cook cites no Minnesota case in which an appellate court has ruled that a district court abused its discretion by allowing an in-court identification of a defendant.

We conclude that the district court did not abuse its discretion by allowing P.T.'s in-court identification of Cook.

II. *Spreigl* Evidence of Cook's Second–Degree–Assault Conviction

After conducting a careful five-step *Spreigl* analysis, the district court allowed the state to offer evidence about Cook's 2005 second-degree-assault conviction to show identity; modus operandi, i .e., common scheme or plan; and opportunity. The state offered the evidence through four witnesses. C.B. and D.H. testified that when they were both 15 years old, Cook and Whitfield approached them and several friends in a mall parking lot and asked them for one dollar. When they did not give Cook and Whitfield a dollar, one of them struck C.B. in the eye with a gun and one of them struck D.H. between the eyes. C.B.'s injuries required "staples in the back of [his] head, [his] chin, and [his] lip." A police officer testified to corroborate C.B.'s testimony about his injuries, describing them as "facial injuries, a split lip, swollen lip," and a three-inch gash on the back of C.B.'s head. The police officer testified that there was "a considerable amount of blood on [C.B.'s] shirt, which [the officer] considered to be soaked with blood." A police sergeant testified that, during the course of her investigation, Cook "admitted to his involvement with the robbery and also with hitting one of the victims over the head with the gun." The police sergeant also testified that several of the witnesses identified Whitfield and Cook as the attackers.

***4** Cook argues that the district court abused its discretion by admitting the *Spreigl* evidence to prove Cook's identity, common scheme or plan, and opportunity. "[E]vidence of other crimes, wrongs, or bad acts, also called *Spreigl* evidence, may be admitted for limited, specific purposes." *State v. Fardan*, 773 N.W.2d 303, 315 (Minn.2009). "Minn. R. Evid. 404(b) allows evidence that is used as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* at 316 (quotation omitted). "The overarching concern behind excluding such evidence is that it might be used for an improper purpose, such as suggesting that the defendant has a propensity to commit the crime or that the defendant is a proper candidate for punishment for his or her past acts." *Id.* at 315. The admissibility of rule 404(b) evidence is dependent on satisfaction of a five-step process. *State v. Ness*, 707 N.W.2d 676, 68586 (Minn.2006). The *Ness* court described the five-step process as follows:

> (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.

Id. at 686.

Cook challenges only the satisfaction of steps four and five, arguing that the evidence was not relevant to or sufficiently probative of identity, common scheme or plan, or opportunity. "A defendant who claims the trial court erred in admitting evidence bears the burden of showing the error and any resulting prejudice." *Id.* at 685 (quotation omitted). "If the admission of [*Spreigl*] evidence is a close call, it should

be excluded." *Fardan*, 773 N.W.2d at 316. Appellate courts review "the district court's decision to admit *Spreigl* evidence for an abuse of discretion." *Ness*, 707 N.W.2d at 685.

A. Identity

Spreigl evidence may be relevant and material to show identity of the perpetrator if "identity is at issue" and "there is a sufficient time, place, or modus operandi nexus between the charged offense and the *Spreigl* offense," even if the past crime is not a "signature crime," as long as the past crime is "sufficiently similar to the incident at issue" and not merely of the charged offense's "same generic type." *State v. Wright*, 719 N.W.2d 910, 917–18 (Minn.2006) (quotations omitted).

Here, as to the time nexus, approximately three years transpired between the 2005 *Spreigl* assault and the attack on P.T, but, according to Cook's presentence investigation report, Cook spent one of those years in a juvenile-detention facility, beginning in February 2006. When discharged from the facility, Cook was placed on "supervised release" until April 14, 2008, less than one month before the attack on P.T. *See id.* at 918 ("Temporally remote *Spreigl* incidents may be less objectionable if: ... the defendant spent a significant part of that time incarcerated and was thus incapacitated from committing crimes....").

***5** As to the place nexus, Cook committed the 2005 *Spreigl* assault in Savage and the crimes against P.T. occurred in neighboring Burnsville.

As to the modus operandi nexus, Cook committed the 2005 *Spreigl* assault in concert with Whitfield, who admitted that he participated in the attack on P.T., claiming also that Cook committed the offense with him. *See State v. Lynch*, 590 N.W.2d 75, 81 (Minn.1999) (supporting admission of *Spreigl* evidence to prove identity where the defendant worked with same accomplice in the *Spreigl* crime and crime at issue); *State v. Kennedy*, 363 N.W.2d 863, 866 (Minn.App.1985) (same), *review denied* (Minn. May 20, 1985). And, significantly, both the 2005 *Spreigl* assault and the attack on P.T. were committed with spontaneous, gratuitous, unprovoked violence with a weapon against unknown victims and with the motive of theft. *See State v. Lewis*, 547 N.W.2d 360, 363–64 (Minn.1996) (concluding that district court's admission of *Spreigl* evidence was not an abuse of discretion because the prior crimes and current crime, among other similarities, were "robberies or attempted robberies"; were "crimes in which a number of accomplices participated"; "involved randomly selected victims not known to the assailants"; and "involved gratuitous infliction or attempted infliction of injury not necessary within the context and logic of the commission of the crime of robbery"). In the 2005 *Spreigl* assault, Cook bludgeoned a 15–year–old boy with a gun, causing serious injuries and hospitalization, apparently to steal just one dollar. The attack against P.T. included at least 20 stabbings and an apparent attempt to incinerate P.T.'s body and home for the purpose of stealing personal property. The only items that P.T. discovered missing were several coins, two bottles of cologne, and his car, which the intruders abandoned the same night as the crime a mile from P.T.'s home.

We conclude that the district court did not abuse its discretion by determining that the 2005 *Spreigl* assault was relevant and material to show Cook's identity.

B. Common Scheme or Plan, i.e. Modus Operandi

Spreigl evidence may be relevant and material to show a common scheme or plan when it has a "*marked similarity* in modus operandi to the charged offense." *Ness*, 707 N.W.2d at 688 (quotation omitted). For the reasons we have already discussed regarding the nexus between the modus operandi of the 2005 *Spreigl* assault and the crime against P.T., we conclude that the district court did not abuse its discretion by determining that the 2005 *Spreigl* assault was markedly similar to the crime against P .T., and that the *Spreigl* evidence was relevant and material to show a common scheme or plan.

C. Opportunity

Spreigl evidence may be relevant and material to show opportunity to commit a charged offense when it is relevant and material to show how the defendant had the means to commit the charged offense. *See State v. Campbell*, 367 N.W.2d 454, 459–60 (Minn.1985) (concluding that *Spreigl* evidence demonstrated opportunity where it showed that defendant used mace to disable an individual five days before the murder at issue, where mace had been used in the commission of the murder). Our review of the record does not reveal how evidence of Cook's 2005 *Spreigl* assault was relevant and material to show that Cook had the opportunity to attack P.T. We conclude that the district court abused its discretion by relying on this ground as a ground for admitting the evidence of the 2005 *Spreigl* assault, but we further conclude that the error was harmless because the evidence was relevant and material to show Cook's identity and common scheme or plan.

