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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0595**

State of Minnesota,
Respondent,

vs.

Pedro Ayala-Leyva,
Appellant.

**Filed March 26, 2018
Affirmed
Bjorkman, Judge**

Hennepin County District Court
File No. 27-CR-12-5274

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Daniel P. Repka, Repka Law, LLC, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Bjorkman, Judge; and
Smith, Tracy M., Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his 309-month sentence for conspiring to commit first-degree sale of a controlled substance while a member of the conspiracy possessed a firearm. He argues that (1) severe aggravating circumstances do not exist to justify a sentence of more than double the presumptive term and (2) the district court violated his constitutional confrontation right by allowing prior trial testimony of unavailable witnesses to be read into the record at his sentencing trial. We affirm.

FACTS

Appellant Pedro Ayala-Leyva was a principal operator in a large-scale, multi-state methamphetamine-distribution ring. In 2012, after a nine-month state and federal investigation, respondent State of Minnesota charged Ayala-Leyva with conspiring to commit first-degree sale of a controlled substance while a member of the conspiracy possessed a firearm. The state provided notice that it intended to seek an aggravated sentence.

At Ayala-Leyva's jury trial, the state presented extensive evidence of the methamphetamine conspiracy, which we set forth in detail in our earlier opinion, *State v. Ayala-Leyva*, 848 N.W.2d 546, 558 (Minn. App. 2014), *review denied* (Minn. Aug. 11, 2015). To briefly summarize, the state showed: an extremely high number of calls between Ayala-Leyva and co-conspirators; Ayala-Leyva received cash deposits from co-conspirators; the organization used vehicles with concealed compartments to transport methamphetamine from California to Minnesota; police searches of residences and

vehicles associated with Ayala-Leyva and co-conspirators yielded multiple firearms and quantities of methamphetamine in excess of 7,200 grams (approximately 16 pounds); and the organization generated approximately one-half million dollars in revenue in the four-month period preceding Ayala-Leyva's arrest. Six of Ayala-Leyva's co-conspirators testified at his trial, detailing the California-Minnesota-Wisconsin operation and establishing Ayala-Leyva's role as one of its leaders.

The jury found Ayala-Leyva guilty. During the sentencing phase, the district court asked the jury to determine whether: (1) the offense was a major controlled-substance crime, (2) Ayala-Leyva's conduct placed a number of people at risk, and (3) Ayala-Leyva committed the offense as part of a group of three or more active participants. The jury answered all three questions in the affirmative, and the district court sentenced Ayala-Leyva to 360 months' imprisonment, the statutory maximum. *See* Minn. Stat. § 152.021, subd. 3(a) (2010). The sentence is greater than three times the presumptive 103-month sentence. Minn. Sent. Guidelines 4 (2010); *see State v. Parker*, 901 N.W.2d 917, 924 n.3 (Minn. 2017) (determining departure duration from top of presumptive sentencing range).

On appeal, we affirmed Ayala-Leyva's conviction but reversed his aggravated sentence because it was not based on a jury's factual findings as to circumstances supporting severe aggravating factors. *Ayala-Leyva*, 848 N.W.2d at 558. We remanded for resentencing, noting that any decision to impose a more-than-double upward durational departure would have to be supported by a sentencing jury's factual findings indicating "severe" aggravating circumstances. *Id.* at 558-59.

The district court convened a jury for a resentencing trial. The state presented numerous witnesses and exhibits, substantially replicating the first trial. But two of Ayala-Leyva's testifying co-conspirators, Mario Castro and Obet Moreno-Guerrero, were deported after the first trial. Over Ayala-Leyva's objection, the district court permitted their prior trial testimony to be read to the jury.

The district court asked the jury to answer 34 special-verdict interrogatories, all related to the same three aggravating factors at issue in Ayala-Leyva's first trial. Based on the jury's findings, the district court determined that all three aggravating factors exist. And the district court concluded that those factors constitute severe aggravating circumstances, making this "one of those rare cases" that warrant a more-than-double departure from the guidelines sentence. Ayala-Leyva appeals his 309-month prison sentence.

D E C I S I O N

I. The district court did not abuse its discretion by imposing a 309-month aggravated sentence.

A district court must impose a sentence within the presumptive sentencing range unless there are "identifiable, substantial, and compelling circumstances" to warrant an upward departure. Minn. Sent. Guidelines 2.D (2010). "Substantial and compelling circumstances are those showing that the defendant's conduct was significantly more . . . serious than that typically involved in the commission of the offense in question." *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009) (quotation omitted); *see also* Minn. Sent. Guidelines 2.D.2 (2010) (providing nonexclusive list of departure reasons). Even when

such circumstances exist, a double upward departure “is generally the ‘upper limit’ of a sentencing departure.” *Ayala-Leyva*, 848 N.W.2d at 558 (quoting *State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981)). “Only in cases of ‘severe aggravating circumstances’ may the district court impose a greater-than-double departure from the presumptive sentence; in such cases the only absolute limit on duration is the maximum provided in the statute defining the offense.” *State v. Shattuck*, 704 N.W.2d 131, 140 (Minn. 2005).

