2016 WL 102476
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NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Gideon Charles ARRINGTON, II, Appellant.

No. A14–1945.
|
Jan. 11, 2016.
|
Review Denied March 29, 2016.

Attorneys and Law Firms

Cathryn Middlebrook, Chief Appellate Public Defender, Kathryn J. Lockwood, Assistant Public Defender, St. Paul, MN (for appellant).

Lori Swanson, Attorney General, St. Paul, MN; and Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, MN (for respondent).

Considered and decided by WORKE, Presiding Judge; LARKIN, Judge; and BJORKMAN, Judge.

UNPUBLISHED OPINION

WORKE, Judge.

***1** Appellant challenges his 324–month executed sentence for first-degree criminal sexual conduct, arguing that the district court abused its discretion by imposing a sentence nearly double that of the presumptive sentence. Appellant also seeks to withdraw his guilty plea due to ineffective assistance of counsel. We affirm.

FACTS

In November 2013, appellant Gideon Charles Arrington, II approached Z.A. as she left her workplace to run errands and told her that he was a police officer. When Z.A. returned to her workplace, Arrington forced her into his vehicle, threatened to shoot her if she did not comply, and stuck an object into her back that she believed to be a gun. Arrington handcuffed Z.A., blindfolded her with duct tape, and drove her to his house. He left Z.A. in a cold garage for a prolonged period of time. Arrington subsequently penetrated Z.A.'s mouth with his penis and forced his penis into her vagina on at least two occasions. After each assault, Arrington scrubbed Z.A. with a bleach solution, and once made her sit in a bleach bath. He washed her clothes, eventually returning them to her in wet condition. Arrington kept Z.A. blindfolded and threatened to kill her if she was not quiet and compliant. He put a gun into her mouth. He told her that he knew where she lived and threatened to kill her if she contacted the police. After nine hours, Arrington released Z.A. Z.A. alerted a taxi driver who contacted the police after observing her wearing wet clothes, smelling of bleach, having duct tape in her hair, and suffering from wounds left on her face from the duct tape.

DNA samples taken from Z.A.'s body matched Arrington, and a witness to the kidnapping identified Arrington in a sequential lineup. Arrington was charged with three counts of first-degree criminal sexual conduct and one count of kidnapping.

After jury selection, Arrington entered an *Alford* plea [1] to one count of first-degree criminal sexual conduct and waived his right to a *Blakely* jury trial [2] in exchange for a maximum executed sentence of 324 months and the dismissal of the remaining counts. The district court imposed a 324–month sentence, slightly less than double the presumptive sentence under the Minnesota Sentencing Guidelines, based upon four aggravating factors: (1) there were multiple acts and/or types of penetration; (2) the victim was treated with particular cruelty; (3) Arrington had a prior felony offense involving injury to a victim; and (4) there was an abuse of trust. This appeal follows.

DECISION

Sentencing

Arrington first argues that the district court abused its discretion by granting the state's motion for an upward sentencing departure because the imposed sentence unduly exaggerates the criminality of his conduct. A district court has great discretion in sentencing, and we will not reverse a sentencing decision absent an abuse of discretion. *State* *v. Soto*, 855 N.W.2d 303, 307–08 (Minn.2014). To justify a durational departure from the presumptive sentence, there must be "substantial and compelling circumstances." *Rairdon v. State*, 557 N.W.2d 318, 326 (Minn.1996). "If the record supports findings that substantial and compelling circumstances exist, this court will not modify the departure unless it has a strong feeling that the sentence is disproportional to the offense." *State v. Anderson*, 356 N.W.2d 453, 454 (Minn.App.1984) (quotation omitted). Aggravating factors give the district court discretion to impose a sentence up to twice the length of the presumptive prison term. *Dillon v. State*, 781 N.W.2d 588, 596 (Minn.App.2010), *review denied* (Minn. July 20, 2010).

***2** The district court relied upon four substantial and compelling reasons to support the sentencing departure. First, it concluded that Arrington committed multiple acts of penetration, based on the fact that he forced Z.M. to perform fellatio on him and penetrated her vagina multiple times. "The fact that a defendant has subjected a victim to multiple forms of penetration is a valid aggravating factor in first-degree criminal sexual conduct cases." *State v. Yaritz*, 791 N.W.2d 138, 145 (Minn.App.2010) (quotation omitted), *review denied* (Minn. Feb. 23, 2011). Therefore, the district court properly relied upon this reason.