D. Probative Value vs. Prejudice

*6 Cook argues that even if the *Spreigl* evidence of Cook's 2005 assault was relevant and material, its probative value was outweighed by its potential prejudice to him. We disagree. "When balancing the probative value against the potential prejudice, unfair prejudice is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Bell*, 719 N.W.2d 635, 641 (Minn.2006) (quotation omitted). Here, the *Spreigl* evidence was probative of Cook's identity and common scheme or plan. Moreover, the district court gave the jury a cautionary instruction before the jury heard the *Spreigl* evidence and before the jury deliberated, which mitigated any potential for unfair prejudice. *See State v. Bartylla*, 755 N.W.2d 8, 22 (Minn.2008) (stating that "any potential unfair prejudice [resulting from admission of *Spreigl* evidence] was mitigated by the cautionary instructions").

We conclude that the district court did not abuse its discretion by allowing admission of the 2005 *Spreigl* assault as relevant and material to show Cook's identity and common scheme or plan.

III. Trial Conducted During Cook's Absence on May 4 and 5, 2011

Cook argues that the district court abused its discretion by conducting trial without his presence on the afternoon of May 4 and the entire day of May 5, 2011.

On the morning of May 4, Cook's counsel asked for a trial continuance to permit her to further investigate an evidentiary matter and because Cook had a "cold" and a "sore throat." Cook's counsel commented that she was "starting to get sick just sitting next to him." The district court denied that motion. On the afternoon of May 4, while Cook was present in the courtroom, his counsel asked the district court to excuse him "for the remainder of the day" because he was "ill," had been "struggling with illness for a couple of days," and was "doing much worse this afternoon." Cook's counsel offered nothing more specific about Cook's illness or its severity. The court stated, "Mr. Cook, you have an absolute right to be present at all proceedings," and asked, "You wish to give up that right this afternoon?" Cook replied, "Yes," and the court excused his presence and proceeded with the trial for the remainder of the day.

On the morning of May 5, Cook's counsel informed the district court that she had spoken with Cook, that he had the stomach flu, that he had arrived at the courthouse but had a hard time getting there, and that she did not think that Cook could sit in the courtroom through the day. Counsel also informed the court that Cook would not be coming to court and stated that she understood that his absence from the courtroom was with the approval of the court. The prosecutor asked to clarify the circumstances and noted that the previous day Cook had affirmatively personally waived his appearance and that, based on the representations of Cook's counsel, the prosecutor assumed that Cook was continuing his personal waiver by his choice. Cook's counsel confirmed that to be the circumstance, and the court said that Cook's waiver was "noted of record." Upon the request of Cook's counsel, the court allowed her to make a record about Cook's absence in front of the jury. When the jurors were seated, Cook's counsel stated that Cook continued to be ill with a stomach flu and asked that the court excuse his absence. The court responded, "Okay. He gave his personal waiver and that's accepted. So he is excused for today." The state called witnesses to testify that day, and Cook's counsel cross-examined them. Cook claims that when he returned to court on May 6, he was "surprised that the trial proceeded without him."

*7 At the hearing on Cook's motion for judgment of acquittal or a new trial, Cook's trial counsel testified that Cook was "not physically able to continue sitting at the trial [on May 4]." Cook, his father, and an attorney independent of trial counsel submitted affidavits stating that Cook was too sick to attend court on the afternoon of May 4 and the day of May 5. The district court disregarded the statements as not credible. The court noted that after it excused Cook's absence on the afternoon of May 4, it instructed the state to call its next witness before Cook left the courtroom, and Cook did not object. The court found that Cook's trial counsel was "credible" when she told the court on May 5 that she spoke with Cook that morning; that Cook waived his right to be present through her; that Cook's "voluntary waiver of his [right to be present] on May 5th was for his own comfort, but did not constitute a genuine medical emergency"; and that Cook "failed" to "produce facts that his absence was involuntary."

"The Confrontation Clause of the Sixth Amendment to the United States Constitution, which is applicable to the states through the Fourteenth Amendment, guarantees criminal defendants a right to be present at all stages of the trial where his absence might frustrate the fairness

of the proceedings." *State v. Worthy*, 583 N.W.2d 270, 277 (Minn.1998) (quotation omitted). "[T]he court must indulge every reasonable presumption against the loss of constitutional rights." *State v. Finnegan*, 784 N.W.2d 243, 247 (Minn.2010). But "like any constitutional right, the right to be present at trial may be waived by the accused." *State v. Martin*, 723 N.W.2d 613, 619 (Minn.2006) (quotation omitted). "This court reviews a decision to proceed with trial with the defendant absent under an abuse-of-discretion standard, and this court will not disturb the trial court's factual findings unless clearly erroneous." *Id.* at 620 (quotation omitted).

Cook argues that the district court abused its discretion by conducting trial in his absence because his waiver of his right to be present was "involuntary when he was sick and the [district] court denied his request for a continuance," and, even if his May 4 waiver was valid, the district court erred by extending the waiver through May 5 without hearing personally from Cook. Cook's argument is unpersuasive.

"While it is plainly the preferred practice, we have not required ... a defendant to explicitly affirm to the district court his personal waiver of his right to be present." *Id.* at 619. A defendant bears a "heavy" burden to show that his absence from trial was involuntary. *Id.* at 620 (quotation omitted). "Once a jury was impaneled in the presence of the defendant, he had clear and unequivocal notice of the commencement of trial. Voluntary absence thereafter is a knowing waiver of constitutional rights. To hold otherwise would countenance flight and impose unnecessary costs and burdens on the criminal justice system." *State v. Johnson*, 483 N.W.2d 109, 110–11 (Minn.App.1992) (discussed with approval in *Carse v. State*, 778 N.W.2d 361, 370 (Minn.App.2010), *review denied* (Minn. Apr. 20, 2010)), *review denied* (Minn. June 10, 1992); *see also Finnegan*, 784 N.W.2d at 248 ("[O]ur judicial system could not function if defendants were allowed to pick and choose when to show up for trial."). In light of *Martin*, *Johnson*, and *Carse*, the material inquiry is not whether Cook gave an oral waiver voluntarily or personally; the material inquiry is whether Cook was absent from trial voluntarily.

***8** "[W]hether a defendant is voluntarily absent from trial ... is a factual determination" that we will not disturb unless clearly erroneous, and "[w]e will not reverse findings of fact as clearly erroneous if there is reasonable evidence to support them." *Finnegan*, 784 N.W.2d at 249, 251 (quotations omitted).

