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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0625**

State of Minnesota,
Respondent,

vs.

Jesus Manuel Balvoa,
Appellant.

**Filed February 11, 2019
Reversed and remanded
Worke, Judge**

Ramsey County District Court
File No. 62-CR-17-5320

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John Choi, Ramsey County Attorney, Adam E. Petras, Assistant County Attorney, St. Paul,
Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Cleary, Chief Judge; and
Worke, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant argues that the district court erred in sentencing him to an upward durational departure without finding the existence of aggravating factors, and when none are evident from the record. We reverse and remand for resentencing.

DECISION

Appellant Jesus Manuel Balvoa was charged with two counts of first-degree criminal sexual conduct, second-degree criminal sexual conduct, and third-degree criminal sexual conduct following his July 8, 2017 assault of his 12-year-old niece. Balvoa pleaded guilty to second-degree criminal sexual conduct, admitted to an unspecified aggravating factor, and agreed to an aggravated sentencing range of 109-135 months in prison. The district court sentenced Balvoa to 135 months in prison. Balvoa challenges his sentence.

Although the parties agree that the district court erred by sentencing Balvoa to an upward durational departure without finding the existence of an aggravating factor, this court must still conduct an independent inquiry. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (noting the responsibility of appellate courts to decide cases in accordance with the law, regardless of whether the parties contest an issue).

A district court must impose the presumptive guidelines sentence unless there are “identifiable, substantial, and compelling circumstances” to warrant a departure. Minn. Sent. Guidelines 2.D.1 (2016). Substantial and compelling circumstances demonstrate that the defendant’s conduct “was significantly more . . . serious than that typically involved in the commission of the offense in question.” *State v. Edwards*, 774 N.W.2d 596, 601 (Minn.

2009). We review de novo whether a valid ground for a departure exists. *Dillon v. State*, 781 N.W.2d 588, 598 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

Here, the parties agreed to an aggravated sentencing range. “[N]egotiated plea agreements that include a sentencing departure are justified . . . in cases where substantial and compelling circumstances exist.” *State v. Misquadace*, 644 N.W.2d 65, 71 (Minn. 2002). But “[a] plea agreement standing alone . . . does not create such circumstances in its own right. Rather, when reviewing a plea agreement that includes a sentencing departure, the court must determine whether the offense of conviction reflects any aggravating . . . circumstances that warrant a departure.” *Id.* Thus, a district court must articulate proper and adequate reasons for an upward departure, and the record must include evidence supporting the departure. *Tucker v. State*, 799 N.W.2d 583, 586 (Minn. 2011); Minn. Sent. Guidelines 2.D.1.c (2016) (providing that “[i]n exercising the discretion to depart from a presumptive sentence, the [district] court must disclose in writing or on the record the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence”).

Balvoa’s presumptive sentence was 90 months in prison, the presumptive range was 90-108 months in prison. As part of his plea, Balvoa agreed to admit to an unspecified aggravating factor, waive a jury determination on an aggravating factor, and agreed to a sentence between 109-135 months in prison. At sentencing, the state asked the district court to impose a 135-month sentence and the district court did so. But the district court did not articulate reasons for imposing an aggravated sentence, and the warrant of

commitment indicates that Balvoa's 135-month sentence was not a departure from the sentencing guidelines.

The district court failed to make findings explaining why the facts of this case differed from a typical one and were therefore substantial and compelling enough to warrant a departure. *See State v. Yaritz*, 791 N.W.2d 138, 144 (Minn. App. 2010) (stating that district court's aggravating-factor findings provide reasons explaining substantial-and-compelling basis for departure), *review denied* (Minn. Feb. 23, 2011). But under the circumstances here, we may independently examine the record to determine if evidence exists to justify the departure. *See State v. Weaver*, 796 N.W.2d 561, 572-73 (Minn. App. 2011), *review denied* (Minn. Jul. 19, 2011).

Balvoa admitted to an unspecified aggravating factor and "waive[d] *Blakely*." He also submitted a "petition regarding aggravated sentence," in which he waived his right to a trial on the facts in support of an aggravated sentence, waived his right not to testify, and agreed to "tell the [district court] about the facts which support an aggravated sentence." *See Yaritz*, 791 N.W.2d at 144 (stating that because, due to *Blakely* waiver, the defendant agreed to have the district court determine whether aggravating factors existed based on the facts entered at the time of the plea, there was no need for the district court to make findings supporting departure). While a single aggravating factor may justify a departure, *Dillon*, 781 N.W.2d at 599, the record here does not include evidence justifying the departure.