Second, the district court concluded that Arrington treated Z.A. with particular cruelty based on numerous facts, including blindfolding her with duct tape, forcing her to bathe in bleach, holding her in an unheated garage for an extended period of time, and threatening to kill her. The Minnesota Sentencing Guidelines permit an upward durational departure where a defendant treats a victim with particular cruelty. Minn. Sent. Guidelines 2.D.3.b. (2) (Supp.2013); *see also* *Tucker v. State*, 799 N.W.2d 583, 587 (Minn.2011) (noting that an upward sentencing departure based on particular cruelty is not an abuse of the district court's discretion when the cruelty is not usually associated with the relevant offense). Based on the record, the district court properly relied upon this as an aggravating factor.

Third, it is undisputed that Arrington was previously convicted of felony first-degree aggravated robbery involving injury to a victim. The sentencing guidelines permit an upward durational departure where the "current conviction is for a criminal sexual conduct offense ... and ... the offender has a prior felony conviction for ... an offense in which the victim was otherwise injured." Minn. Sent. Guidelines 2.D.3.b.(3) (Supp.2013). Therefore, the district court properly relied upon this aggravating factor.

Fourth, the district court concluded that Arrington abused Z.A.'s trust because he told her he was a police officer and suggested that, because of this, he knew where she lived and could find her later. Arrington asserts that impersonating a police officer is a separate offense that cannot be used to enhance his criminal-sexual-conduct offense, and that he was not in a position of trust because he was not a police officer. Because the district court relied upon numerous other factors that support the upward sentencing departure, we need not determine whether abuse of trust is a proper aggravating factor here. *See* *Dillon*, 781 N.W.2d at 595–96 (holding that a single aggravating factor is sufficient to justify an upward departure).

Arrington contends that even if his sentence was "technically permissible," it unfairly exaggerates the criminality of his conduct. We disagree. Arrington does not cite caselaw demonstrating that the district court could not use the four aggravating factors to impose a durationally increased sentence. Rather, he cites caselaw reducing multiple consecutive sentences. *See, e.g.*, *State v. Goulette*, 442 N.W.2d 793, 795 (Minn.1989) (affirming defendant's convictions but reducing aggregate sentence where five consecutive sentences unfairly exaggerated the defendant's criminal conduct).

Guilty plea withdrawal and ineffective assistance of counsel

***3** Arrington argues that his guilty plea is invalid because he was pressured by counsel to enter a plea, and asks this court to permit him to raise an ineffective-assistance-of-counsel claim in a postconviction proceeding. "Generally, an ineffective assistance of counsel claim should be raised in a postconviction petition for relief, rather than on direct appeal." *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn.2000). But a party may directly raise the issue of plea-withdrawal on appeal if the record is sufficient for this court to reach a conclusion on the validity of the plea. *State v. Newcombe*, 412 N.W.2d 427, 430 (Minn.App.1987), *review denied* (Minn. Nov. 13, 1987). Arrington concedes that the record is likely insufficient to establish an effective-assistance-of-counsel claim at this point. Based on the record before us, we are unable to conclude whether counsel was effective and whether the plea is valid. Therefore, the issue of whether Arrington's guilty plea is invalid based on ineffective assistance of counsel is preserved for postconviction proceedings, in accordance with the law, should Arrington choose to initiate them.

Affirmed.

All Citations

Not Reported in N.W.2d, 2016 WL 102476

Footnotes

1 In an *Alford* plea, the accused maintains his innocence but "reasonably concludes that there is evidence which would support a jury verdict of guilty." *State v. Goulette*, 258 N.W.2d 758, 760 (Minn.1977).

2 *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), holds that a defendant is entitled to a jury determination on whether there are aggravating factors warranting an upward durational sentencing departure. *State v. Dettman*, 719 N.W.2d 644, 647 (Minn.2006).

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

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2016).
Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Lester Corey BATES, Appellant.

A17-1842
|
Filed September 24, 2018
|
Review Denied December 18, 2018

Lyon County District Court, File No. 42-CR-16-1208

Attorneys and Law Firms

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Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Connolly, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

***1** A Lyon County jury found Lester Corey Bates guilty of felony domestic assault. The jury's verdict is based on evidence that Bates threw a half-gallon plastic container of milk at his girlfriend's head. We conclude that the prosecutor did not engage in prosecutorial misconduct, with the exception of two statements that did not affect Bates's substantial rights and, thus, are not reversible error. We also conclude that the district court did not err by imposing an upward durational departure from the presumptive sentencing guidelines range based on the aggravating factor of the presence of a child. Therefore, we affirm.

