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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1529**

State of Minnesota,
Respondent,

vs.

John Jacob White,
Appellant.

**Filed May 30, 2017
Affirmed
Toussaint, Judge***

Beltrami County District Court
File No. 04-CR-14-806

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

Annie Claesson-Huseby, Beltrami County Attorney, David P. Frank, Assistant County Attorney, Bemidji, Minnesota (for respondent)

Bradford Colbert, Legal Assistance to Minnesota Prisoners, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Kirk, Judge; and Toussaint, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

TOUSSAINT, Judge

In this probation-revocation appeal appellant argues that the sentencing court erred in departing durationally upward from the presumptive sentence because the reasons relied on by the district court for the aggravated durational departure did not make appellant's conduct significantly more serious than a typical kidnapping. We affirm.

FACTS

On March 19, 2014, appellant John Jacob White was charged with two counts of kidnapping in violation of Minn. Stat. § 609.25, subd. 1(2) (2012), for kidnapping two victims on March 15, 2014. White pleaded guilty because both victims blamed him, along with another co-defendant, for the kidnapping. White also waived his right to a *Blakely* trial and admitted two facts that could be used to support an aggravated sentence.

At sentencing on November 25, 2014, White received a 54-month stayed sentence on the first kidnapping count, a double-upward durational departure from the presumptive 27-month stayed sentence. And the court sentenced White to a consecutive stayed sentence of 42 months for the second kidnapping count, which was also a double-upward durational departure from the presumptive 21-month executed sentence. The court imposed the upward durational departures based on two aggravating factors: particular cruelty, and commission of the crime as part of a group of three or more people who all actively participated in the crime. The court also granted White a mitigated dispositional departure on count two, sentencing White to a stay of execution of the presumptive commitment to prison for a period of 20 years, explaining that the mitigated dispositional departure was

appropriate because White played a minor or passive role in the kidnapping of the victims. White was then placed on probation subject to certain conditions.

On June 24, 2016, the court revoked the stay of execution and executed the sentence pronounced at sentencing after White admitted to violating the terms of his probation for a fourth time. This appeal follows.

DECISION

I.

As an initial matter, the state argues that this court does not have jurisdiction to hear White's sentencing argument because it is time-barred. We disagree. We agree with White that, under the supreme court's reasoning in *State v. Fields*, 416 N.W.2d 734, 735 (Minn. 1987), this court can review an upward durational sentencing departure in a probation-revocation appeal. It is true that here, unlike in *Fields*, White did not challenge the validity of the durational departure in the district court at the revocation hearing by moving for a modification of his sentence. The supreme court in *Fields* did not address whether an appeal from a sentencing departure was appropriate in a probation-revocation appeal where the defendant did not raise the issue in the district court during the revocation hearing. But hearing the merits of White's sentencing challenge is consistent with the policy articulated in *Fields* that "it would be wrong to do anything to require a defendant [whose probation has been revoked and had a previously stayed sentence with an aggravated durational departure imposed] to either appeal directly at the time the sentence is imposed or not at all, because that would lead to an increase in sentencing appeals." *Id.* at 736. And in *State v. Losh*, a probation-revocation appeal from the revocation of probation and execution of a

120-month prison sentence for kidnapping, the supreme court addressed the merits of a challenge to an upward durational departure. 721 N.W.2d 886, 888, 895 (Minn. 2006).

II.

White argues that the district court erred in departing durationally upward from the presumptive sentence because the court's reasons for the departure did not make White's conduct significantly more serious than a typical kidnapping. "We review a district court's decision to depart from the presumptive guidelines sentence for an abuse of discretion." *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015). "If the reasons given for an upward departure are legally permissible and factually supported in the record, the departure will be affirmed." *Id.* (quotation omitted). "But if the district court's reasons for departure are improper or inadequate, the departure will be reversed." *Id.* (quotations omitted).

"The Minnesota Sentencing Guidelines . . . limit the sentencing court's discretion by prescribing a sentence or range of sentences that is 'presumed to be appropriate.'" *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quoting Minn. Sent. Guidelines 2.D.1). "The Minnesota Sentencing Guidelines promote uniformity, proportionality, and predictability in sentencing." *Hicks*, 864 N.W.2d at 156. "The guidelines permit departures from the presumptive sentence, but a court departing from the guidelines must articulate 'substantial and compelling' circumstances justifying the departure." *Id.*; *see also* Minn. Sent. Guidelines 2.D.1 (2014).

"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." *Hicks*, 864 N.W.2d at

157 (quotation omitted). “The guidelines contain a ‘nonexclusive list of factors that may be used as reasons for departure.’” *Id.* (quoting Minn. Sent. Guidelines 2.D.3). “Generally, the district court may impose an upward durational sentencing departure if the evidence shows that the defendant committed the offense in a particularly serious way.” *Id.* “But the court may not do so if the sentence will unfairly exaggerate the criminality of the defendant’s conduct, or punish a defendant twice for the same conduct.” *Id.* (quotation omitted).

