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**STATE OF MINNESOTA
IN COURT OF APPEALS
A15-1646**

State of Minnesota,
Respondent,

vs.

Rena Dawn Kramer,
Appellant.

**Filed March 12, 2018
Affirmed
Schellhas, Judge**

Mower County District Court
File No. 50-CR-14-801

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Kristen Nelsen, Mower County Attorney, Scott K. Springer, Assistant County Attorney,
Austin, Minnesota (for respondent)

John J. Leunig, Justin J. Duffy, The Law Office of John J. Leunig, Bloomington, Minnesota
(for appellant)

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

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges her convictions of first-degree assault and first-degree
burglary and her sentence, as well the district court's denial of her petition for

postconviction relief. She argues: (1) the district court (a) failed to vindicate her right to counsel of her choice by denying her continuance request, and (b) abused its discretion in imposing an upward durational departure; and (2) the postconviction court erred in denying (a) her ineffective-assistance-of-counsel claim, and (b) her motion to withdraw her guilty pleas and factual admissions related to the aggravating factors. We affirm.

FACTS

On April 8, 2014, respondent State of Minnesota charged appellant Renae Kramer with first-degree assault and first-degree burglary. Kramer severely injured an 85-year-old victim, who was a longtime acquaintance, while attempting to steal her prescription pain medication. Kramer pushed the victim down the stairs to her basement, saw the victim on the floor, left the victim in the dark, shut the basement door, left the house, and locked the door behind her. Emergency personnel rescued the victim after she activated her emergency-alert bracelet. The victim sustained two broken wrists, spinal fractures, and head injuries that caused bleeding in her brain and distorted vision. The injuries necessitated surgeries and rehabilitation therapy at a nursing home.

Kramer retained legal counsel in April 2014. In August 2014, the district court scheduled the trial for eight days in January 2015. The state provided pretrial notice that it intended to seek an aggravated sentence based on particular vulnerability of the victim and particular cruelty of the offense.

On the evening of January 15, 2015, Kramer advised her counsel that she wished to fire him and asked another attorney to represent her. At a hearing on January 16, the prosecutor withdrew the state's plea offer. After the hearing, Kramer's original counsel of

record moved to withdraw from representing Kramer due to an “irretrievable breakdown in the attorney client relationship.” The district court initially denied the motion.

On January 19, 2015, another attorney, whom Kramer wished to represent her, filed a substitution-of-counsel form, appeared in court the next day on Kramer’s behalf, and requested a continuance of the trial date so that he could prepare for trial and consult with a “psychiatrist, psychologist, or toxicologist, or all three.” The attorney did not argue that Kramer’s counsel of record had rendered ineffective assistance to Kramer. The attorney advised the district court that if it did not grant a continuance, he could not adequately or ethically represent Kramer. The district court denied a continuance, and Kramer waived her right to counsel and stated that she wished to proceed to trial pro se.

On January 21, 2015, Kramer hired a new attorney (plea attorney), who was able to revive the state’s original plea offer. With assistance of the plea attorney, Kramer pleaded guilty to first-degree assault and first-degree burglary. The district court and the plea attorney reviewed Kramer’s rights on the record, and Kramer admitted to facts to support her plea and the aggravating factors. At the plea hearing, Kramer’s attorney asked for a sentencing hearing that was “out a bit,” stating that he had “to get files from two different attorneys to prepare for sentencing” and did not have “all the work product right now.”

The district court concluded that Kramer’s *Blakely*¹ trial-rights waiver on the aggravating factors was insufficient and therefore conducted an additional hearing on

¹ In *Blakely v. Washington*, the Supreme Court ruled that a criminal defendant has the Sixth Amendment right to a jury trial on aggravating factors that would enhance a sentence. 542 U.S. 296, 304, 124 S. Ct. 2531, 2537–38 (2004).

April 15, 2015. Kramer waived her rights to a *Blakely* trial and again admitted facts to support the previously identified aggravating factors. At sentencing, the district court granted the state’s upward-departure motion on the bases of particular vulnerability and particular cruelty and sentenced Kramer to 180 months’ imprisonment.

Kramer petitioned for postconviction relief on eight grounds. The postconviction court granted an evidentiary hearing on Kramer’s plea-withdrawal claim and her claim that her plea counsel rendered ineffective assistance but denied her other claims. Following an evidentiary hearing, the postconviction court denied Kramer’s petition for postconviction relief in its entirety.