> [A] district court that makes a finding on the voluntariness of the defendant's absence without an adequate investigation creates substantial risk of retrial. Clearly, the better practice is to pause the proceedings for as long as is reasonably necessary for the court to ascertain that the defendant's absence is truly voluntary.

Id. at 251.

On the facts in this case, we conclude that the district court did not clearly err by determining that Cook failed to satisfy his heavy burden to prove that his absence from trial on the afternoon of May 4 and the day of May 5 was involuntary. Even if the district court clearly erred in its determination, Cook did not object to the district court conducting trial during his absence on the afternoon of May 4 and day of May 5, and his failure to object constituted "acquiescence." *See Martin*, 723 N.W.2d at 619, 621 (holding that defendant waived his right to be present when district court communicated with deliberating jury without defendant's presence because "a defendant's failure to object" constitutes "acquiescence"); *State v. Hannon*, 703 N.W.2d 498, 505 (Minn.2005) (holding that defendant "waived any right he had to attend the [in-chambers] conference" where a summary of a defense witness's testimony was prepared because "[n]either [defendant] nor his attorney objected to the creation or use of the summary nor was any objection raised at trial to [defendant's] exclusion from the conference").

IV. Right to Public Trial and Jury Instructions

Cook argues that the district court violated his right to a public trial by ordering the courtroom door closed during the final jury charge. Appellate courts review de novo whether a defendant's right to a public trial has been violated. *State v. Brown*, 815 N.W.2d 609, ——, 2012 WL 2529435, at *5 (Minn. July 3, 2012). "In all criminal prosecutions, the accused shall enjoy the right to a ... public trial...." U.S. Const. amend VI; *see* Minn. Const. art. 1, § 6 (same). But a district court does not implicate a defendant's right to a public trial when the court locks the courtroom doors during jury instructions; the court never clears the courtroom of all

spectators; the court tells the people in the courtroom that they are welcome to stay; the court keeps the trial open to the public and press already in the courtroom; the court does not order the removal of any member of the public, the press, or the defendant's family; and the jury instructions do not comprise a proportionately large portion of the trial proceedings. *Brown*, 815 N.W.2d 609, 2012 WL 2529435, at *6 (footnote omitted).

In this case, the district court instructed the court's spectators as follows:

> ***9** You are welcome to stay as long as you like or leave whenever you feel like it. But once the court begins the jury instructions, no one is allowed to enter or leave the courtroom during the instructions. There must not be any interruptions. The bailiff will be standing at the main door to the courtroom. If anyone wants to leave before I start or stay until after I am concluded, you are welcome to do that but you can't leave halfway through or partway through.

The record reflects that the district court never ordered the removal of any member of the public, press, or Cook's family, and the jury instructions comprised less than 40 pages of a transcript consisting of more than 2,000 pages.

In light of *Brown*, we conclude that the district court's closing of the courtroom door during its final charge to the jury did not implicate Cook's right to a public trial.

V. Ineffective Assistance of Trial Counsel

Cook argues that his trial counsel provided ineffective assistance because she "fail[ed] to follow up in trying to contact" a possible alibi witness who "could have exonerated Cook." Although his counsel called the possible alibi witness on one occasion and left a voicemail message, Cook argues that she should have "made additional phone calls," "assigned an investigator to locate and interview" the possible alibi witness, or "asked Cook for more identifying information." We are not persuaded.

"Claims of ineffective assistance of counsel involve mixed questions of law and fact, which we review de novo." *Vance v. State*, 752 N.W.2d 509, 513 (Minn.2008).

> The Sixth Amendment guarantees a defendant the effective assistance of counsel. To demonstrate that he did not receive effective assistance of counsel, [an appellant] must show that (1) his counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that, but for his counsel's unprofessional errors, the result of the proceedings would have been different. We need not address both the performance and prejudice prongs if one is determinative.

State v. Nissalke, 801 N.W.2d 82, 111 (Minn.2011) (quotations and citations omitted).

An attorney's performance does not fall below an objective standard of reasonableness when she

> exercise[s] the customary skills and diligence that a reasonably competent attorney would exercise under the circumstances. But decisions to present certain evidence and call certain witnesses at trial are tactical decisions properly left to the discretion of trial counsel, and such decisions do not prove that counsel's performance fell below an objective standard of reasonableness.

Id. (quotations and citation omitted). We "presume[ ] that the lawyer is competent to provide the guiding hand that the defendant needs," *State v. Dalbec*, 800 N.W.2d 624, 628 (Minn.2011) (quotation omitted), and "strong[ly] presum[e] that, under the circumstances, the challenged action might be considered sound trial strategy," *State v. Rhodes*, 657 N.W.2d 823, 844 (Minn.2003) (quotations omitted).

***10** In this case, the district court found that Cook's trial counsel "demonstrated a thorough knowledge of the case," "conducted effective, detailed, and probing cross-examinations of State's witnesses," "effectively advanced [Cook's] theory of the case," and gave Cook "a vigorous and thorough defense." Counsel testified that she called Cook's alleged alibi witness and left a recorded message with her number and identification as Cook's attorney, and she requested that the alleged alibi witness call her back. She further testified that the witness did not return her call, that Cook asked her "several times" about the witness, and that she told him, "You know where I am every day. I'm here and I'm with you. If you have this witness, bring her in," but that the witness never came. Cook identifies no record evidence, nor could we locate any, that would overcome the presumptions that his trial counsel acted competently and had a sound trial strategy.

We conclude that Cook fails to satisfy his burden of showing that his trial counsel's performance fell below an objective standard of reasonableness and we therefore are not persuaded that she provided ineffective assistance to Cook.

VI. Sentencing

A. Double–Upward–Durational Departure for First–Degree Arson and Consecutive Sentences for First–Degree Arson and First–Degree Attempted Murder

Cook argues that the district court abused its discretion by imposing a double-upward-durational departure for his first-degree-arson sentence and consecutive sentences for his first-degree-arson and first-degree-attempted-murder sentences. He claims that the sentences are not justified by severe aggravating factors. We disagree.

We review the district court's decision to depart from a presumptive sentence for an abuse of discretion. *Tucker v. State*, 799 N.W.2d 583, 585–86 (Minn.2011). We conduct a de novo assessment of the district court's decision as to "whether a valid departure ground exists, relying on the factual findings that support the decision," *State v. Weaver*, 796 N.W.2d 561, 567 (Minn.App.2011), and "whether the valid departure reasons are severe, so as to justify a sentence that runs longer than twice the presumptive sentence," *Dillon v. State*, 781 N.W.2d 588, 598 (Minn.App.2010), *review denied* (Minn. July 20, 2010).