FACTS

On November 13, 2016, Bates's girlfriend, A.K., picked him up in her car to go to a movie. A.K.'s one-year-old son was in the back seat. After Bates got into A.K.'s car, the couple began to argue. They stopped at a gas station to buy milk. They continued to argue after they drove away from the gas station. A.K. eventually stopped the car to allow Bates to get out. The couple continued to argue. After Bates got out of the car, he threw a half-gallon plastic container of milk at A.K.'s head. The milk container struck A.K. on the right side of her jaw and burst, spilling milk on A.K. and splattering milk throughout her car. A.K.'s one-year-old son was awake and alert in the back seat when Bates threw the milk container.

A.K. called 911 and drove to the Marshall Law Enforcement Center. She met Corporal Rieke in the parking lot. She told Corporal Rieke that she and Bates had argued and that Bates had thrown a half-gallon container of milk at her, hitting her on the right side of her face and neck. She told Corporal Rieke that the impact of the milk container exacerbated pre-existing pain from recent dental work. Corporal Rieke observed that the right side of A.K.'s face and neck was red and that she was soaked with milk. Corporal Rieke took photographs of the right side of A.K.'s face and neck. Corporal Rieke also inspected A.K.'s car and saw milk splattered throughout the interior and a broken plastic milk container inside the car.

The state charged Bates with one count of domestic assault with intent to cause fear of immediate bodily harm or death, in violation of Minn. Stat. § 609.2242, subd. 4 (2016), and one count of domestic assault by intentionally inflicting or attempting to inflict bodily harm, in violation of Minn. Stat. § 609.2242, subd. 4.

The case was tried to a jury on one day in May 2017. The state called two witnesses: A.K. and Corporal Rieke. Bates did not testify and did not introduce any other evidence. The jury found Bates not guilty on count 1 and guilty on count 2. The jury also found that Bates committed the offense charged in count 2 "in the actual presence of a child who saw or heard or otherwise perceived the offense."

At sentencing, the district court found substantial and compelling reasons for an upward durational departure from the presumptive sentencing guidelines range based on the jury's finding that Bates committed the offense in the presence of a child. The district court imposed a sentence of 36 months of imprisonment but stayed execution of the sentence and placed Bates on probation for five years. Bates appeals.

DECISION

I. Claim of Prosecutorial Misconduct

***2** Bates first argues that the prosecutor committed misconduct in four ways in her opening statement, her closing argument, and her rebuttal closing argument.

A. Objected-to Statement

Bates argues that the prosecutor committed misconduct in her rebuttal closing argument by vouching for A.K.'s credibility. In the challenged statement, the prosecutor stated, "I'd submit to you that what [A.K.] told you today, while it may have been hard for her to come here and say it, it was ... the truth." Bates objected on the ground that the prosecutor vouched for the witness's credibility, and he moved for a mistrial. The prosecutor suggested that the district court give the jury a curative instruction. The district court denied Bates's motion for a mistrial and determined that a curative instruction was unnecessary. After the jury's verdict, Bates moved for a new trial on the ground that the prosecutor had impermissibly vouched for A.K.'s credibility. The district court denied the motion on the ground that the prosecutor's statement was a comment on the evidence but not an expression of her personal opinion.

"[A] prosecutor should not ... vouch for the veracity of any particular evidence." *State v. McArthur*, 730 N.W.2d 44, 53 (Minn. 2007). "Vouching occurs when the government implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness's credibility." *In re Welfare of D.D.R.*, 713 N.W.2d 891, 900 (Minn. App. 2006) (quotation omitted). Specifically, a prosecutor "may not interject his or her personal opinion so as to personally attach himself or herself to the cause which he or she represents." *Ture v. State*, 681 N.W.2d 9, 20 (Minn. 2004) (quotation omitted). This prohibition does not "prevent the prosecutor from arguing that particular witnesses were or were not credible." *State v. Everett*, 472 N.W.2d 864, 870 (Minn. 1991).

In this case, the prosecutor did not express a personal opinion about A.K. or her testimony. Rather, the prosecutor argued that A.K.'s testimony was credible. The prosecutor's statement concerning A.K.'s testimony is similar to the argument in *Everett*, in which the prosecutor called attention to the "mild manner" of a state's witness and invited the jury to "[j]udge his demeanor." *Id.* The supreme court concluded that the prosecutor's argument was not improper because "the statements were not in the form of personal opinions." *Id.*

Thus, the prosecutor did not improperly vouch for A.K.'s credibility in her rebuttal closing argument.

