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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0255**

State of Minnesota,
Respondent,

vs.

Angel Daniel Ramirez,
Appellant.

**Filed January 8, 2018
Affirmed
Peterson, Judge**

Washington County District Court
File No. 82-CR-14-4091

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

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Bjorkman, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal challenging his sentence for second-degree murder, appellant argues that the district court erred by imposing a 432-month prison sentence, a greater-than-double

upward departure, because the sentence was based on conduct from separate behavioral incidents and on evidence relating to first-degree murder charges that were dismissed as part of the plea agreement. We affirm.

FACTS

Appellant Angel Daniel Ramirez was charged with one count of unintentional felony murder in the death of his one-year-old daughter A.A.R. After further investigation resulted in the discovery of evidence that Ramirez had engaged in a past pattern of child abuse against A.A.R. and that he committed the murder under circumstances manifesting an extreme indifference to human life, a grand jury indicted him on two counts of first-degree murder. Ramirez pleaded guilty to unintentional felony murder.

In the morning on March 15, 2014, A.A.R.'s mother, B.A.A., called 911 when she checked on A.A.R. and realized that A.A.R. was not breathing. Responding officers and paramedics were unable to revive A.A.R. A.A.R. had bruising around her left eye and petechiae in her eye from an injury that occurred on March 12, 2014, when Ramirez was alone with A.A.R. Ramirez initially claimed that the injury occurred when A.A.R., who was learning to walk, fell and hit her head on a wooden door frame.

At the plea hearing, Ramirez testified that the injury to A.A.R.'s eye occurred when he threw a sippy cup at her. Ramirez threw the cup because A.A.R. was crying, and he became frustrated. The injury became worse over the next two days, and, on March 14, 2014, B.A.A. and Ramirez's grandmother brought A.A.R. to urgent care. The urgent-care doctor recommended that they bring A.A.R. to the hospital to have the eye evaluated, but they brought her home without doing so. B.A.A. wanted to bring A.A.R. to the hospital,

but Ramirez did not think it was necessary. They got into an argument over it, and A.A.R. did not go to the hospital.

A.A.R., B.A.A., and Ramirez all slept in the same room. At about 9:00 p.m. on March 14, Ramirez was awakened by A.A.R. crying. B.A.A. was not in the room. Ramirez went over to A.A.R.'s crib and tried to rock her to sleep, but A.A.R. continued crying. Ramirez, still frustrated over his argument with B.A.A., hit A.A.R. in the stomach. A.A.R. continued crying, and Ramirez knew that he had injured her.

Ramirez tried to go back to sleep. Within 20 minutes, Ramirez again became frustrated with A.A.R.'s crying, and he walked over to the crib and hit A.A.R. in the back of the head. A.A.R. continued crying, and Ramirez gave her a bottle. Ramirez then went back to sleep and did not check on A.A.R. during the rest of the night. In the morning, Ramirez got up and went to work without checking on A.A.R.

An autopsy indicated that the cause of A.A.R.'s death was multiple blunt-force traumatic injuries and that the manner of death was homicide. She had significant bruising on all sides of her head and swelling of the brain. She had a scratch on her neck and bruises on her trunk, arms, and both sides of her jaw. She did not have bruises on her hands, knees, shins, or elbows consistent with falling. There was internal bleeding in the small bowel and inner part of the stomach.

As part of the plea agreement, the parties agreed that Ramirez would receive an executed 432-month prison term, which was 2.4 times longer than the presumptive sentence. Ramirez admitted that A.A.R. was particularly vulnerable due to her young age and his abuse of her over an extended period. He also admitted that he acted with

particularly cruelty by continuing to abuse her when he knew that she was already injured. The district court sentenced Ramirez to the agreed-on term of 432 months and found that the departure was justified by A.A.R.'s particular vulnerability and Ramirez's particular cruelty.

The district court stated:

[A.A.R.] was 13 months old. She was a baby. Just learning how to walk Probably just learning how to speak a few words. There was a relationship here, a father/daughter relationship. A relationship that made her particularly vulnerable to the egregious and terrible acts of a father who would beat his own child.

