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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Bryan BLOCKER, Appellant.

A17-0847

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Review Denied November 28, 2017

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

Attorneys and Law Firms

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Considered and decided by [Kirk](#), Presiding Judge; [Rodenberg](#), Judge; and [Florey](#), Judge.

UNPUBLISHED OPINION

[FLOREY](#), Judge

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

FACTS

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

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

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

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

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

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

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

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

DECISION**I.**

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

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

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

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

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

II.

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

Guidelines sentences are presumed to be appropriate, and departures should be made “only when substantial and compelling circumstances can be identified and articulated.” [Minn. Sent. Guidelines 1.A. \(2014\)](#). “[T]he question of whether the district court's reason for the departure is ‘proper’

is treated as a legal issue.” [Dillon v. State, 781 N.W.2d 588, 595 \(Minn. App. 2010\)](#), review denied (Minn. July 20, 2010).

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

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

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

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

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

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

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

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

Appellant argues that the factors were not severe enough and not similar to those found in other cases that supported a greater than double departure. “A greater than double departure is warranted only in the rare case where severe aggravating circumstances exist.” *State v. Ayala-Leyva*, 848

N.W.2d 546, 558 (Minn. App. 2014) (quotation omitted), review denied (Minn. Aug. 11, 2015). “Although the supreme court acknowledged early on ... that there is no clear line that marks the boundary between ‘aggravating circumstances’ justifying a double departure and ‘severe aggravating circumstances’ justifying a greater than double departure, the [appellate] court has not been greatly deferential to the district court’s severity determinations.” *Dillon*, 781 N.W.2d at 596 (quotation and citation omitted). An appellate court draws on its “broader, multijurisdictional perspective” to conduct a “less deferential” review of a district court’s decision to impose a sentence representing more than a double upward departure. *Id.* at 598.

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

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

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Footnotes

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

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