This appeal follows.

D E C I S I O N

Denial of trial continuance

Kramer argues that the district court abused its discretion and violated her constitutional rights by denying her continuance motion days before the start of trial. “A guilty plea by a counseled defendant has traditionally operated, in Minnesota and in other jurisdictions, as a waiver of all non-jurisdictional defects arising prior to the entry of the plea.” *State v. Jeffries*, 806 N.W.2d 56, 64 (Minn. 2011) (quotation omitted). When a defendant admits in open court that she is guilty of an offense charged, she “may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” *Id.* (quotation omitted); *but see Class v. United States*, No. 16-424, 2018 WL 987347, at *6 (U.S. Feb. 21, 2018) (recognizing that “guilty plea does implicitly waive some claims, including some constitutional claims,” but

holding that guilty plea by itself does not bar federal criminal defendant from challenging constitutionality of statute of conviction on direct appeal). Here, Kramer does not challenge the constitutionality of the statute of conviction, and her guilty plea operated as a waiver of the prior defects she raises on appeal, including the district court's denial of her continuance. The district court did not abuse its discretion by denying Kramer's request for a continuance.

Ineffective assistance of counsel

Kramer argues that the district court improperly denied relief on her ineffective-assistance-of-counsel claim. An abuse-of-discretion standard applies when reviewing a postconviction court's decision, and an appellate court examines whether the postconviction court's findings are supported by sufficient evidence. *State v. Whitson*, 876 N.W.2d 297, 303 (Minn. 2016). An appellate court reviews factual findings for clear error, and legal conclusions de novo. *Id.*

A criminal defendant has the right to "effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). This right extends to the plea negotiation process. *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994). In an ineffective-assistance-of-counsel claim the defendant must show (1) counsel's performance was deficient, meaning it "fell below an objective standard of reasonableness," and (2) the deficient performance prejudiced the defense, that is but for counsel's unprofessional errors, the result would have been different. *Id.* (quotation omitted).

Performance

Kramer alleges that her plea attorney's performance was objectively unreasonable because he failed to (1) advise her of the true nature of the sentence she would receive under the plea bargain, (2) advise her of her rights regarding the aggravating factors, and (3) conduct a further investigation into the facts before advising her to plead guilty.

"The first *Strickland* prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S. Ct. 1473, 1482 (2010) (quotation omitted). "[D]efense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 566 U.S. 134, 145, 132 S. Ct. 1399, 1408 (2012).

Regarding Kramer's allegation that her plea attorney failed to advise her on the nature of the plea bargain and her rights regarding the aggravating factors, the district court found that the plea attorney discussed with Kramer "the [state's] plea offer, the potential sentence that she would face if she was convicted and the aggravating factors were found," and that Kramer would have to waive her rights to a *Blakely* trial and stipulate to facts underlying two aggravating factors. Additionally, the plea attorney testified that he had an extensive conversation with Kramer about her case, and that he "thoroughly" went over the plea petition with her.

Kramer argues that these findings are clearly erroneous because the plea attorney was "simply not credible" and that the court's credibility findings were "simply not

supported by the record.” In essence, Kramer asks us on review to find that her testimony at the evidentiary hearing was credible and that the plea attorney’s testimony was not. But, “[i]t is the province of the fact-finder to determine the weight and credibility to be afforded the testimony of each witness.” *State v. Kramer*, 668 N.W.2d 32, 38 (Minn. App. 2003), review denied (Minn. Nov. 18, 2003). This is especially true when resolution of the case depends on conflicting testimony. *Id.* The district court credited the plea attorney’s testimony, and we decline to override the district court’s credibility determination.

Further, Kramer argues that the district court’s findings regarding the plea attorney’s level of advisement and preparation are clearly erroneous because he stated that he did not possess certain documents in Kramer’s file and was only retained to revive the plea deal. Kramer also asserts that the plea attorney could not have met Kramer’s father in his office on January 20 between 3:30 and 5:30 p.m. because Kramer, and her file, were in court at that time.