B. Unobjected-to Statements

Bates also argues that the prosecutor committed misconduct on three other occasions. But Bates did not object at trial to the three other instances of alleged misconduct. Accordingly, this court applies "a modified plain-error test." *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). To prevail under the modified plain-error test with respect to any particular instance of alleged misconduct, Bates must establish that there is an error and that the error is plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error is plain if it "contravenes case law, a rule, or a standard of conduct." *Id.* If Bates were to establish a plain error, the state would have the burden of showing that the error did not affect Bates's substantial rights, *i.e.*, "that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id.* (quotations omitted). "If the state fails to demonstrate that substantial rights were not affected, 'the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.' " *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (quoting *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)).

1.

***3** Bates argues that the prosecutor committed misconduct in her opening statement by making a statement that inflamed the passions and prejudices of the jury. In the challenged statement, the prosecutor stated:

> Now, while these facts today might seem simple and concrete, in a case of domestic assault, when emotions of the victim are involved, the case [becomes] anything but that. Today, [A.K.] will be asked to do the impossible. She will be asked to answer personal questions about her sex life, questions about her relation —her past relationship, and confront her former boyfriend and relive a traumatic experience. These are things that would be difficult for any of us under any circumstances, let alone in an open courtroom in front of twelve strangers.

An opening statement need not be "colorless," but it must be confined to a description or outline of the facts a party expects to prove. *State v. Bolstad*, 686 N.W.2d 531, 544 (Minn. 2004); *Tucker v. State*, 245 N.W.2d 199, 202 (Minn. 1976); *State v. Montgomery*, 707 N.W.2d 392, 399 (Minn. App. 2005). In describing the anticipated evidence, the prosecutor must not use language that may inflame the passions and prejudices of the jury. *Montgomery*, 707 N.W.2d at 399-400. Here, the challenged statement does not appear to have been designed to inflame the passions and prejudices of the jury and likely did not do so. The statement appears reasonably related to evidence the state intended to introduce and, thus, information the jury would perceive during the evidentiary phase of trial. In light of its relatively innocuous nature, the prosecutor's statement is not plainly misconduct.

2.

Bates also argues that the prosecutor committed misconduct in her closing argument by making a statement that inflamed the passions and prejudices of the jury. In the challenged statement, the prosecutor said to the jury, "with your verdict of guilty, I'd ask that you convey to [A.K.] and to [A.K.'s child] someday, that this type of behavior and what [A.K.] experienced is against the law."

The state's closing argument must be based on the evidence introduced at trial or reasonable inferences from the evidence. *State v. Morton*, 701 N.W.2d 225, 237 (Minn. 2005); *State v. Crane*, 766 N.W.2d 68, 74 (Minn. App. 2009), *review denied* (Minn. Aug. 26, 2009). "It is improper for the prosecutor to make statements urging the jury to ... send a message with its verdict." *State v. Duncan*, 608 N.W.2d 551, 556 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). The prosecutor should not do so because

> the jury's role is not to enforce the law or teach defendants lessons or make statements to the public or to 'let the word go forth'; its role is limited to deciding dispassionately whether the state has met its burden in the case at hand of proving the defendant guilty beyond a reasonable doubt.

State v. Salitros, 499 N.W.2d 815, 819 (Minn. 1993). Here, the prosecutor used language that essentially asked the jury to "send a message." The prosecutor's statement plainly is misconduct.

3.

Bates also argues that the prosecutor committed misconduct in her rebuttal closing argument by making a statement that shifted the burden of proof to Bates. In the challenged statement, the prosecutor said, "I'd submit to you that there [was] nothing that [A.K.] testified to today that was contradicted by the Defense."

***4** "A prosecutor may not comment on a defendant's failure to ... contradict testimony." *State v. Porter*, 526 N.W.2d 359, 365 (Minn. 1995). Such a comment "may suggest to the jury that the defendant bears some burden of proof." *Id.* In *Porter*, the supreme court determined that the prosecutor engaged in misconduct by arguing that the defense failed to impeach the state's witness because the argument tended to shift the burden of proof to the defense. *Id.* at 364-65. Here, the prosecutor did exactly what *Porter* prohibits: she stated that Bates did not contradict the state's evidence. The prosecutor's statement plainly is misconduct.

4.

