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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0433**

State of Minnesota,
Respondent,

vs.

Nathan George Oliver,
Appellant.

**Filed January 29, 2018
Affirmed
Reyes, Judge**

Beltrami County District Court
File No. 04-CR-16-3595

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

David Hanson, Beltrami County Attorney, Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Mark D. Nyvold, Special
Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

U N P U B L I S H E D O P I N I O N

REYES, Judge

Appellant challenges his 56-month sentence, a double upward durational departure from the presumptive guidelines sentence for felony domestic assault, arguing that the district court relied on two improper bases for the departure. He also asserts that the district

court did not explain the basis of the departure and that he received ineffective assistance of counsel. We affirm.

FACTS

Appellant Nathan George Oliver had an on-again-off-again relationship with N.B. for approximately three years. On March 31, 2016, Beltrami County issued an Order for Protection (OFP) prohibiting appellant from having any contact with N.B. for a period of two years. On November 2, 2016, N.B. received dialysis for a kidney condition. Later that day, she rested at the home of appellant's aunt, W.Z., where appellant stayed. N.B. testified that she and appellant had occasional contact and that she knew appellant would be at W.Z.'s home on November 2. N.B. stayed overnight.

N.B. awoke the next morning and noticed that appellant appeared to be angry. Appellant had N.B.'s phone and was searching it for a text message. They argued in W.Z.'s kitchen. Appellant then struck the right side of N.B.'s face twice with his open hand and punched the left side of N.B.'s jaw once. W.Z. stepped in front of appellant to protect N.B., who left the kitchen and called the police. The responding officers observed red marks on both sides of N.B.'s face.

Appellant was arrested and charged with felony violation of an OFP and felony domestic assault. Minn. Stat. §§ 518B.01, subd. 14(d)(1), 609.2242, subd. 4 (2016). Appellant stipulated to three prior convictions of qualified domestic-violence-related offenses within the previous ten years. Prior to a jury trial, the district court granted the state's request to pursue an upward sentencing departure based on the aggravating factor

of the victim's particular vulnerability but denied its request to pursue a departure based on the career-offender statute, Minn. Stat. § 609.1095, subd. 2 (2016).

The district court held a bifurcated jury trial on the charges and on the aggravating factor. The jury found appellant guilty of both felony offenses. And in the *Blakely* trial,¹ the jury found that the state had proved beyond a reasonable doubt the aggravating factor of the victim's particular vulnerability on the day of the assault and that appellant knew of her medical condition.

Before sentencing appellant, the district court reduced appellant's presentence criminal-history score by one point because it found that two prior convictions were committed as part of a single behavioral incident. The state moved for a double upward durational departure from a presumptive sentence of 28 months based on the aggravating factor of the victim's vulnerability. The district court determined that "because the jury did answer the questions that this [c]ourt interprets as their finding that [N.B.] was particularly vulnerable, an upward departure of an aggravated sentence is appropriate." The district court then stated:

So I think this is a case where the maximum upward departure of two times is the cap. So the question that this [c]ourt has is at what point between 28 and 56 [months] is appropriate. We not only have [N.B.'s] particular vulnerability, but we do have [appellant's] history of assaultive violence toward other people, making him, despite the remorse that he is showing

¹ Under *Blakely*, "[a] district court must submit to a jury the question of whether the [s]tate has proven beyond a reasonable doubt the existence of additional facts, which were neither admitted by the defendant, nor necessary to prove the elements of the offense, but which support reasons for [the sentencing] departure." *State v. Rourke*, 773 N.W.2d 913, 921 (Minn. 2009). If the jury finds that the state has met its burden, the district court may exercise its discretion to depart from the presumptive sentence. *Id.* at 919.

now, making him a particular threat to public safety. For that reason, I do believe a double upward departure is the most appropriate sentence in this case, given all the facts and given the history.

The district court sentenced appellant to 56 months. This appeal follows.

DECISION

I. The district court did not abuse its discretion in imposing a sentence that is a double upward durational departure.

Appellant challenges the district court's imposition of a 56-month sentence, arguing that it improperly relied on his "history of assaultive violence" and his "particular threat to public safety" in imposing a double upward durational departure. We disagree.

We review a district court's decision to depart from the sentencing guidelines for an abuse of discretion. *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015). In general, we defer entirely to the district court's judgment on the proper length of a sentencing departure up to double the presumptive range when it has identified a proper reason to depart. *Dillon v. State*, 781 N.W.2d 588, 596 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). Whether a particular reason for an upward departure is proper is a question of law, which we review de novo. *Id.* at 595.

Under the Minnesota sentencing guidelines, a district court may depart from a presumptive sentence only when the record contains "substantial and compelling circumstances" for the departure. *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008). Substantial and compelling circumstances are those circumstances that indicate the defendant's conduct was significantly more serious than conduct typically involved in the commission of the crime. *Hicks*, 864 N.W.2d at 157. Both the sentencing guidelines and

statute identify aggravating factors. Minn. Sent. Guidelines 2.D.3 (2016); Minn. Stat. § 244.10, subd. 5a (2016). “Aggravating factors [are] reasons explaining why the facts of the case provide the district court a substantial and compelling basis to impose a sentence outside the range on the grid.” *Rourke*, 773 N.W.2d at 920.

The sentencing guidelines identify a victim’s “particular[] vulnerab[ility] due to age, infirmity, or reduced physical or mental capacity, [when] the offender knew or should have known of this vulnerability” as an aggravating factor. Minn. Sent. Guidelines 2.D.3.b(1) (2016). *See also* Minn. Stat. § 244.10, subd. 5a(1) (2016). However, neither the guidelines nor the statute identify a defendant’s history of assaultive violence or his potential threat to public safety as aggravating factors. “Using appellant’s prior offenses and speculating as to his future offenses as a basis for upward departure (in the name of ‘public safety’) is improper.” *State v. Herrmann*, 479 N.W.2d 724, 729 (Minn. 1992).