There was a relationship of trust, of accessibility, and vulnerability. There was a relationship of complete dependence. This was a child who couldn't fight back. A child who couldn't even alert someone else that in the quiet of time with just her father, that her father was treating her in such an egregious fashion.

That made her particularly vulnerable, and that particular vulnerability, because of her age, because of her dependence, because of your accessibility to her in times when no one else is there, and because of her particular vulnerability due to her age, it is a severe factor, and that has been proven beyond a reasonable doubt.

I am also going to find that there was particular cruelty. . . . This child wasn't just struck once in anger or something out of frustration. This child was beaten to death. Multiple times, this child was struck in the head on multiple occasions. The bruises that are revealed when the scalp is retracted back account of that. The swelling of her brain accounts for that. The bruises around her body, it's not just one. There's multiple bruises. The bruises that were in her abdomen where she hemorrhaged internally because she was struck so hard . . . by Mr. Ramirez's fist.

Mr. Ramirez, you prevented her from even getting care so that she could possibly be seen by a doctor. Just left her there to die after inflicting severe injuries on her.

The district court issued a written order reiterating its statements at the sentencing hearing. The court also stated:

12. When [Ramirez] put [A.A.R.] to bed that night, he was angry. He was angry because [A.A.R.'s] mother wanted to take her to the hospital. He reacted by punching [A.A.R.] in the stomach, causing her extreme pain and injury, and making it difficult for her to breathe.

13. He admitted to law enforcement and to this Court that he used his knuckles when he punched her in the stomach. We now know, from the evidence that has been presented, that he hit [A.A.R.] with such force that he caused internal injuries.

14. A short while later, [A.A.R.] woke up and began to cry. [Ramirez] turned her over, and punched her in the back of the head. This, too, caused her extreme pain and injury. We now know that he hit [A.A.R.] so hard that he caused traumatic injury to her brain. [A.A.R.] was already in a diminished state due to the earlier punch in the stomach that she had received from [Ramirez]. This gratuitous infliction of pain and injury makes [Ramirez's] actions against [A.A.R.] severe.

....

16. Those bruises to [A.A.R.'s] scalp were not superficial. When the first layer of [A.A.R.'s] scalp was bent back during the autopsy, it showed more bruising, deeper bruising on the underside of her scalp, and that bruising went all the way through a couple of spots in her brain. This demonstrates the degree of force with which [Ramirez] hit [A.A.R.] . . .

17. After [Ramirez] hit [A.A.R.] on the night she died, he simply left her there in her crib. He didn't go back to check on her – not that night, nor in the morning before he went to work. He walked out the door that morning without

demonstrating even the slightest concern as to whether his daughter was injured, or in pain, or even still alive.

This appeal followed sentencing.

DECISION

This court reviews a more-than-double sentencing departure for an abuse of discretion. *Dillon v. State*, 781 N.W.2d 588, 598 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). In doing so, this court reviews de novo “whether a valid reason to depart exists” and “whether the valid departure reasons are severe, so as to justify a sentence that runs longer than twice the presumptive sentence.” *Id.* “A district court abuses its discretion if it relies on invalid bases either to depart or to extend the sentence beyond double its presumptive length.” *Id.* Appellate review of a sentence longer than twice the presumptive sentence is “less deferential” than the “great deference” accorded a sentence up to twice the presumptive length. *Id.*

The district court relied on particular vulnerability and particular cruelty to support the sentencing departure. The first aggravating factor exists when the victim is “particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, which was known or should have been known to the offender.” Minn. Sent. Guidelines 2.D.2.b.(1) (2012). As the district court found, A.A.R. was particularly vulnerable due to her age and the father/daughter relationship between her and Ramirez.

The second aggravating factor exists when “[t]he victim was treated with particular cruelty for which the individual offender should be held responsible.” Minn. Sent. Guidelines 2.D.2.b.(2) (2012). “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*, 781 N.W.2d at 600-01.

As the district court found, Ramirez repeatedly hit A.A.R., and he hit her with such force that he caused a traumatic brain injury and extreme pain and internal injuries to her stomach. Knowing that she was injured, he hit her in the back of the head when she woke up and began to cry. He failed to get her medical attention, left her in the crib after hitting her, and did not check on her in the morning.