Findings are clearly erroneous “only if the reviewing court is left with the definite and firm conviction that a mistake has been made.” *State v. Roberts*, 876 N.W.2d 863, 868 (Minn. 2016). After reviewing the record, we are not left with such a conviction. First, the plea attorney’s testimony makes clear that the meeting with Kramer’s father, while initially thought to be between 3:30 and 5:30 p.m., could have occurred later in the afternoon or evening. Second, the attorney’s statement that he did not “have all the work product” implied that he had reviewed Kramer’s file. Third, the fact that the attorney went over possible defenses and trial tactics with Kramer is not inconsistent with the attorney being hired to revive the plea deal.

As to Kramer's claim of a failure to investigate, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. "It is within trial counsel's discretion to forgo investigation of leads not reasonably likely to produce favorable evidence." *Gustafson v. State*, 477 N.W.2d 709, 713 (Minn. 1991). In an ineffectiveness-of-counsel case, counsel's decision to not investigate is given a "heavy measure of deference," and is assessed for reasonableness, examining all of the circumstances. *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.*

The district court determined that the plea attorney's decision to forgo further investigation was not objectively unreasonable because (1) no additional investigation was likely to produce favorable evidence, and (2) Kramer limited the plea attorney's representation to reviving the state's plea offer. The district court did not err in its determinations. The plea attorney stated that he had read Kramer's file, and based on the information in that file a reasonable defense attorney could have decided that additional research into a mental-illness or involuntary-intoxication defense would have been fruitless. Two doctors retained by Kramer's first attorney, reviewed Kramer's first psychological evaluation under Minn. R. Crim. P. 20.02, which assessed Kramer's mental state at the time of the offense. Both doctors agreed with the state's examiner that Kramer was not laboring under such a defect of reason during the offense as to not know the nature of her acts.

In order to assert an involuntary-intoxication defense Kramer would have had to show that she became “unexpectedly intoxicated due to the ingestion of a medically prescribed drug.” *Minneapolis v. Altimus*, 306 Minn. 462, 469, 238 N.W.2d 851, 857 (1976) (discussing the various forms of the involuntary-intoxication defense). When raising such a defense, “the defendant must not know, or have reason to know, that the prescribed drug is likely to have an intoxicating effect.” *Id.* at 470, 238 N.W.2d at 857. The record evidence that Kramer’s plea attorney said that he reviewed shows that Kramer was addicted to narcotics and was *voluntarily* under the influence of drugs the day of the offense. Furthermore, the state’s evidence was strong in this case. Kramer was potentially facing 234 months in prison for the first-degree-assault charge; Kramer’s first attorney explored possible defenses to no avail; and Kramer hired the plea attorney to resurrect the plea offer. Given the circumstances, the plea attorney made a reasonable choice to forgo further investigation and advise Kramer to accept the plea offer.

Prejudice

Kramer also cannot show prejudice. When a defendant pleads guilty and later asserts ineffective assistance of counsel, she must demonstrate “a reasonable probability that, but for counsel’s ineffective representation,” she would not have entered her plea. *Johnson v. State*, 673 N.W.2d 144, 148 (Minn. 2004). “A reasonable probability means a probability sufficient to undermine confidence in the outcome.” *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009) (quotation omitted).

Even assuming that Kramer’s plea attorney failed to properly advise her of her rights and the consequences of her plea, the district court fully advised Kramer on the record at

two separate hearings on her constitutional rights, her rights to a separate trial under *Blakely*, and the potential sentence she could receive. And assuming the plea attorney's decision to forgo further investigation was unreasonable, Kramer does not allege that her first attorney, who also advised her to accept the plea offer, was ineffective. In sum, Kramer cannot show that but for her plea attorney's supposed deficient performance, the result would have been different, and the district court did not abuse its discretion by denying Kramer's ineffectiveness-of-counsel claim.

Denial of plea withdrawal

Kramer argues that the district court erred in denying her petition for postconviction relief on her plea-withdrawal claim. Kramer argues that her guilty plea and aggravating-fact admissions were invalid because they were not intelligent, voluntary or accurate.

"A defendant has no absolute right to withdraw a guilty plea after entering it." *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). After sentencing has occurred, a district court must allow withdrawal of a guilty plea if necessary to correct a "manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. "A manifest injustice exists if a guilty plea is not valid." *Raleigh*, 778 N.W.2d at 94. "To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent." *Id.* Whether a guilty plea is valid is a question of law that this court reviews de novo. *Id.* The burden is on Kramer to show that her plea is invalid. *Lussier v. State*, 821 N.W.2d 581, 588 (Minn. 2012).

