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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1198**

State of Minnesota,
Respondent,

vs.

Steven Michael Gutierrez,
Appellant.

**Filed September 5, 2017
Affirmed
Peterson, Judge**

Ramsey County District Court
File No. 62-CR-15-5966

Lori Swanson, 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, Sara J. Euteneuer, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Peterson, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

Appellant argues that the evidence is insufficient to support his convictions of attempted first- and second-degree murder and the upward durational departure in his sentence for attempted first-degree murder. We affirm.

FACTS

On the night of July 31, 2015, appellant Steven Michael Gutierrez argued with his girlfriend, J.K., in their home. J.K.’s adult brother, T.M., also was present in the home. The argument escalated to a hostile breakup, and Gutierrez grabbed some of his belongings and left in his work van after scattering on the floor the cremated remains of J.K.’s pet rabbit.

About an hour later, Gutierrez reentered the home and led J.K. out the back door. Gutierrez expressed a desire to reconcile with J.K., but J.K. told Gutierrez to leave. When J.K. tried to go back inside, Gutierrez “lunged” at her and “tackled” her to the ground. T.M. ran outside and jumped on Gutierrez. During the struggle, Gutierrez put his hands to J.K.’s neck, and J.K. felt a “tug” on the right side of her neck. Gutierrez then got up and ran away.

Blood began “squirt[ing]” from a wound in J.K.’s neck. T.M. called 911, and J.K. went inside, lay on the floor, and held a towel to her neck. When police and paramedics arrived, they found J.K. lying in a large pool of blood with a “gaping” neck wound. J.K. was taken by ambulance to a hospital, where she received emergency surgery to repair a life-threatening “slash” to her neck about 12 centimeters long and 5 centimeters wide.

Neither J.K. nor T.M. saw Gutierrez with a weapon that night. Police later found in Gutierrez's work van a box of razor blades with one blade missing. J.K.'s trauma surgeon opined that her neck wound was "most consistent" with a wound caused by a "sharp blade," such as a razor blade, and involved "an excessive amount of force." Because of the wound, J.K. has a scar that extends from the base of her hairline behind her right ear to the center of her throat, and her voice is deeper and raspier than it was before the attack.

Respondent State of Minnesota charged Gutierrez with attempted first-degree murder (premeditated), attempted second-degree murder (intentional), and first-degree assault (great bodily harm). After a five-day trial, a jury found Gutierrez guilty of the charged offenses and of the lesser included offense of fifth-degree assault (harm). The jury also found by special verdict that (1) Gutierrez's weight exceeded J.K.'s weight by more than 100 pounds on July 31, 2015; (2) J.K. was pregnant on July 31, 2015; (3) Gutierrez was aware, on July 31, 2015, that J.K. was pregnant; (4) J.K. suffered a "permanent disfigurement" as a result of the attack; and (5) J.K. suffered a "permanent injury" as a result of the attack. The district court sentenced Gutierrez to 240 months in prison for attempted first-degree murder, an upward durational departure, based on the aggravating factors of J.K.'s particular vulnerability and the particular cruelty with which Gutierrez committed the offense.

DECISION

I.

"When the direct evidence of guilt on a particular element is not alone sufficient to sustain the verdict," appellate courts apply a heightened two-step standard of review.

Loving v. State, 891 N.W.2d 638, 643 (Minn. 2017). In the first step, appellate courts “identify the circumstances proved by the State,” deferring to “the jury’s acceptance of the State’s evidence and its rejection of any evidence in the record that is inconsistent with the circumstances proved by the State.” *Id.* The first step “requires an appellate court to winnow down the evidence presented at trial by resolving all questions of fact in favor of the jury’s verdict, resulting in a subset of facts that constitute ‘the circumstances proved.’” *State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017). In the second step, appellate courts independently determine “whether a reasonable inference of guilt can be drawn from the circumstances proved, viewed as a whole, and whether a reasonable inference inconsistent with guilt can be drawn from the circumstances proved, again viewed as a whole.” *Id.* “To sustain the conviction, the circumstances proved, when viewed as a whole, must be consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *Id.* at 601.

Gutierrez contests his convictions of attempted first- and second-degree murder, arguing that the evidence was insufficient to prove intent to kill and premeditation beyond a reasonable doubt. A person is guilty of attempted first-degree murder (premeditated) if he (1) intends to cause the death of another person; (2) engages in premeditation regarding a murderous act toward that person; and (3) takes a substantial step, beyond mere preparation, toward causing the death of that person. Minn. Stat. §§ 609.17, subd. 1, .185(a)(1) (2014). A person is guilty of attempted second-degree murder (intentional) if he (1) intends to cause the death of another person; and (2) takes a substantial step, beyond

mere preparation, toward causing the death of that person. Minn. Stat. §§ 609.17, subd. 1, .19, subd. 1(1) (2014).