"Departures are warranted only when substantial and compelling circumstances are present," which are circumstances "demonstrating that the defendant's conduct in the offense of conviction was *significantly* more or less serious than that typically involved in the commission of the crime in question" and include the "nonexclusive list of aggravating factors" found in the sentencing guidelines. *State v. Jones*, 745 N.W.2d 845, 848 (Minn.2008) (quotation omitted). District courts must justify double-upward-durational departures with aggravating factors, *State v. Spain*, 590 N.W.2d 85, 88–89 (Minn.1999), but "[t]he presence of a single aggravating factor is sufficient to uphold an upward departure," *Weaver*, 796 N.W.2d at 571 (quotation omitted).

***11** Although concurrent sentencing is presumptive, consecutive sentences for first-degree attempted murder and first-degree arson are permissive and therefore do not constitute a departure that requires the existence of aggravating factors. Minn. Sent. Guidelines II.F, VI. (Supp.2007). But district courts must not impose felony sentences consecutively if the convictions involved only a single victim and a single course of conduct when one sentence has already been subject to an upward-durational departure, unless "additional aggravating factors ... justify the consecutive sentence," Minn. Sent. Guidelines cmt. II.F.04 (2006), or "severe [aggravating factors] ... support both a double durational departure and a departure as to consecutive sentencing," *State v. Williams*, 608 N.W.2d 837, 840 (Minn.2000).

Here, the district court sentenced Cook on the record and issued a nine-page sentencing order. The court found that Cook treated P.T. with "particular cruelty," subjected him to a "particularly gratuitous infliction of pain," and degraded him. The court also found that Cook's "particularly cruel conduct is a severe aggravating circumstance" and that this case is "one of the extremely rare cases" when a "greater than double departure is not only justified but warranted." The court noted that

> after leaving [P.T.] lying in a pool of blood, with his T-shirt soaked with blood, while lying there defenseless, and preventing [P.T.] from getting up, [Cook] ... turned on the gas on all four burners on the kitchen stove, without igniting the burners, and set eight separate fires in five rooms of

> the dwelling, including the bedroom where [P.T.] lay helpless.

The court further found that Cook did so "to conceal or get rid of [P.T.'s] body, separately and distinctly different from attempting to cause his death by stabbing him"; that "arson to cover up the intended homicide and the exacerbation of the severity of the fire by turning on all the gas on the stove is another aggravating factor, over and above the cruelty to [P.T.]"; and that turning on the gas "posed a significant danger to firefighters and rescue personnel who would be expected to respond to the report of a fire at [P.T.'s] residence, as well —another aggravating factor." The court further found that P.T.'s home was "a quad home, attached to three others," which "caused a greater than normal danger to others, namely the other occupants of the quad home and their places of abode," and "expos[ed] neighboring residents in the quad home units to imminent personal peril." The court concluded that its findings and "the resulting aggravating factors" are "more than a sufficient basis to depart durationally on the presumptive sentences."

The district court's identified aggravating factors relevant to the departures at issue are threefold: (1) attempting to conceal P.T .'s body through arson; (2) endangering P.T.'s neighbors by setting eight fires in five separate rooms of P.T.'s home and turning on the gas; and (3) endangering firefighters and rescue personnel by turning on the gas. We must determine first "whether the reasons provided [for the departures] are legally permissible and factually supported by the record" and second "whether the stated reasons justify the departure[s]." *Weaver*, 796 N.W.2d at 567.

B. Legally Permissible and Factually Supported Factors

***12** Cook argues that using the fire to conceal Cook's attempted murder is not a permissible aggravating factor "because it was conduct underlying the attempted-murder conviction"—"[t]he fire was part of the attempt to kill [P.T.] because the perpetrators knew he was not dead when they left." This argument is unavailing. This court recently permitted as an aggravating factor attempting to conceal a body by arson because the crime of concealment was not charged and first-degree arson is an exception to the statutory prohibition against cumulative punishment. *Id.* at 571. Here, the district court found that lighting the fires and turning on the gas burners was Cook's "attempt to conceal or get rid of [P.T.'s] body, separately and distinctly different from attempting to cause his death by stabbing him multiple times while defenseless in his own pool of blood." The court's finding is factually supported by a medical examiner's testimony regarding how incredibly unlikely it was that Cook survived his stab wounds, noting that if the stab wounds to P.T.'s head had been "a few inches" in a different direction they could "absolutely ... have gone into his brain" and killed him. We conclude therefore that this aggravating factor was legally permissible and factually supported.

Cook concedes on appeal that "putting other people in danger living in a quad townhome might be an aggravating factor." In *State v. Lewis*, we held that aggravating factors warranting an upward-durational departure in a first-degree-arson sentence may include "utter disregard for the safety of others in [an] apartment building" where "the damage resulting from the fire was extensive." 385 N.W.2d 352, 356–57 (Minn.App.1986), *review denied* (Minn. May 29, 1986). Here, the district court found that Cook's fire-setting "caused a greater than normal danger to others, namely the other occupants of the quad home and their places of abode" and "expos[ed] neighboring residents in the quad home units to imminent personal peril." The court's findings are supported by the record and its conclusion is supported by the findings. We conclude that this aggravating factor was legally permissible.

Cook argues that turning on the gas is not an aggravating factor because it was part of the commission of arson. We disagree. In *State v. Morris*, we affirmed the district court's conclusion that a defendant's conduct yielded a severe aggravating factor where the defendant caused a standoff situation that was, among other things, "fraught with the risk of serious physical injury to police officers." 609 N.W.2d 242, 244, 247 (Minn.App.2000), *review denied* (Minn. May 23, 2000). Cook is correct that it is legally impermissible for a district court to justify departures based on elements of an underlying crime. *Jones*, 745 N.W.2d at 849. But the aggravating factor of turning on the gas was legally permissible in this case because the eight fires, not the gas, constituted the arson. A deputy fire marshal testified that "on the oven top ... there were unburned materials, including napkins, other paper material on the counter, had absolutely no damage to it whatsoever. So [the fire is] not a continuation of the oven burners being on.... Can't happen that way." We conclude therefore that this aggravating factor was legally permissible and factually supported.

C. Justification for Departure

***13** The remaining issue is whether the aggravating factors justify the double-upward-durational departure for Cook's first-degree-arson sentence and the consecutive sentences for first-degree arson and first-degree murder. No dispute exists that all three of these factors may justify the double-upward-durational departure for Cook's first-degree-arson sentence because double-upward-durational departures require only aggravating factors. *See Spain*, 590 N.W.2d at 88–89. And we do not observe any additional aggravating factors that could independently justify the consecutive sentences. Minn. Sent. Guidelines cmt. II.F.04 (noting that "additional aggravating factors" may "justify the consecutive sentence"). We therefore must determine whether any of the three aggravating factors is "severe" and thus legally sufficient to justify both the double-upward-durational departure and consecutive sentences. *See Williams*, 608 N.W.2d at 840 (noting that "severe" aggravating factors may "support both a double durational departure and a departure as to consecutive sentencing").