Because we have concluded that two of the challenged statements by the prosecutor were plainly misconduct, we must proceed to the third step of the modified plain-error test, at which the state has the burden of showing that the plain error did not affect Bates's substantial rights, *i.e.*, "that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Ramey*, 721 N.W.2d at 302 (quotations omitted). Here, the prosecutor's erroneous statements were very brief. *See State v. Johnson*, 915 N.W.2d 740, 746 (Minn. 2018); *State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003); *State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994). The district court instructed the jury that counsel's arguments were not evidence and that the jurors were "the sole judges of whether a witness is to be believed and of the weight to be given a witness's testimony." *See Johnson*, 915 N.W.2d at 747; *Washington*, 521 N.W.2d at 40. The district court also instructed the jury on the elements of the offenses and that the state had the burden of proof. In addition, the jury acquitted Bates of one count of domestic assault, which tends to show that the jury understood that the state had the burden of proof. *See State v. DeWald*, 463 N.W.2d 741, 745 (Minn. 1990). Furthermore, the evidence of Bates's guilt is overwhelming. A.K. testified in detail about the incident, and her testimony was corroborated by Corporal Rieke's testimony. Moreover, the evidence included photographs of A.K.'s red face and jaw and of the interior of her car. One photograph depicted a broken plastic milk container and splattered milk. Thus, the prosecutor's plainly erroneous statements did not affect Bates's substantial rights.

II. Upward Durational Departure

Bates also argues that the district court erred at sentencing by imposing an upward durational departure on the ground that a child was present when he committed the offense.

The Minnesota Sentencing Guidelines specify a presumptive sentence for a felony offense. Minn. Sent. Guidelines 2.C (2016). The presumptive sentence is "presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics." Minn. Sent. Guidelines 1.B.13 (2016). Accordingly, a district court "must pronounce a sentence ... within the applicable [presumptive] range unless there exist identifiable, substantial, and compelling circumstances to support a departure." Minn. Sent. Guidelines 2.D.1 (2016); *see also State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). "Substantial and compelling circumstances are those 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." *State v. Hicks*, 864 N.W.2d 153, 157 (Minn. 2015) (quotation omitted). The guidelines provide a non-exclusive list of aggravating factors that may justify a departure. Minn. Sent. Guidelines 2.D.3.b (2016).

***5** In this case, the district court relied on one of the aggravating factors in the guidelines' non-exclusive list: "The offense was committed in the presence of a child." Minn. Sent. Guidelines 2.D.3.b.(13) (2016); *State v. Vance*, 765 N.W.2d 390, 393 (Minn. 2009). An offense is committed in the presence of a child only if "the child sees, hears, or otherwise witnesses some portion of the commission of the offense in question." *State v. Robideau*, 796 N.W.2d 147, 152 (Minn. 2011).

Bates contends that the presence-of-a-child aggravating factor does not apply in this case on the ground that the presence of A.K.'s one-year-old child did not make his conduct "particularly outrageous" because it "did not heighten, significantly or otherwise, the seriousness of [his] conduct." We can resolve Bates's contention without considering the particular facts of this case. Under the sentencing guidelines, the presence of a child, by itself, is a sufficient basis for an upward durational departure. *See* Minn. Sent. Guidelines 2.D.3.b.(13) (2016); *Vance*, 765 N.W.2d at 393. There is no additional requirement. The district court need not find that other circumstances surrounding the commission of the offense are "substantial and compelling circumstances to support a departure," Minn. Sent. Guidelines 2.D.1 (2016), or that "the defendant's conduct in the offense of conviction was significantly more ... serious than that typically involved" for reasons other than simply the presence of a child, *Hicks*, 864 N.W.2d at 157.

Bates also contends that the evidence is insufficient to establish that A.K.'s one-year-old son actually saw, heard, or otherwise perceived some portion of the commission of the offense. *See Robideau*, 796 N.W.2d at 152. Contrary to Bates's contention, A.K. testified that her son was awake and alert in the back seat while A.K. and Bates were arguing and when Bates threw the milk container at her. Although it is unclear whether the child was facing forward or backward, the evidence allows an inference that, at the least, the child heard the sounds of Bates's criminal conduct. Thus, the district court did not err by imposing an upward durational departure from the presumptive sentencing guidelines range.

Affirmed.

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

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
George Edward BENNETT, Appellant.

No. C9-96-2506.
|
Aug. 26, 1997.
|
Review Denied October 14, 1997.

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

Attorneys and Law Firms

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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