A person acts with intent to kill if he “either has a purpose to . . . cause the result” of another person’s death “or believes that the act, if successful, will cause that result.” See Minn. Stat. § 609.02, subd. 9(4) (2014) (defining mental states, including “[w]ith intent to”). “Intent may be inferred from events occurring before and after the crime and may be proved by circumstantial evidence.” *State v. Rhodes*, 657 N.W.2d 823, 840 (Minn. 2003). Also, “[i]ntent can be inferred from the idea that a person intends the natural consequences of his or her actions.” *Nelson v. State*, 880 N.W.2d 852, 860 (Minn. 2016) (quotation omitted). And “[i]ntent to cause death can be inferred from the nature and extent of the victim’s wounds and the defendant’s failure to aid the victim after an assault.” *Id.* (quotation omitted).

The following circumstances were proved at trial. Soon after a heated argument that culminated in a breakup, Gutierrez physically led J.K. out of their home at night, away from T.M., and against her stated wishes. When J.K. rebuffed Gutierrez’s attempts to “work it out” and tried to go back inside, Gutierrez lunged at her and tackled her to the ground. As Gutierrez and J.K. “wrestled” on the ground and T.M. joined in the fray, Gutierrez used a sharp blade and an “excessive amount of force” to make a single, deep gash to J.K.’s neck, about 12 centimeters long and about 5 centimeters wide. Then Gutierrez got up and ran away.

The wound to J.K.’s neck was life-threatening: her external and internal jugular veins and vertebral artery were transected, and she lost a great deal of blood. By the time

she was rushed into emergency surgery, she was near death. Though J.K. ultimately survived Gutierrez's attack, she has a permanent scar from the base of her hairline behind her right ear to the center of her throat, and her voice is deeper and raspier than it was before the attack.

A reasonable inference that Gutierrez intended to kill J.K. can be drawn from the circumstances proved, viewed as a whole. J.K. rejected Gutierrez's attempts to reconcile and told him to leave the home that they shared mere hours before. He physically overpowered her and forcefully slashed her throat with a sharp blade. The natural and probable consequence of that act is J.K.'s death, which certainly would have occurred absent medical intervention. And Gutierrez fled immediately after wounding J.K. instead of trying to save her. *See State v. Mills*, 290 N.W.2d 616, 617 (Minn. 1980) (considering evidence that defendant tried to flee among evidence of defendant's guilt).

No reasonable inference that Gutierrez did not intend to kill J.K. can be drawn from the totality of the circumstances proved. In support of his argument that "[t]he circumstances proved by the state are not inconsistent with the alternative, rational hypothesis that Gutierrez did not subjectively intend to kill [J.K.] but only intended to assault her," Gutierrez selectively chooses from the circumstances proved, viewing facts in isolation and distinguishing the facts in this case from the facts in caselaw that found the evidence sufficient to support an inference of intent to kill. For instance, Gutierrez cites cases that found an inference of intent to kill sufficiently supported by the defendant's failure to aid a wounded victim and notes that in his case, "Gutierrez fled but did not leave [J.K.] without assistance," because T.M. was present. Gutierrez also cites cases that found

an inference of intent to kill sufficiently supported by the defendant's infliction of multiple wounds on a victim and points out that J.K. had a "single wound."

We reject Gutierrez's attempts to focus on particular details while ignoring the broader picture. *See State v. Robertson*, 884 N.W.2d 864, 872 (Minn. 2016) (stating that "[w]hen viewed in isolation, the facts cited by [the defendant] might support a rational inference other than guilt. But we view the circumstances proved as a whole."). We conclude that the circumstances proved, viewed as a whole, are inconsistent with any rational hypothesis except that Gutierrez intended to kill J.K. Sufficient evidence supports Gutierrez's conviction of attempted second-degree murder, and sufficient evidence supports the intent element of Gutierrez's conviction of attempted first-degree murder.

A person engages in premeditation regarding an act if he "consider[s], plan[s] or prepare[s] for, or determine[s] to commit, the act . . . prior to its commission." Minn. Stat. § 609.18 (2014). To prove that a defendant engaged in premeditation regarding a murderous act, "the State must prove that . . . after the defendant formed the intent to kill, some appreciable time passed during which the consideration, planning, preparation or determination prior to the commission of the act took place." *Loving*, 891 N.W.2d at 644 (quotation omitted). Like intent, premeditation may be proved by circumstantial evidence and may be inferred from evidence regarding "the actions taken by the defendant before and after the crime," including evidence of "planning activity, motive, and the nature of the killing." *Id.* at 643-44.