The district court did not label these aggravating factors as "severe aggravating factors" but concluded that they were "more than a sufficient basis to depart durationally" and that this case is "one of the extremely rare cases" where a "greater than double departure is not only justified but warranted." "There remains 'no easy-to-apply test' of severity," "the inquiry is unstructured," and "the outcome can depend on alternative factors." *Dillon*, 781 N.W.2d at 597. In *State v. Stanke*, 764 N.W.2d 824, 826, 828–29 (Minn.2009), the supreme court held that the defendant's conduct was "atypical and particularly egregious" and supported the more-than-double-upward-durational departure when the defendant "admitted that he was not only driving at high speeds, he was doing so during rush hour while talking on his cell phone, injecting himself with methamphetamine, and steering with his knee," and "[h]e had also not slept for approximately two weeks due to drug use." *Stanke*, 764 N.W.2d at 828–29. And this court held in *Morris* that it is a severe aggravating factor to "create[ ] an immediate risk of physical harm to police officers and residents of the surrounding neighborhood," "forc[ing] the evacuation of residences in the surrounding neighborhood." 609 N.W.2d at 247.

In this case, after Cook taunted P.T., degraded him, and threatened his son's life, Cook not only lit one fire in P.T.'s bedroom in P.T.'s presence while P.T. laid helpless in his own blood with at least 20 stab wounds, but also lit seven other fires throughout P.T.'s home, endangering the safety of P.T.'s neighbors, and turned on the stove's gas, endangering the safety of P.T.'s neighbors, firefighters, and rescue personnel. Cook argues that setting fire to P.T.'s home is not a severe aggravating factor because no person was injured by the fire and the fire was limited to P.T.'s home and quickly extinguished. But these facts do not diminish the atypical and egregious nature of Cook's conduct or render our holding in *Morris* inapplicable. In light of *Stanke* and *Morris*, we conclude that the aggravating factors of endangering P.T.'s neighbors, firefighters, and rescue personnel were severe and justify both the double-upward-durational departure for Cook's first-degree-arson sentence and consecutive sentences for first-degree arson and first-degree attempted murder.

***14** Moreover, "[a]lthough the district court did not consider whether the ... aggravating factors constituted severe aggravating factors, we conclude that the facts of this case are atypical and particularly egregious," and we are "convinced beyond a reasonable doubt that if we were to remand to the district court, the court would determine that at least one if not more of the ... factors was a severe aggravating factor warranting the imposition of a sentence that exceeded the double-durational-departure limit." *Stanke*, 764 N.W.2d at 828–29.

D. Motor–Vehicle–Theft Sentence

Cook argues that the district court abused its discretion by sentencing him for his motor-vehicle-theft conviction because the offense arose out of the same behavioral incident as the offenses underlying his other convictions. Cook's argument is persuasive. "[I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them." Minn.Stat. § 609.035, subd. 1 (2006). "The state has the burden to establish by a preponderance of the evidence that the conduct underlying the offenses did not occur as part of a single behavioral incident." *Williams*, 608 N.W.2d at 841. But neither at sentencing nor on appeal has the state made any argument regarding the single behavioral incident as it relates to the theft offense. We therefore vacate Cook's motor-vehicle-theft sentence because the state has not satisfied its burden of establishing by a preponderance of the evidence that the conduct underlying Cook's motor-vehicle-theft offense did not occur as part of the same behavioral incident as the other offenses.

Affirmed as modified.

All Citations

Not Reported in N.W.2d, 2012 WL 3263760

End of Document

2021 WL 2067320
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

John Arlo Bowen OMAHA, Appellant.

A20-1220

Filed May 24, 2021

Denied August 10, 2021

Beltrami County District Court, File No. 04-CR-19-2310

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Considered and decided by Jesson, Presiding Judge; Worke, Judge; and Reyes, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

***1** In this direct appeal from his judgment of conviction of and sentence for conspiracy to commit assault in the first degree, appellant argues that (1) he received ineffective assistance of counsel because his attorney conceded all elements of the offense without his consent and (2) the district court abused its discretion by imposing an upward durational departure based on facts unrelated to the offense of conviction. We affirm.

FACTS

In the early morning of June 10, 2018, law-enforcement officers responded to a report of a person shot at the Pine Ridge Apartments in Bemidji, Beltrami County, Minnesota. Officers found R.T., after he was shot multiple times while lying in his recliner in his apartment. They observed that the perpetrator fired numerous shots from the hallway into R.T.'s apartment and from the lawn into R.T.'s and another apartment. Multiple people, including a three-year-old child, were present in the building. R.T. was airlifted to a hospital in critical condition, but ultimately survived his injuries.

In August 2019, after extensive investigation, respondent State of Minnesota charged appellant John Arlo Bowen Omaha with one count of conspiracy to commit assault in the first degree under Minn. Stat. § 609.175, subd. 2 (2018), with reference to Minn. Stat. § 609.221, subd. 1 (2018). The state filed an amended *Blakely* motion [1] asserting as grounds for an aggravated sentence that (1) appellant's conduct could have injured persons other than the intended victim and (2) appellant used a firearm in committing the offense.

1 *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004) (establishing notice requirements for prosecutor to seek aggravated sentence).

At a contested omnibus hearing, defense counsel stated "[i]deally we would be entering a [guilty] plea" but expressed reluctance due to the nature of the evidence and the effect of the crime on the community. The parties therefore agreed to proceed with a stipulated-evidence trial under Minn. R. Crim. P. 26.01, subd. 3. Because of the potentially voluminous evidence, the district court asked both parties to prepare proposed orders as closing arguments. Both parties hesitated over submitting closing arguments in that form. The district court agreed to discuss the issue further at a later hearing.

In December 2019, the district court held the stipulated-evidence trial, at which appellant waived his right to a jury trial on the issues of guilt and the existence of facts to support an aggravated sentence. The district court again asked the parties if they planned to submit written closing arguments. The state confirmed that it would submit a narrative-form written argument. Defense counsel said she discussed submitting a proposed order with appellant and he agreed to do so. The parties also waived the seven-day

timeline for the district court's decision on the stipulated evidence. The parties then submitted their written closing arguments.

In February 2020, the district court issued an order, finding in part that "[defense counsel] seems to have waived elements in her closing statement. [Appellant] did not waive these elements on the record." At another hearing in March 2020, defense counsel asked appellant questions on the record, showing that he agreed to her written closing argument and that they had discussed a concession strategy.