The state argued that Balvoa should receive an upward durational departure because Balvoa committed the offense in the victim's zone of privacy, was in a place of trust over

the victim, caused the victim pain and ordered her to not tell anyone, exposed the victim to pregnancy and STDs, blamed the victim, and is not remorseful. In establishing the factual basis for his guilty plea, Balvoa admitted that he held his 12-year-old niece against her will, held her down, and touched her vagina with his hand. Balvoa admitted that he did it for his own sexual gratification. Balvoa admitted that he was 29 years old at the time, and that it occurred at the victim's residence. The only aggravating factor Balvoa admitted was that he committed the offense in the victim's home.

A district court may impose an upward departure when the facts support a finding that a defendant committed a crime in a victim's zone of privacy. *State v. Kindem*, 338 N.W.2d 9, 17-18 (Minn. 1983). The victim's zone of privacy includes a victim's home. *State v. Thao*, 649 N.W.2d 414, 421 (Minn. 2002). But this court has concluded that when the victim and the defendant share a residence, the victim has an expectation of privacy in her personal bedroom. *See State v. Mohamed*, 779 N.W.2d 93, 100 (Minn. App. 2010) (holding that father did not subject his son to serious physical abuse in his son's "zone of privacy" because there was no evidence that father committed the offense in the son's bedroom of their shared residence), *review denied* (Minn. May 18, 2010); *State v. Hagen*, 679 N.W.2d 739, 741 (Minn. App. 2004) (stating that violation of the zone of privacy was not an aggravating factor when the defendant lived in the same residence as the victim and the offense occurred in the defendant's basement living quarters, not in the victim's bedroom). Based on caselaw, Balvoa did not violate the victim's zone of privacy because Balvoa and the victim shared a residence and there is no evidence that the offense occurred in the victim's bedroom.

“[A]bsent a statement of the reasons for the sentencing departure placed on the record at the time of sentencing, no departure will be allowed.” *State v. Geller*, 665 N.W.2d 514, 517 (Minn. 2003) (holding that because the district court did not state reasons for departure on the record at the time of sentencing, it was not allowed to provide reasons for the departure on remand, and instead, was required to impose the presumptive guidelines sentence). The district court failed to state the reason for the departure at sentencing; thus, the matter should be remanded for resentencing.

While the parties agree that the matter should be remanded, they disagree with respect to resentencing. Balvoa argues that he should be sentenced to the 90-month presumptive sentence. The state contends that on remand, the parties should be allowed to argue for a sentence within the 90-108 month presumptive range because “any sentence within the presumptive range . . . constitutes a presumptive sentence.” *See State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

Balvoa cites *State v. Rannow*, which relied on *Geller*, in stating that when a district court fails to state reasons for the departure, “remand to the district court for another opportunity to state the reasons for departure is not the proper remedy. . . . Instead, a reviewing court must remand . . . for imposition of the presumptive guidelines sentence.” 703 N.W.2d 575, 580 (Minn. App. 2005). What *Geller* and *Rannow* make clear is that on remand, a district court may not reimpose the aggravated sentence and provide justifying reasons that were lacking when the sentence was initially imposed. Neither case states that a district court may not consider a sentence on remand that is within the presumptive range.

The Minnesota Sentencing Guidelines prescribe a sentencing range that is “presumed to be appropriate.” Minn. Sent. Guidelines 2.D.1. A district court must impose a sentence within the applicable range unless substantial and compelling circumstances distinguish the offender or the offense. *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014). Within that range, a district court has great discretion in sentencing. *Id.* at 307.

In *State v. Rushton*, the defendant pleaded guilty to first-degree criminal sexual conduct. 820 N.W.2d 287, 288 (Minn. App. 2012). The district court sentenced Rushton according to the plea agreement, which included a life sentence, with a minimum 300 months in prison, an upward departure from the presumptive guidelines sentence. *Id.* at 289. Rushton argued on appeal that the district court erred by setting the minimum term of imprisonment above the presumptive guidelines range. *Id.*

This court determined that Rushton’s presumptive guidelines range was 153-216 months in prison; thus, the 300-month sentence was an upward departure. *Id.* at 290. This court determined that the district court failed to articulate a substantial and compelling reason to justify the departure, and reversed and remanded this aspect of Rushton’s sentence with instructions to the district court to “set a minimum term of imprisonment within the presumptive guidelines range of 153 to 216 months.” *Id.* at 290-91 (citing *Geller*, 665 N.W.2d at 517).

Because any sentence within the presumptive range is a presumptive sentence, and there is precedent that on remand in these circumstances a district court may consider a sentence within the presumptive range, we agree with the state. The appropriate remedy

here is remand with instructions to consider a sentence within the presumptive range of 90-108 months in prison.

Reversed and remanded.