Ramirez argues that the district court improperly relied on prior uncharged incidents of child abuse and on Ramirez’s commission of the dismissed first-degree-murder charge to support the sentencing departure. Facts underlying a separate uncharged incident cannot support an upward departure. *State v. Edwards*, 774 N.W.2d 596, 602 (Minn. 2009). Ramirez argues that the district court erred in basing its particular-cruelty finding in part on assaults that occurred before March 14, 2014. The district court relied in part on the assault that occurred on March 12, 2014, when Ramirez hit A.A.R. in the eye with a sippy cup. That assault was part of the sequence of events that led to the unintentional-murder charge. On March 14, A.A.R. was in a weakened condition from the sippy-cup injury, and Ramirez’s refusal to allow her to go to the hospital led to the argument between him and B.A.A., which was part of the reason Ramirez was upset. The consequences of the sippy-cup incident were part of the reason that Ramirez was angry and assaulted A.A.R. on March

14. The district court, therefore, properly relied on the sippy-cup incident as support for the departure.

The district court also referred to assaults that occurred when Ramirez pulled the hair in A.A.R.'s ponytail out of her head and threw her on a bed when angry. Minn. Stat. § 244.10, subd. 5a(b) (2012), states: "Notwithstanding section 609.04 or 609.035, or other law to the contrary, when a court sentences an offender for a felony conviction, the court may order an aggravated sentence beyond the range specified in the sentencing guidelines grid based on any aggravating factor arising from the same course of conduct." In interpreting this statute, the supreme court stated that a district court may "consider the entirety of a defendant's conduct in determining whether the defendant committed the sentenced offense in a manner that is significantly more serious than that typically involved in the commission of the sentenced offense." *State v. Fleming*, 883 N.W.2d 790, 797 (Minn. 2016). A court may base an upward departure on "any aggravating factor, even if the aggravating factor relates [to], or arises in connection with another offense committed during the same course of conduct." *Id.* But "where a defendant pleads guilty to a lesser offense, the [district] court ordinarily may not base an upward durational departure on evidence indicating that in fact the defendant could have been convicted of a greater offense." *State v. Kisch*, 346 N.W.2d 130, 132-33 (Minn. 1984). Because the hair-pulling and throwing-on-the-bed incidents were not part of the unintentional-murder course of conduct and were evidence indicating that Ramirez could have been convicted of first-degree murder, the district court should not have relied on them.

“If the reasons given [for a departure] are improper or inadequate, but there is sufficient evidence in the record to justify departure, the departure will be affirmed.” *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985). When a district court relies on both proper and improper bases for aggravating factors, an appellate court “must determine whether the district court would have imposed the same sentence absent reliance upon the improper aggravating factor[s].” *State v. Mohamed*, 779 N.W.2d 93, 100 (Minn. App. 2010) (quotation omitted), *review denied* (Minn. May 18, 2010). This court considers “the weight given to the invalid factor[s] and whether any remaining factors found by the court independently justify the departure.” *Id.* (quotation omitted). The district court mentioned the hair-pulling and throwing-on-the-bed incidents only briefly and emphasized the particular cruelty with which Ramirez committed the assaults that caused A.A.R.’s death and the particular vulnerability of A.A.R. The record shows that the district court would have imposed the same sentence even without the hair-pulling and throwing-on-the-bed incidents.

Ramirez also argues that, even if there were severe aggravating circumstances, the 432-month sentence was excessive. The district court was permitted to impose a sentence up to the statutory maximum of 480 months. Minn. Stat. § 609.19, subd. 2 (2012). The 432-month sentence was not excessive when a 13-month-old child was beaten to death as a result of Ramirez’s uncontrolled anger at the child’s mother. Even though the death was unintentional, the severity of the assault was likely to severely harm the extremely vulnerable victim, and committing the assault demonstrated extreme indifference to the obvious possibility of causing the victim’s death. The 432-month sentence was supported

by severe aggravating circumstances and was not excessive. The district court did not abuse its discretion.

Affirmed.