***2** The district court then issued findings of fact, conclusions of law, and an order finding appellant guilty of conspiracy to commit first-degree assault and finding that facts existed supporting the aggravating factors. At sentencing, defense counsel argued that both aggravating factors related to the uncharged assault, rather than the charged conspiracy-to-commit-assault-in-the-first-degree, and that the district court therefore could not rely on those factors. The district court rejected that argument and found that the evidence supported both aggravating factors. It convicted appellant and sentenced him to 120 months in prison, representing an upward durational departure.[2] This appeal follows.

[2] The presumptive sentence for conspiracy is one-half of the appropriate sentence for the underlying offense. Minn. Sent. Guidelines 2.G.2 (Supp. 2017). Appellant's presumptive sentence, based on his criminal-history score and the severity level of the offense, was 67 months, so that a double upward departure would be 134 months. But the district court capped appellant's sentence at 120 months because of the statutory maximum. Minn. Stat. § 609.221, subd. 1 (capping first-degree-assault sentence at 20 years).

DECISION

I. Defense counsel's concession of guilt does not constitute ineffective assistance of counsel because appellant acquiesced to the concession.

Appellant argues that he received ineffective assistance of counsel because his attorney conceded all three elements of the offense without his consent. We disagree.

"To succeed on an ineffective assistance of counsel claim, a defendant must show that (1) 'his attorney's performance fell below an objective standard of reasonableness,' and (2) 'a reasonable probability exists that the outcome would have been different, but for counsel's errors.' " *State v. Luby*, 904 N.W.2d 453, 457 (Minn. 2017) (quoting *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007)). But "[w]hen defense counsel concedes the defendant's guilt without consent, 'counsel's performance is deficient and prejudice is presumed.' " *Id.* (quoting *State v. Prtine*, 784 N.W.2d 303, 317-18 (Minn. 2010) (*Prtine I*)). In determining whether counsel impermissibly conceded guilt, we apply a two-step analysis. First, we ask "whether defense counsel made a concession of guilt." *Id.* Second, we ask whether the defendant "acquiesced in that concession." *Id.* (quoting *Prtine I*, 784 N.W.2d at 318). We review both inquiries de novo. *Id.* at 457. But we review the district court's findings of fact for clear error. *Prtine I*, 784 N.W.2d at 312.

A. Defense counsel conceded all three elements of conspiracy.

Appellant argues that defense counsel conceded all three elements of conspiracy. We agree.

A concession of guilt may be express or implied. *Luby*, 904 N.W.2d at 457. In assessing whether counsel impliedly conceded guilt, we consider counsel's challenged statements in the context of the whole trial. *Dukes v. State*, 660 N.W.2d 804, 813 (Minn. 2003). Counsel's statements constitute an implied concession of guilt only when "a reasonable person viewing the totality of the circumstances would conclude that counsel conceded the defendants [sic] guilt." *Torres v. State*, 688 N.W.2d 569, 573 (Minn. 2004) (quotation omitted).

The elements of conspiracy to commit assault in the first degree are the following: (1) defendant conspired with another to commit assault in the first degree; (2) defendant or another party to the conspiracy committed an overt act in furtherance of the conspiracy; and (3) either defendant entered into the conspiracy in the venue or an overt act took place in the venue. 10 *Minnesota Practice*, CRIMJIG 5.07, 13.03 (2020); Minn. R. Crim. P. 24.01 (stating case must be tried in county where offense committed).

***3** Here, defense counsel expressly conceded the first and second elements of conspiracy in her written closing argument. Although she stated in her proposed conclusions of law that the state failed to prove venue in Beltrami County, in her proposed findings of fact, she stated that appellant went to Beltrami County to scout out R.T.'s apartment and he drove with J.H. to Bemidji, in Beltrami County, on the night the

incident occurred. Because these proposed findings recount overt acts in furtherance of the conspiracy in Beltrami County, they satisfy the venue requirement and implicitly concede venue. CRIMJIG 5.07 (requiring that defendant "entered the agreement, or an overt act took place" in venue); *see Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 385 (Minn. 1999) (noting that "or" is generally disjunctive). By conceding all three elements of conspiracy, defense counsel conceded appellant's guilt.

B. Appellant acquiesced to defense counsel's concession of guilt.

Appellant argues that he did not consent to defense counsel's concession of venue and that no understandable trial strategy supported counsel's concession. We are not persuaded.

We first recite the facts relevant to whether appellant consented to the concession strategy. Defense counsel presented the concession strategy early in the case, noting "[i]deally we would be entering a [guilty] plea." She expressed concern about appellant having to testify in front of an emotional community in order to enter a plea. Further, defense counsel stated that appellant would be "happy to discuss his role since it's a conspiracy charge, but as a matter of honor he [did] not want to implicate anyone else, so that's why we feel that the stipulated evidence trial is the best option." The parties therefore proceeded with a stipulated-evidence trial to avoid those concerns. Appellant never objected to that strategy, even though he objected to other matters not raised on appeal.

Additionally, defense counsel stated that appellant "agree[d] that [her] argument was proper as far as admitting the elements of the offense" and that she had discussed the defense strategy with appellant. Defense counsel made a record of that agreement at the March 5 hearing:

> COUNSEL: [A]s part of [my written argument] we said the State has proven that the Defendant conspired with another to commit the crime of assault in the first degree, correct?
>
> APPELLANT: Yes.
>
> Q: And you agree that it's okay for me to make that argument.
>
> A: Yes.
>
> Q: And then we also agreed that an overt act was made in furtherance of that conspiracy, correct?
>
> A: Yes.
>
> Q: And we've discussed the strategy of why I've made that argument, correct?
>
> A: Yes.
>
> Q: So you're comfortable with what I've submitted to the Court?
>
> A: Yes.
>
> Q: And ... I did lay out findings of fact ... and you agree with the factual findings except for number 17,[3] correct?
>
> A: Yes.

[3] Proposed finding 17 states "Defendant assaulted the victim by firing multiple rounds of ammunition through the wall of the victim's apartment. The victim was ultimately struck several times and required extensive emergency care. Three other individuals were present in the apartment at the time of the shooting, but none were injured."

This colloquy shows that appellant expressly consented to counsel's concession of guilt for elements one and two, but not the third element of venue. We must therefore analyze whether the record shows that appellant impliedly consented to counsel's concession of the venue element.

A defendant impliedly consents to concession if (1) conceding guilt is an "understandable strategy"; and the defendant (2) was present when counsel conceded guilt; (3) understood that counsel conceded guilt; and (4) did not object to the concession (four-factor test).[4] *Luby*, 904 N.W.2d at 459; *Prtine I*, 784 N.W.2d at 318. We look to "the entire record to determine if the defendant acquiesced" to the concession strategy. *Prtine I*, 784 N.W.2d at 318.

[4] Appellate courts may also look to whether counsel used a concession strategy consistently throughout trial without objection from the defendant to determine whether a defendant impliedly consented. *Luby*, 904 N.W.2d at 457. Because we conclude that appellant consented

under the four-factor test, we need not address this test.