"Planning activity consists of facts about how and what the defendant did prior to the actual killing which show he was engaged in activity directed toward the killing." *State*

v. Palmer, 803 N.W.2d 727, 734 (Minn. 2011) (quotation omitted). “Planning activity may consist of prior possession of the murder weapon by the defendant, sneaking up on the prospective victim, or taking the prospective victim to a location where others are unlikely to intrude.” *Id.* (quotation omitted). Motive to kill, as relevant to premeditation, may exist due to the deterioration or end of the defendant’s relationship with the victim or the defendant’s serious argument with the victim. *State v. Moore*, 846 N.W.2d 83, 89 (Minn. 2014). And the nature of the killing may indicate premeditation where the defendant deliberately places a wound on a vital part of the victim’s body. *State v. Ortega*, 813 N.W.2d 86, 101 (Minn. 2012).

The following circumstances were proved in this case. As Gutierrez and J.K. argued and ended their relationship, Gutierrez gathered some of his belongings, scattered the remains of J.K.’s beloved pet on the floor, and left in his work van, which contained a box of razor blades. Shortly after Gutierrez left, he sent a text message to T.M. that said, “Tell her to come talk to me.” J.K. immediately responded with a text message that contained an expletive-backed refusal. About an hour later, Gutierrez reentered the home without knocking and asked J.K. to go outside and talk. When J.K. refused, Gutierrez took her by the arm, led her outside, and “persisted on talking.” J.K. repeatedly refused to talk, told Gutierrez to leave, and told him that she wanted to go back inside.

J.K. moved to go back inside, and Gutierrez “lunged at [her] kind of like when football players tackle each other,” taking her to the ground. While on top of her, and as T.M. physically intervened in the fray, Gutierrez used an unseen sharp blade to forcefully slash J.K.’s throat and neck, transecting muscles and blood vessels from about the center

of her throat to the base of her hairline behind her right ear. Then Gutierrez got up and ran away, leaving J.K. on the ground bleeding from the gaping neck wound that he had inflicted.

A reasonable inference that Gutierrez engaged in premeditation before attacking J.K. can be drawn from the circumstances proved, viewed as a whole. The intense argument, contentious breakup, and J.K.'s rejection of Gutierrez's attempts to reconcile provided Gutierrez with a motive to kill. While Gutierrez was away from the home for a short time, he located or acquired a razor blade or other sharp blade. He had that blade when he reentered the home, and he held or carried it in such a way that it was not visible. He made J.K. go outside with him, at night and away from T.M., with the blade still concealed in or near his hand. At some point, he used the blade to slash J.K.'s throat. He then fled without rendering aid to J.K.

The circumstances proved are inconsistent with any rational hypothesis except that Gutierrez premeditated the attack on J.K. Regarding planning activity, Gutierrez minimizes the fact that he secured and concealed a weapon, arguing that "[t]hese behaviors, even if consistent with having premeditated an attempt to kill [J.K.], are also equally consistent with Gutierrez having initially only intended to use the unseen weapon to scare or injure her." Gutierrez again selects some circumstances proved, while discounting or ignoring others, and asks us to disregard the entirety of the circumstances proved. Given the extremely serious wound inflicted on a vital part of J.K.'s body and the amount of force needed to inflict the wound, we cannot reasonably infer a plan to merely scare or injure J.K.

Regarding motive, Gutierrez emphasizes evidence that “[he] returned [to the home] to repair [his] relationship with J.K.” Gutierrez contends that the state presented “no evidence that he was so angry over their argument that he would kill her,” and argues that the circumstances proved do not “exclude the alternative, rational inference that [murderous] intent arose spontaneously and without an intervening period of appreciable time before the attempt itself occurred.” But he fails to credit other evidence proving that, even as he tried to “work it out” with J.K., he was concealing a sharp blade in or near his hand and, when J.K. refused to participate in relationship repair, he used that blade to slash her throat. This evidence does not support an inference that an intent to kill arose in Gutierrez without warning and with *no* appreciable time before he put that intent into action.

