2016 WL 102476
Only the Westlaw citation is currently available.

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UNPUBLISHED OPINION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).

2018 WL 4558173
Only the Westlaw citation is currently available.

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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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.

All Citations

Not Reported in N.W. Rptr., 2018 WL 4558173

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1997 WL 526313
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN.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

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

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

(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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1991 WL 42587
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN.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

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
RAYMOND (NMN) HOUSE, Appellant.

No. C3-90-1158.
|
April 2, 1991.
|
Review Denied May 10, 1991.

Appeal from District Court, Hennepin County; Delila F. Pierce, Judge.

Attorneys and Law Firms

Hubert H. Humphrey, III, Attorney General, St. Paul, Michael Freeman, Hennepin County Attorney, Donna J. Wolfson, Assistant County Attorney, Minneapolis, for respondent.

John M. Stuart, State Public Defender, Michael F. Cromett, Asst. State Public Defender, St. Paul, for appellant.

Considered and decided by PARKER, P.J., and FOLEY and KLAPHAKE, JJ.

UNPUBLISHED OPINION

FOLEY, Judge.

*1 Appellant Raymond (NMN) House challenges his conviction and sentence for one count of criminal sexual conduct in the third degree, Minn.Stat. § 609.344, subd. 1(c) (1988). We affirm.

FACTS

Early in the morning of June 5, 1989, complainant, after having a substantial amount of beer, went to the urgent care entrance of Fairview-Deaconess Hospital and rang the buzzer. She told the night receptionist she was drunk and needed help. The receptionist asked House, the uniformed security guard, to investigate.

Complainant recalls asking House to see a doctor or a nurse. House took her to a patient room, telling her to get comfortable and take her jeans and shoes off. He felt her neck and head indicating that she was warm. Complainant did not fear House at this point. House then left the room for 5 to 10 minutes. While he was gone, complainant redressed. When House returned, he directed complainant to take off her blouse and bra. When complainant felt his hands on her breasts, she tried to walk away but could not move because a counter was in front of her and House stood behind her. He was pressed against her and was "fumbling from behind." House inserted his penis and had intercourse for three to five minutes, while he held his hands on either side of complainant on the counter. Complainant protested but House continued having sex for two to three seconds and then ejaculated.

Complainant testified that during the attack she was afraid of House because he was a security guard and may have been carrying a weapon. A blood alcohol test revealed that complainant had a blood alcohol concentration of .18 at 7 a.m. the morning of the assault, approximately 3 hours after the attack.

House does not deny that he had sexual intercourse with complainant. He argues, however, that she enticed him by removing her clothes and asking him to "come on," which he interpreted as a request for sexual intercourse. When first questioned by the police, House denied having sexual intercourse. In jail, House denied raping complainant but later told the questioning officer that he had sex with her.

DECISION

1. When reviewing an insufficiency of evidence claim we view the evidence in the light most favorable to the prosecution. *State v. Bias*, 419 N.W.2d 480, 484 (Minn.1988) (citing *State v. Race*, 383 N.W.2d 656 (Minn.1986)). We must determine whether, under the facts in the record and any legitimate inferences that can be drawn from them, a jury could reasonably conclude that the defendant was guilty of the offense charged.

Id. Minnesota law provides:

A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if * * *

(c) the actor uses force or coercion to accomplish the penetration;

Minn.Stat. § 609.344, subd. 1(c) (1988).

House argues the evidence is insufficient to support a jury finding that he used "force or coercion" to accomplish sexual penetration. While the record does not support a finding of use of "force," we find the evidence amply supports the jury's finding of "coercion." "Coercion" is defined as

***2** words or circumstances that cause the complainant reasonably to fear that the actor will inflict bodily harm upon * * * or force the complainant to submit to sexual penetration or contact * * *.

Minn.Stat. § 609.341, subd. 14 (1988). A specific act or threat is not required to prove coercion. *Id.* The Minnesota Supreme Court has held that

when an actor coerces a complainant so as to cause her fear while accomplishing sexual contact, the requirement of coercion in section 609.345, subd. 1(c) is satisfied.

State v. Middleton, 386 N.W.2d 226, 230 (Minn.1986) (footnote omitted).

Here, complainant testified that House took her to a vacant area in the hospital, instructed her to remove her clothing, forced her to bend over a table or counter while he pressed his body up against her and held his hands on either side of her while engaging in sexual intercourse. Complainant testified she could not move and she was afraid of House.