“[A]ny *fact* (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a guilty plea . . . must be admitted by the defendant or proved to a jury beyond a reasonable doubt.” *State v. Rourke*, 773 N.W.2d 913, 919 (Minn. 2009); *see also* Minn. Stat. § 244.10, subd. 7 (2012) (stating that a “defendant may waive the right to a jury determination of whether facts exist that would justify an aggravated sentence”).

Here, White waived the right to a *Blakely* trial and admitted two aggravating facts. First, White admitted that he committed the kidnapping with particular cruelty because he assaulted the victims while they were restrained and because he poured alcohol down the victims’ throats when the victims could not defend themselves. Second, White admitted that he committed the kidnapping as part of a group of at least three individuals who actively participated in the crime. Both aggravating facts are permissible reasons for an aggravated departure. *See* Minn. Sent. Guidelines 2.D.3.b (2014).

White first appears to argue that the district court abused its discretion in departing durationally from the presumptive sentence because the court based the departure solely

on the fact that White committed the crime as part of a group of three or more persons because the participation of three persons did not make the kidnappings in this case significantly more serious than the typical kidnapping. We are not persuaded. This argument misstates, in part, the court's reason for the aggravated durational departure. In the departure report, the court listed two reasons for imposing the aggravated departure: (1) that the victims were treated with particular cruelty, and (2) that the crimes were committed as part of a group of three or more persons who all actively participated in the crime. And the court stated on the record at sentencing that there were two grounds White admitted for an aggravated departure as to both victims—particular cruelty and that the kidnapping of “both victims were committed as a part of three or more individuals being involved”—before stating that “I specifically focus on the fact that these crimes were committed with three or more individuals and I accept those admissions that Mr. White did enter.”

Even if the court did base the decision to impose an aggravated durational departure solely on the fact that White committed the kidnappings as part of a group of three or more individuals who actively participated in the crime, the departure would not be an abuse of discretion. See *State v. Alvarez*, 820 N.W.2d 601, 623 (Minn. App. 2012) (explaining that, “An upward departure may be supported based on the presence of a single aggravating factor.”), *aff'd sub nom. State v. Castillo-Alvarez*, 836 N.W.2d 527 (Minn. 2013). In *Alvarez*, this court held that “the district court did not abuse its discretion in imposing an upward durational departure” based solely on the fact that the crime was committed as part of a group of three or more people who actively participated in the crime even though the

court concluded that particular cruelty, relied on as a basis for the departure by the district court, was an invalid basis for departure in that case. *Id.*

White next argues that the district court erred by departing from the presumptive sentence based on the fact that the offense was committed by a group of three or more persons because it is illogical for the court to impose an aggravated durational departure on this basis where it also found that White played a minor role. *See* Minn. Sent. Guidelines 2.D.3.b.(2), (10) (2014). This argument fails because nothing in the sentencing guidelines requires the court to prove the degree of participation each member of the group played in the commission of the offense, but only requires that each person actively participated in the crime, and White does not contest that he actively participated in the crime.

And the fact that White played a more minor role in the assault and kidnapping of the victims does not mean that his actions could not result in the crime being committed in a particularly serious way. The supreme court held in *Losh* that particular cruelty, and the fact that the crime was committed as part of a group of three or more persons who all actively participated in the crime, supported the district court's aggravated durational departure decision as to Losh. 721 N.W.2d at 896. The court found that there was sufficient evidence that Losh committed the kidnapping with particular cruelty because she left the victim in an unsafe place even though there was no evidence that Losh was involved in planning the kidnapping, or even that she truly understood the extent of the victim's injuries. *Id.* at 889, 896. And the court held that Losh, as the driver of the car, should be held responsible for committing the kidnapping as a part of a group of three or more persons who all actively participated in the crime even though it seems clear that Losh was only

following the directions of the other participants. *See id.* The fact that White's conduct, like Losh's conduct, was not his idea or was minor in comparison to the conduct of other participants in the crime does not minimize the significance of White's actions, so White's argument fails.

Finally, White argues that even if the departure, on the grounds that three or more people actively participated in the crime, "could be rationalized for the departure on one of the victims, it should not be grounds for a departure for both of the victims." This argument also fails because White admitted that he treated both victims with particular cruelty and that he participated in a group of three or more people in the kidnapping of both victims.

We therefore conclude that the district court did not abuse its discretion in imposing the aggravated durational departures on White for either kidnapping conviction because the reasons provided for the upward departures are legally permissible and factually supported in the record.

Affirmed.