*4 First, a concession strategy is understandable if the totality of the circumstances show that conceding guilt is objectively reasonable. *State v. Prtine*, 799 N.W.2d 594, 599 (Minn. 2011) (*Prtine II*). The strength of the state's evidence is relevant in determining whether a concession strategy is understandable. *Id.* (citation omitted).

Here, the record shows that appellant planned to plead guilty to the conspiracy charge but wanted to avoid testifying in front of an emotional community, implicating his coconspirators, or admitting the assault. Conceding guilt on the conspiracy charge in a stipulated-evidence trial, thereby avoiding extensive testimony by appellant, is an understandable strategy to achieve those goals. Further, the state had overwhelming evidence on each element, including the venue element, showing the reasonableness of conceding guilt.

Appellant argues that defense counsel's concession strategy does not fit within three specific examples set out by the supreme court indicating when such a strategy is "understandable." *State v. Wiplinger*, 343 N.W.2d 858, 861 (Minn. 1984). But *Wiplinger* provides *examples*, not an exhaustive list, of when a concession strategy is understandable. We therefore conclude that conceding guilt is an understandable strategy in this case, and this factor supports acquiescence.

Second, appellant stated on the record that he reviewed the proposed order. He attended the March hearing when the district court noted that defense counsel waived "a couple of" elements in the proposed order. Appellant nevertheless approved of the proposed order. In the unique context of a stipulated-evidence trial with written closing arguments which appellant reviewed and approved, we conclude that he was present when the concessions were made. This factor supports acquiescence.

Third, appellant affirmed on the record that defense counsel's argument, including conceding elements of the offense, was proper. Although he explicitly denied finding of fact 17, he approved of all others, including those that recount his presence in Beltrami County on two occasions while carrying out the conspiracy. Appellant also reviewed the 93 stipulated exhibits and agreed to submit them. Some of those exhibits also show appellant's presence in Beltrami County during the conspiracy. And the record reflects that defense counsel discussed the defense strategy with appellant and indicated, on the record and with appellant present, the reasons for that strategy. These facts show that appellant understood he was conceding the elements of the offense, including venue, and this factor therefore supports acquiescence.

Fourth, appellant did not object to the concessions at any time throughout the proceedings. This factor also supports acquiescence. In sum, all four factors are met. We conclude that appellant acquiesced to counsel conceding his guilt and therefore affirm his conviction.

II. The district court did not abuse its discretion by imposing an upward durational departure due to aggravating factors.

Appellant argues that the district court impermissibly relied on aggravating factors, specifically risk to others in the apartment and use of a firearm, that are unrelated to the conspiracy to support an upward durational departure. We disagree.

*5 We review the district court's decision to depart from a presumptive guidelines sentence for an abuse of discretion. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). The district court abuses its discretion if its reasons for departure are improper or insufficient evidence exists to justify departure. *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014). It may exercise its discretion to depart only if aggravating factors that "provide [ ] substantial and compelling reason[s]" to do so exist. *Id.* Substantial and compelling reasons are those that show the defendant's conduct was "significantly more ... serious than that typically involved in the commission of the crime in question." *State v. Hicks*, 864 N.W.2d 153, 157 (Minn. 2015) (quotation omitted). Aggravating factors generally must relate to the offense of conviction. *Id.* at 157, 162.

Here, in order to justify an upward departure based on the aggravating factors of risk to others in the apartment and use of a firearm, these aggravating factors must relate to the conspiracy.[5] Whether these aggravating factors, which are most closely tied to appellant's conduct of shooting into R.T.'s apartment, relate to the conspiracy requires us to address whether a conspiracy is a continuing offense that encompasses the shooting. This is a matter of statutory construction that we review de novo. *Longoria v. State*, 749 N.W.2d 104, 106 (Minn. App. 2008). A crime is not continuing unless the legislature clearly so indicates, *State v.*

Lawrence, 312 N.W.2d 251, 253 (Minn. 1981) (citing *Toussie v. United States*, 397 U.S. 112, 115, 90 S. Ct. 858, 860 (1970)), or the nature of the offense is such that the legislature "must assuredly have intended that it be treated as a continuing one." *Toussie*, 397 U.S. at 115, 90 S. Ct. at 860.

5 We note that Minn. Stat. § 244.10, subd. 5a(b), allows the district court to rely on aggravating factors "arising from the same course of conduct" as the offense of conviction. But because we conclude that the aggravating factors relate to the offense of conviction, here, conspiracy, we need not rely on this statute.

"Whoever conspires with another to commit a crime and[,] in furtherance of the conspiracy[,] one or more of the parties does some overt act in furtherance of such conspiracy" is guilty of the offense of conspiracy. Minn. Stat. § 609.175, subd. 2. The conspiracy statute does not clearly indicate that conspiracy is a continuing crime. *See id.* Because we discern no clear indication of the legislature's intent in the statutory language, we must therefore decide whether the nature of a conspiracy is such that the legislature must have intended it as a continuing crime. *See Toussie*, 397 U.S. at 115, 90 S. Ct. at 860.

Like other continuing crimes such as possession and concealment of stolen property, conspiracy involves ongoing activity rather than a single act. *See Lawrence*, 312 N.W.2d at 253 (comparing "receiving," which "connotes a single act," with possession and concealment, which are ongoing); *State v. Fleming*, 883 N.W.2d 790, 797 (Minn. 2016) (stating that possession offense continued during assault). "It is in the nature of a conspiracy that each day's acts bring a renewed threat of the substantive evil [the legislature] sought to prevent." *Toussie*, 397 U.S. at 122, 90 S. Ct. at 864. In other words, conspiracies involve planning and execution, which continue until the participants actively terminate the conspiracy, the participants achieve their objective, or the conspiracy is terminated for other reasons.

Appellant argues that a conspiracy is complete upon the first overt act in furtherance of the conspiracy. But just because a conspiracy may be charged upon the first overt act does not mean that the conspiracy terminates at that point. Possession of contraband begins when a person first obtains the item, but that does not mean the crime of possession terminates upon the instance of obtaining the item. *See Fleming*, 883 N.W.2d at 797 (noting that after obtaining a gun, Fleming "continued to commit the possession offense when he fired the gun"). Rather, the person continues to commit the offense of possession as long as the person remains in possession of the item. *Id.* Similarly, while the initial acts of agreement and an overt act meet the definition of conspiracy, those acts do not exhaust it. *Cf. Lawrence*, 312 N.W.2d at 253 (stating that "while the initial act of concealing may meet the definition of the proscribed conduct, it does not exhaust it"); *see also United States v. Kissel*, 218 U.S. 601, 607, 31 S. Ct. 124, 126 (1910) (stating with regard to conspiracy that "the unlawful agreement satisfies the definition of the crime, [ ] it does not exhaust it").