Finally, Gutierrez makes conclusory claims that “the nature of the physical altercation . . . simply cannot exclude the rational hypothesis that any attempt to kill [J.K.] had not been premeditated,” but he fails to support those claims with citations to authority or to the record. Gutierrez directed his attack to J.K.’s neck, a vital part of her body, and he makes no attempt to distinguish the caselaw, cited above, that holds that the nature of a murderous attack may indicate premeditation when the defendant deliberately places a wound on a vital part of the victim’s body.

We conclude that the circumstances proved, viewed as a whole, are inconsistent with any rational hypothesis except that Gutierrez’s attack on J.K. was premeditated. Sufficient evidence supports Gutierrez’s conviction of attempted first-degree murder.

II.

The Minnesota Sentencing Guidelines provide sentencing ranges that are “presumed to be appropriate for the crimes to which they apply.” Minn. Sent. Guidelines 2.D.1 (2014). Any sentence that falls within the applicable range is considered a presumptive sentence. *Rushton v. State*, 889 N.W.2d 561, 565 (Minn. 2017); *see also* Minn. Sent. Guidelines 4.A, 5.A (2014) (providing “discretionary range[s] within which a court may sentence without the sentence being deemed a departure”). Any sentence that falls outside the applicable range is considered a departure from the presumptive sentence. Minn. Sent. Guidelines 2.D.1.

“The guidelines permit departures from the presumptive sentence, but a court departing from the guidelines must articulate ‘substantial and compelling’ circumstances justifying the departure.” *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015) (quoting Minn. Sent. Guidelines 2.D.1). “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.” *Id.* at 157 (quotation omitted). Appellate courts “review a district court’s departure from a presumptive sentence for an abuse of discretion.” *State v. Fleming*, 883 N.W.2d 790, 794 (Minn. 2016). “If the reasons given for an upward departure are legally permissible and factually supported in the record, the departure will be affirmed.” *Hicks*, 864 N.W.2d at 156 (quotation omitted).

One permissible aggravating factor is that “[t]he victim was treated with particular cruelty for which the individual offender should be held responsible.” Minn. Sent.

Guidelines 2.D.3.b; *see also* Minn. Stat. § 244.10, subd. 5a (2014) (same). “[T]he particular cruelty aggravating factor is a reason that explains why the additional facts found by the jury provide the district court a substantial and compelling basis for imposition of a sentence outside the range on the grid.” *State v. Rourke*, 773 N.W.2d 913, 920 (Minn. 2009). “Particular cruelty involves the gratuitous infliction of pain and cruelty of a kind not usually associated with the commission of the offense in question.” *Tucker v. State*, 799 N.W.2d 583, 586 (Minn. 2011) (quotation omitted). The nature and extent of a victim’s injuries may indicate that the offender treated her with particular cruelty. *Dillon v. State*, 781 N.W.2d 588, 600–01 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

The district court sentenced Gutierrez to 240 months in prison, a 24-month upward departure for attempted first-degree murder with a criminal-history score of zero. *See* Minn. Sent. Guidelines 2.G.11 (2014) (providing presumptive sentencing ranges for crime of attempt or conspiracy to commit first-degree murder). The court explained that the upward departure was based on (1) J.K.’s particular vulnerability, on account of her pregnancy and the “significant size difference” between J.K. and Gutierrez; and (2) the particular cruelty with which Gutierrez committed the offense, in light of J.K.’s prominent scar and the changes in her voice.

According to Gutierrez, the record does not support a determination that he treated J.K. with particularly cruelty, because “attempted murder with a single stab resulting in permanent scarring and injury is not any more . . . cruel than any other method of attempted murder.” But Gutierrez did not inflict a typical single stab wound that left a scar after healing; he slashed J.K.’s throat. A paramedic testified that he had never before seen a

neck laceration as severe as J.K.'s and the trauma surgeon testified that he had never before seen blood-vessel injury as extensive as J.K.'s. The trauma surgeon also testified that J.K.'s wound involved an "excessive amount of force" and nearly killed her, and the paramedic testified that J.K.'s "very wide" and "gaping" wound exposed "parts of her neck muscle all the way down to her lower airway." Also, the state presented abundant evidence that the attack left J.K. with a large permanent scar and with her voice deeper and raspier than it was before she was cut.

Accordingly, we conclude that the record supports the district court's determination that J.K.'s prominent scar and the changes in her voice, which the jury found were a permanent disfigurement and a permanent injury, demonstrate that Gutierrez treated J.K. with particularly cruelty. Because "a single aggravating factor may, by itself, justify an upward durational departure," *State v. Solberg*, 882 N.W.2d 618, 624-25 (Minn. 2016), we decline to consider whether the record also supports the district court's determination that J.K. was particularly vulnerable.

Affirmed.