Intelligence

A plea must be intelligent “to insure that the defendant understands the charges, understands the rights he is waiving by pleading guilty, and understands the consequences of his plea.” *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983).

Kramer argues that her plea and admissions were not intelligent because she was not aware of the consequences of her plea and her admissions. As previously discussed, the district court’s findings that Kramer was adequately advised of her rights and the consequences of her plea and admissions has a strong basis in the record. Kramer’s plea of guilty and her admissions were intelligently made.

Voluntariness

“The voluntariness requirement ensures a defendant is not pleading guilty due to improper pressure or coercion.” *Raleigh*, 778 N.W.2d at 96. To determine whether a plea is voluntary, appellate courts examine what the parties reasonably understood to be the terms of the plea agreement. *Id.*

Kramer again asserts she was not properly advised and that her plea attorney improperly pressured her to enter her plea and admissions by telling her a guilty plea was her “only option” and by whispering to her at her plea hearing that she was required to say “yes.” Again, the district court did not find Kramer or her father’s testimony credible and instead credited the plea attorney’s testimony. The plea attorney denied making statements improperly pressuring Kramer to plead guilty and make admissions. Kramer’s plea attorney and first attorney said that they explained the plea offer to Kramer multiple times.

The district court also fully explained the plea deal and Kramer said she understood. The plea was voluntary.

Accuracy

A plea must be accurate in order to “protect a defendant from pleading guilty to a more serious offense than he could be convicted of were he to insist on his right to trial.” *Trott*, 338 N.W.2d at 251. “To be accurate, a plea must be established on a proper factual basis.” *Raleigh*, 778 N.W.2d at 94. A district court will satisfy the requirement for a proper factual record “by asking the defendant to express in his own words what happened.” *Id.* A district court should be particularly wary of situations in which the factual basis is established by asking a defendant only leading questions. *Id.*

Here, Kramer is correct that the colloquies of her guilty plea and aggravating-fact admissions consisted entirely of counsel’s leading questions and Kramer’s one- and two-word answers. No one at the plea hearing asked Kramer to recount in her own words what she did to commit the charged crimes. But leading questions during a plea colloquy, by themselves, do not invalidate a guilty plea. *Barnslater v. State*, 805 N.W.2d 910, 914 (Minn. App. 2011). “A defendant may not withdraw his plea simply because the court failed to elicit proper responses *if the record contains sufficient evidence to support the conviction.*” *Raleigh*, 778 N.W.2d at 94 (emphasis added); see *Lussier* 821 N.W.2d at 589 (examining grand-jury transcript to assess accuracy of plea and concluding that “plea petition and colloquy may be supplemented by other evidence to establish the factual basis for a plea”); *Trott*, 338 N.W.2d at 252 (examining complaint and pictures of victim in assessing accuracy of plea when the defendant “freely admitted” allegations).

Here, the record contains sufficient evidence to support a conviction of first-degree assault. The victim's testimony at her deposition, the police reports, and complaint show that Kramer intentionally pushed the victim down a flight of stairs, causing her injuries. The victim's injuries constituted "great bodily harm" because they caused a high probability of death when she hit her head and bled, and the injuries led to a "permanent or protracted loss or impairment of the function" of her hands and vision. *See* Minn. Stat. §§ 609.02, subd. 8, .221, subd. 1 (2012) (defining "great bodily harm" and first-degree assault).

Sufficient evidence in the record also supports Kramer's conviction of first-degree burglary. The record shows that Kramer entered the victim's home and remained inside after the victim demanded that Kramer leave. *See* Minn. Stat. § 609.581, subd. 4 (2012) (providing that "enters a building without consent" means "to remain within a building without the consent of the person in lawful possession"). The record demonstrates that Kramer entered the victim's home with the intent to steal her pills, and assaulted the victim to accomplish this goal. *See* Minn. Stat. § 609.582, subd. 1 (2012) (defining first-degree burglary).

The record also contains sufficient facts underlying the aggravating factors. The victim lived alone and was 85 years old, 4'11" tall, and weighed 80 pounds. After Kramer pushed the victim down the stairs, she observed the victim in her injured state, left the victim in a dark basement, and locked the door to the victim's home.

In sum, although the colloquies of the guilty pleas and admissions contained only leading questions, the record provides substantial credible evidence in support of Kramer's

convictions and facts underlying the aggravating factors. The postconviction court did not err in rejecting Kramer's plea-withdrawal claim.