We assume without deciding that the district court relied on the challenged improper factors and the proper aggravating factor of N.B.’s particular vulnerability in deciding the duration of the sentencing departure. Therefore, we must determine whether the district court would have imposed the same sentence absent reliance on the improper factors by considering the weight given to the improper factors and whether the remaining proper factor found by the district court independently justifies the departure. *State v. Mohamed*, 779 N.W.2d 93, 100 (Minn. App. 2010), *review denied* (Minn. May 18, 2010). We must also determine whether there is sufficient evidence to support the upward departure. *State v. Vance*, 765 N.W.2d 390, 395 (Minn. 2009).

Here, the district court made one brief reference to appellant's history of assaultive violence and his threat to public safety when discussing the duration of the departure, and then only after identifying the aggravating factor of the victim's particular vulnerability as its reason for departing. The district court did not submit the improper factors to the jury or identify them in its sentencing order or report. We conclude that the district court gave little weight to the improper factors.

As to the remaining proper factor, appellant concedes that victim vulnerability is a proper aggravating factor and that the district court followed the proper steps to consider it at the time of sentencing. The presence of a single aggravating factor of the victim's particular vulnerability, when supported by the record, is sufficient to uphold an upward departure. *State v. Peterson*, 799 N.W.2d 653, 659-660 (Minn. App. 2011), *review denied* (Minn. Sept. 28, 2011). Here, the district court allowed the jury to consider the aggravating factor of victim vulnerability. The district court then concluded that an upward departure was appropriate because the jury made a finding that N.B. was particularly vulnerable. The court also identified N.B.'s particular vulnerability as the sole aggravating factor in its sentencing order and departure report.

Finally, the evidence overwhelmingly supports the district court's departure based on the jury's finding of the victim's particular vulnerability.² N.B. testified that she had been diagnosed with complete kidney failure and a 30% functioning heart prior to the assault. She received dialysis three days per week through a permanent port in her arm,

² In his supplemental pro se brief, appellant argues that the departure is unsupported by sufficient evidence based on the victim's particular vulnerability, which we address here.

and she did not feel she could defend herself from appellant due to her illness. The testimony of N.B.'s doctor and W.Z. corroborated N.B.'s description of her weakened condition. Both N.B. and W.Z. testified that N.B.'s illness and treatment made her too weak to defend herself from appellant and that N.B. escaped the assault only with W.Z.'s help. N.B. testified that appellant knew of the extent of her illness and had driven her to dialysis treatments prior to the assault. The officer who arrested appellant testified that appellant told him that N.B. was terminally ill. Appellant did not contest having knowledge of N.B.'s illness and did not call any witnesses to rebut the state's witnesses.

Appellant argues that, based on *Mohamed*, we should remand to the district court to determine the weight given to the improper factors. 779 N.W.2d at 100. This argument is misguided. In *Mohamed*, the defendant stipulated to three aggravating factors that the district court relied on to impose an upward durational departure, two of which were later determined to be improper. 779 N.W.2d at 96, 100. Upon reviewing the record, this court could not discern the weight given to the improper factors and remanded for the district court's determination of whether resentencing was warranted. *Id.* Here, based on our review of the record, it is clear that the district court placed more weight on the proper factor than on the improper factors.

We conclude that the proper aggravating factor of the victim's particular vulnerability independently justified a double upward durational departure and is overwhelmingly supported by the evidence. The district court gave little weight to the improper factors. Therefore, the district court did not abuse its discretion in sentencing appellant to a 56-month, double upward departure.

II. Appellant's pro se arguments lack merit.

We construe appellant's pro se supplemental brief to make three additional arguments, one of which we addressed above.

A. The district court adequately explained the basis of the sentencing departure.

Appellant argues that, following the *Blakely* trial, the district court did not explain why the jury's findings provided it a reason to depart. The record does not support appellant's argument.

When a district court departs from a presumptive sentence, it "must disclose in writing or on the record the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence." *Rourke*, 773 N.W.2d at 920 (quotation omitted). Here, the district court expressly identified the jury's finding of the aggravating factor of the victim's particular vulnerability as its reason to depart at the sentencing hearing and in its sentencing order and report. The court also addressed the serious nature of appellant's offense at the sentencing hearing, stating, "It's incomprehensible to me that a woman who is dying, in your words, terminally ill . . . is someone who deserves being struck in the head." The district court adequately explained why the jury's findings provided it a reason to depart.

B. Appellant did not receive ineffective assistance of counsel.

Appellant asserts that he received ineffective assistance of counsel because his counsel did not introduce several audio and transcribed witness statements at trial. We are not persuaded.

We review ineffective-assistance-of-counsel claims de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (citing *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 2070 (1984)). To prevail on such a claim, an appellant must “demonstrate that (1) counsel’s performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for his counsel’s unprofessional error, the outcome would have been different.” *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009) (citing *Strickland*, 466 U.S. at 687-88, 104 S. Ct. at 2064-65). Both prongs need not be analyzed if one is determinative. *Id.*

Here, appellant’s showing consists entirely of identifying, by name and date, five statements that he claims his counsel should have presented at trial. Trial strategy and tactical decisions on what evidence to present lie within the discretion of counsel and appellate courts do not review such decisions for competency. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999). Accordingly, appellant has not met his burden to demonstrate that his counsel’s performance was deficient. Because the first *Strickland* prong is dispositive, appellant’s claim fails.

Affirmed.