House argues her testimony was not credible. "Judging the credibility of witnesses is the function of the jury." *State v. Gettel*, 404 N.W.2d 902, 905 (Minn.App.1987), *pet. for rev. denied* (Minn. June 26, 1987). Given House's status as a security guard and his size and strength advantage, the evidence supports complainant's testimony that she feared House would inflict bodily harm if she did not submit to his sexual advances. Viewing the evidence in the light most favorable to the verdict, we conclude that the record contains sufficient evidence of coercion to support the jury's finding of guilt.

2. House next contends that the trial court erred by imposing a double durational departure sentence. We disagree.

In a durational departure, a sentencing court looks at whether the defendant's conduct was significantly more or less serious than that typically involved in the commission of the crime in question.

State v. Cox, 343 N.W.2d 641, 643 (Minn.1984). If there are "substantial and compelling circumstances" departure is justified. Minn.Sent.Guidelines II.D. In this case, the court relied on the complainant's vulnerability and House's position of trust and authority as reasons for departure.

"A victim's vulnerability due to intoxication may be considered as a reason for departure." *Gettel*, 404 N.W.2d at 906 (citing *Ture v. State*, 353 N.W.2d 518, 522 (Minn.1984)). *See* Minn.Sent.Guidelines II.D.2.b.(1). Here, the record shows complainant was legally intoxicated with a blood alcohol content of .18 three hours after the attack occurred. At the time of the attack, she was undoubtedly even more incapacitated due to alcohol. Moreover, House admitted complainant was very upset and talked of harming herself when she entered the hospital. Complainant's vulnerability played a substantial role in the commission of the crime. The trial court did not err by departing from the presumptive sentence due to complainant's vulnerability.

"Abuse of positions of trust and authority are aggravating factors justifying a durational departure." *State v. Carpenter*, 459 N.W.2d 121, 128 (Minn.1990) (citing *State v. Campbell*, 367 N.W.2d 454, 460-61 (Minn.1985) and *State v. Cermak*, 344 N.W.2d 833, 839 (Minn.1984)). House was uniformed and entrusted with the responsibility of protecting hospital personnel, patients and visitors. House used his position to secret her in an unused part of the hospital in order to have sexual intercourse with her. Complainant testified at first she was not afraid of House. However, she became alarmed when House began sexually touching her. Complainant was justified in trusting House and he abused that trust.

***3** House also contends that these two aggravating factors are "elements" of the offense and therefore may not be used to support a departure. *See Gardner*, 328 N.W.2d at 162

(element of crime may not be used as basis for departure). Neither vulnerability of the victim nor abuse of trust is an element of criminal sexual conduct in the third degree. *See* Minn.Stat. § 609.344, subd. 1(c). Accordingly, the trial court was justified in relying on both factors.

3. Finally, the state asks this court to strike House's pro se supplemental brief because it was untimely served. The brief was filed three days after the time for filing expired. However, no prejudice was shown. After thorough review of the pro se brief, we find that the arguments lack merit.

Affirmed.

PARKER, Judge (dissenting),

***3** I respectfully dissent from affirmance of this double departure from the sentencing guidelines. As the decision on the sufficiency of the evidence issue makes clear, the evidence was minimally sufficient to sustain the conviction; this is, in part, the reason I think the sentence should be modified to that recommended by the guidelines.

I suggest further that the trial court appears to have used as justification for departure facts which constitute elements of the offense as it was committed:

(1) The trial court cited the victim's vulnerability due to extreme intoxication. It appears beyond doubt that but for her extreme intoxication, this assault would not have occurred. It seems evident that but for this particular vulnerability, there would have been no attempt at sexual misconduct.

(2) The trial court relied upon the defendant's position of authority as having put the victim in fear. This factor is relied upon in the majority opinion to vitiate the claim of consent; the majority concludes that the victim was coerced by the defendant's show of authority as a security guard and his possession of a gun.

In view of the minimal sufficiency of the evidence and the utilization of facts essential to that verdict (by vitiating his claim of consent) as reasons for departure, I believe modification of the sentence to the guidelines' presumptive level is required.

All Citations

Not Reported in N.W.2d, 1991 WL 42587

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Review Granted May 17, 2005

2005 WL 525522
Only the Westlaw citation is currently available.

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

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Chad Allen ROURKE, Appellant.

No. A03-1254.

|

March 8, 2005.

|

Review Granted May 17, 2005.

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

Attorneys and Law Firms

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

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

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

UNPUBLISHED OPINION

HUDSON, Judge.

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

FACTS

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

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

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

DECISION

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

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

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

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

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

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

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

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

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

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

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

***3 Reversed and remanded.**

All Citations

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

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