***6** Additionally, the facts of this case demonstrate the nature of conspiracy as a continuing offense. The district court found that, after a physical fight with R.T., appellant told J.H. that J.H. "need[ed] to pop out on this lil issue" and asked others on Facebook for R.T.'s address. J.B. provided R.T.'s address at the Pine Ridge Apartments to appellant. Appellant and two other men went to the Pine Ridge Apartments on June 9 and took pictures and videos of the exterior and interior of the apartment building. In the early morning of June 10, J.H. and K.A. drove appellant from Cass Lake to Bemidji where he transferred to a van with "Ty." "Ty" brought appellant to the Pine Ridge Apartments where appellant carried out the shooting. After the incident, K.A. reported to law enforcement that appellant said that he "shot off so many rounds" and that he knocked on the door and started shooting after he heard footsteps inside. Each of these acts are overt acts in furtherance of the same conspiracy. It is nonsensical to separate them into independent conspiracies or say that later conduct supporting the conspiracy is not relevant because it occurs after the first overt act. *Kissel*, 218 U.S. at 607, 31 S. Ct. at 126.

Three reasons in addition to the nature of conspiracy support our conclusion that conspiracy is a continuing offense. First, the definition of the intransitive verb "conspire" includes "scheme." *Merriam-Webster's Collegiate Dictionary* 267 (11th ed. 2014). "Scheme" in turn means "to form plans," which connotes ongoing action. *Id.* A plain and ordinary meaning of "conspire" therefore shows that it is an ongoing activity.

Second, Minnesota's conspiracy statute is similar to the federal conspiracy statute in that both require an agreement and an overt act. *Compare* Minn. Stat. § 609.175, subd. 2, *with* 18 U.S.C. § 371 (2016). Although only persuasive,[6] federal caselaw states that "[c]onspiracy is a continuing offense that continues through the last overt act committed in furtherance

of the conspiracy." *Ashraf v. Lynch*, 819 F.3d 1051, 1053 (8th Cir. 2016). [7]

6 *State v. McClenton*, 781 N.W.2d 181, 191 (Minn. App. 2010) (addressing authorities from other states and federal courts), *review denied* (Minn. June 29, 2010); *State v. Eichers*, 840 N.W.2d 210, 216-17 (Minn. App. 2013) (addressing Eighth Circuit in particular), *aff'd on other grounds*, 853 N.W.2d 114 (Minn. 2014).

7 Other circuits agree. *See, e.g.*, *United States v. Payne*, 591 F.3d 46, 69 (2d Cir. 2010) ("Conspiracy is a continuing offense ... that involves a prolonged course of conduct; its commission is not complete until the conduct has run its course."); *United States v. Fishman*, 645 F.3d 1175, 1195 (10th Cir. 2011) ("A conspiracy ... continues to exist until it is abandoned, succeeds, or is otherwise terminated.").

Third, a number of overt acts may occur in a conspiracy, and jury members need not agree on which overt act establishes guilt. *State v. Ayala-Leyva*, 848 N.W.2d 546, 554-55 (Minn. App. 2014). *Ayala-Leyva* shows that a conspiracy continues beyond the first overt act. In sum, we conclude that conspiracy is a continuing offense. Further, we conclude that it continues until "the last overt act committed in furtherance of the conspiracy," *Ashraf*, 819 F.3d at 1053, up to and including conduct completing the target offense, *Fishman*, 645 F.3d at 1195.

Having established that conspiracy is a continuing offense, we turn to whether the aggravating factors here relate to the conspiracy. Appellant shooting into R.T.'s apartment constitutes the last overt act committed in furtherance of, or more specifically, completing, the conspiracy to commit first-degree assault. *See Ashraf*, 819 F.3d at 1053; *Fishman*, 645 F.3d at 1195. Just as in *Fleming*, when the continuing offense of possession continued while the defendant committed an assault by firing six shots in a public park, so the conspiracy here continued while the appellant committed the uncharged assault by firing numerous shots into R.T.'s and a neighboring apartment. 883 N.W.2d at 797. That conduct endangered others in the apartment and involved use of a firearm. Therefore, the aggravating factors relate to the last overt act of the conspiracy.

***7** Appellant points out that conspiracy is a separate, substantive crime from the uncharged assault, *State v. Burns*, 9 N.W.2d 518, 520 (Minn. 1943), and that the elements of the assault need not be proved to establish a conspiracy, *see State v. Tracy*, 667 N.W.2d 141, 146 (Minn. App. 2003). We acknowledge and reaffirm these well-established principles. But these principles do not prevent facts constituting elements of the assault from overlapping with overt acts in furtherance of the conspiracy. *Cf. United States v. Felix*, 503 U.S. 378, 390, 112 S. Ct. 1377, 1384 (1992) (stating that "overt acts charged in a conspiracy count may also be charged ... as substantive offenses"); *State v. McAlpine*, 352 N.W.2d 101, 104 (Minn. App. 1984) (noting that evidence of possession of controlled substance submitted in prior conspiracy trial could be submitted in subsequent possession trial). And because the shooting constitutes an overt act in furtherance of the conspiracy, the aggravating factors associated with the shooting can therefore relate both to the charged conspiracy and the uncharged assault.

In sum, because a conspiracy is a continuing offense encompassing the acts to which the aggravating factors here relate, the district court did not abuse its discretion by relying on these aggravating factors to impose an upward departure on the conspiracy conviction.

Finally, appellant appears to argue that the evidence does not support the district court's determination that his conduct was "significantly more ... serious than that typically involved" in a conspiracy. *Hicks*, 864 N.W.2d at 157. But in *State v. Blanche*, the supreme court upheld an upward departure when the defendant sprayed bullets in a residential area, endangering multiple people and killing a child. 696 N.W.2d 351, 379-80 (Minn. 2005). The aggravating factors here are similar to *Blanche*: here, the district court found that multiple people, including a child, were present in the apartment when appellant "spray[ed] bullets inside of a residential apartment building showing a degree of recklessness that appropriately justifies an upward departure." *See id.*; *see also Fleming*, 883 N.W.2d at 797 (noting that firing gun six times in park filled with children made possession-of-firearm offense more serious than usual). A review of Minnesota conspiracy cases shows that a typical conspiracy does not endanger multiple people besides the intended victim. Nor does a typical conspiracy involve using a firearm, let alone using one in such a reckless manner. We therefore conclude that the district court did not abuse its discretion by determining that these factors made appellant's conduct "significantly more ... serious than that typically involved" in a conspiracy, and it therefore did not abuse its discretion by imposing an upward departure in this case.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2021 WL 2067320

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1997 WL 526313
Only the Westlaw citation is currently available.

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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

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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

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