Upward-durational-departure sentence

Kramer had a criminal-history score of one at sentencing. The presumptive sentence for first-degree assault was 98 months in prison. Minn. Sent. Guidelines 4.A. (2014). Kramer argues that the district court improperly granted the state's motion for an aggravated sentence of 180 months based on the aggravating factor of "particular cruelty." Appellate courts review a district court's decision to depart from the presumptive guidelines sentence for an abuse of discretion. *Tucker v. State*, 799 N.W.2d 583, 585–86 (Minn. 2011). "An upward departure will be reversed if the sentencing court's articulated reasons for the departure are improper or inadequate and the evidence in the record is insufficient to justify the departure." *Id.* at 586 (quotations omitted).

A district court may depart upward from the presumptive sentence under the Minnesota Sentencing Guidelines "provided that the court finds and makes a record of a substantial and compelling justification for a departure." *State v. Misquadace*, 644 N.W.2d 65, 69 (Minn. 2002); Minn. Sent. Guidelines 2.D (2014). Proper reasons to depart upward include the victim's particular vulnerability due to age, and because "[t]he victim was treated with particular cruelty." Minn. Sent. Guidelines 2.D.3. The district court used these two reasons to depart, and therefore its reasons were proper.

A sentencing court may not base an upward departure on factors that the legislature has already taken into account in determining the degree of the seriousness of the offense. *State v. Thompson*, 720 N.W.2d 820, 830 (Minn. 2006). Something more than the elements

of the offense must exist to justify a departure. *State v. Blegen*, 387 N.W.2d 459, 464 (Minn. App. 1986), *review denied* (Minn. July 31, 1986). The question here is whether the cruelty inflicted by Kramer upon the victim was “greater than the personal injury already included as an element of the crime.” *Id.*

Kramer contends that evidence in the record was insufficient to justify the departure based on particular cruelty because first-degree assault, by its nature, is inherently cruel and her offense was not significantly more serious than a typical first-degree assault case. Kramer also argues that her conduct did not rise to the cruelty shown in a number of assault cases that resulted in affirmed upward departures. For these propositions, Kramer cites the following: *State v. Felix*, 410 N.W.2d 398, 400 (Minn. App. 1987) (affirming upward departure when “the assault was particularly vicious and torturous in that the victim lost consciousness early and repeatedly was beaten by the defendant”), *review denied* (Minn. Sept. 29, 1987); *State v. Anderson*, 370 N.W.2d 703, 706–07 (Minn. App. 1985) (affirming upward departure involving repeated beatings and stamping of victim’s head), *review denied* (Minn. Sept. 19, 1985); *State v. Davis*, 540 N.W.2d 88, 91 (Minn. App. 1995) (upward departure affirmed in assault with kicking of pregnant woman), *review denied* (Minn. Jan. 31, 1996); *State v. Steinhaus*, 405 N.W.2d 270, 271–72 (Minn. App. 1987) (upward departure affirmed in assault with multiple beatings of infant causing severe injuries). While these cases involve egregious conduct, we are not persuaded that they demonstrate the converse: that Kramer’s conduct was not egregious and only involved a “typical” first-degree assault.

Kramer also relies on *State v. Saharath*, 355 N.W.2d 312, 314 (Minn. App. 1984), in which this court ruled that the district court abused its discretion in granting an upward departure in an assault case because its basis for the departure was merely that the victim sustained a “severe and permanent physical injury.” This case does not involve the “typical” first-degree assault injuries like in *Saharath*. A victim’s severe injuries may be considered as an aggravating factor when the injuries involve all the defining factors of “great bodily harm.” *Felix*, 410 N.W.2d at 401.

Here, due to the victim’s head injury and Kramer’s decision to leave the victim locked in her home on the basement floor, the victim was subject to a “high probability of death” and “permanent or protracted loss or impairment” of a body part due to her injured wrists, back, and distorted vision, and “other serious bodily harm” due to her ongoing continued pain, and need for wrist surgeries. See Minn. Stat. § 609.02, subd. 8 (defining “great bodily harm”).

Furthermore, as the state notes, the district court based its particular-cruelty departure on the manner in which Kramer inflicted the injuries on the victim, not only the injuries themselves. For example, the district court noted that the assault was particularly cruel because the victim was 85 years old, weighed 80 pounds, and Kramer “pried” the victim’s hands off the railing in order to push her down the stairs. The court also found that Kramer acted particularly cruel when, after observing the victim’s injuries at the bottom of the stairs, Kramer walked upstairs and locked the door behind the victim, leaving her alone in the basement. We agree with the district court that the manner in which Kramer completed the assault was particularly cruel.

Citing *Tucker*, 799 N.W.2d at 587, Kramer argues that “[f]leeing the scene of the offense and abandoning the victim is typical behavior” in an assault case. But Kramer did not flee the scene once she pushed the victim. She coldly walked up the basement stairs and spent about ten minutes looking through drawers for pills. The victim was too frightened to press her emergency-alert bracelet until Kramer left the home.

Kramer argues that the district court’s finding that Kramer “pried” the victim’s hands off of the stair railing has no basis in the record. Findings of fact are reviewed for clear error. *State v. Blom*, 682 N.W.2d 578, 616 (Minn. 2004) “Pry” means to “raise, move or force open with a lever,” or “to obtain with effort or difficulty.” *The American Heritage Dictionary* 1413 (4th ed. 2006). The victim said that her hand was on a staircase railing when Kramer pushed her and that because of Kramer’s two-handed push against her chest she could not hold on anymore. Kramer was only able to move and force the victim’s hand off the railing with the leverage of her push and with “effort or difficulty.” The district court’s finding is not clearly erroneous, and the court did not abuse its discretion by imposing the upward-departure sentence.

Disparate sentence

Kramer argues that her sentence of 180 months is excessive. An appellate court affords a district court “great discretion in the imposition of sentences” and will not “simply substitute [its] judgment for that of the [district] court.” *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999).

Even when an upward departure is justified “the extent of the departure should be limited to that justified by the reason for the departure.” *State v. Schantzen*, 308 N.W.2d

484, 487 (Minn. 1981). After considering the whole record, an appellate court may limit a departure, when it has “a strong feeling” that the sentence is not “proportional to the severity of the offense of conviction and the extent of the offender’s criminal history.” *Id.* (footnote and quotation omitted). In judging whether a sentence is disproportionate, an appellate court’s decision “must be based on [its] collective, collegial experience in reviewing a large number of criminal appeals from all the judicial districts.” *Spain*, 590 N.W.2d at 89 (quotation omitted).

Generally, the “upper limit” of an upward departure is double the presumptive sentence. *State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981). But rare cases exist where the appropriate sentence may be the statutory maximum, which in this case is 240 months. *Id.*; Minn. Stat. § 609.221, subd. 1. A 196-month sentence would have been a double durational departure from the presumptive sentence of 98 months. The district court’s sentence of 180 months did not exceed the “upper limit” in *Evans*. See 311 N.W.2d at 483 (stating that the upper limit of upward departure is double presumptive sentence).

Kramer argues that statistics from the Minnesota Sentencing Guidelines Commission show her sentence is excessive. Kramer states that from 2005–2014, the statewide average sentence imposed on a first-degree-assault conviction when the defendant had a criminal-history score of one was 99.5 months. These statistics are not convincing, though, because they do not show the average sentence received for a first-degree assault with two aggravating factors found, as is the case for Kramer.

On several occasions, this court has upheld sentences in first-degree assault cases with more than a double upward departure:

In *State v. Leonard*, we concluded that the defendant's continued assaults on an infant justified a nearly triple durational departure to the statutory maximum sentence. 400 N.W.2d 206, 210 (Minn. App. 1987). In *State v. Wickstrom*, we affirmed a 2.5 times departure from the presumptive sentence for a defendant who beat and kicked a woman who was eight months pregnant for 20 minutes in the presence of her child. 405 N.W.2d 1, 6–7 (Minn. App. 1987), *review denied* (Minn. June 30, 1987). And in *State v. Steinhaus*, we upheld a departure that resulted in a sentence that nearly tripled the presumptive sentence when a father severely beat his five-week-old son. 405 N.W.2d 270, 271–72 (Minn. App. 1987).

Dillon v. State, 781 N.W.2d 588, 602 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). While Kramer's assault of the victim in this case was not continued or prolonged, it was committed against a vulnerable victim resulting in the infliction of serious permanent injuries. We therefore do not have "a strong feeling" that Kramer's sentence of less than a double durational departure is excessive or disproportionate to the severity of the offense.

Affirmed.