Appellate courts review upward durational sentencing departures for an abuse of discretion. *Id.* But this deferential standard is nuanced, particularly in the case of a more-than-double upward departure. *Dillon v. State*, 781 N.W.2d 588, 594-98 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). We review de novo the threshold legal determinations that underlie such a departure—whether the departure reasons are valid and whether the valid departure reasons are “severe.” *Id.* at 598. We then review for abuse of discretion the decision whether to depart, and to what degree, although this review is less deferential for sentences beyond the double-departure benchmark. *Id.* at 595, 598.

Ayala-Leyva does not dispute that the aggravating factors the district court relied on are factually supported by the record and valid aggravating factors under Minnesota law. But he challenges both the district court’s determination that the departure reasons are severe and the extent of the departure. We address each argument in turn.

A. Severity of the Aggravating Factors

Ayala-Leyva argues that the district court erred in determining that the aggravating factors proved are “severe.” No “easy-to-apply test” exists to guide our independent

analysis of this issue. *Id.* at 597 (quotation omitted). Instead, we consider the number of aggravating factors and the extremeness of the facts relevant to each factor. *Id.*

As the district court noted in its analysis, Ayala-Leyva’s methamphetamine conspiracy is marked by three separate aggravating factors. When a district court has considerable latitude to impose a double upward departure based on a single aggravating factor, *id.* at 598-99, the presence of multiple such factors suggests extraordinary severity.

As to the first aggravating factor—the involvement of three or more participants in the crime—Ayala-Leyva’s conspiracy far exceeded the threshold. The jury’s findings not only establish that Ayala-Leyva “commit[ted] this crime as part of a group of three or more people who all actively participated in the crime,” but also expressly reflect the involvement of four individuals in addition to Ayala-Leyva.¹ Two of these four testified during Ayala-Leyva’s first trial, along with four other co-conspirators, each explaining his active role in the conspiracy. *See Ayala-Leyva*, 848 N.W.2d at 551-52. And the district court referenced the aggravated sentence of another “top level” co-conspirator in resentencing Ayala-Leyva. *See State v. Sanchez-Sanchez*, No. A14-0584, 2015 WL 1880196, at *1 (Minn. App. Apr. 27, 2015), *aff’d as modified on other grounds*, 879 N.W.2d 324 (Minn. 2016). The active involvement of numerous participants, most of whom operated at Ayala-Leyva’s direction, indicates an unusually high degree of severity.

The major-controlled-substance-crime aggravating factor is even more compelling. An offense constitutes a “major controlled substance crime” if it involves two or more of

¹ The jury found that Koua Yang, Obet Moreno-Guerrero, Daniel Samorano, and Felix Lopez-Martinez each engaged in sale or transportation activities.

seven enumerated circumstances. See Minn. Sent. Guidelines 2.D.2(b)(5). The jury found that five circumstances were proved; the district court applied only three.² Those three nonetheless indicate that Ayala-Leyva’s offense was substantial even within the category of major controlled-substance crimes. The jury found that Ayala-Leyva occupied a high position in the drug distribution hierarchy because members of the conspiracy reported to him and owed him payments from the sale of methamphetamine. The jury also found seven distinct controlled-substance transactions and that “ounces and pounds of methamphetamine [were] regularly sold by members of th[e] conspiracy,” when the sentencing guidelines require only three transactions in any amount. And the jury found the offense involved a high degree of sophistication or planning *and* occurred over a lengthy period of time *and* involved a broad geographic area of disbursement; only one such circumstance is required. As the district court stated in summarizing the significance of this aggravating factor, “this was not only a major controlled substance offense, but one that was particularly severe.”

The third aggravating factor—that the conspiracy put a high number of people at risk—likewise points to remarkably severe circumstances. The jury found, in relevant part: the conspiracy involved the sale or possession of more than 7,200 grams of methamphetamine, which amounts to approximately 36,000 individual doses; the number

² The district court declined to rely on the jury’s finding that the controlled-substance offense involved quantities substantially larger than for personal use, even though there was “an incredible amount of meth,” or the finding that members of the conspiracy possessed firearms, reasoning that those facts duplicate elements of the offense and therefore are inappropriate sentencing considerations under *State v. McIntosh*, 641 N.W.2d 3, 11-12 (Minn. 2002).

of people involved in the conspiracy allowed for wide distribution of methamphetamine in a greater number of communities; and methamphetamine use endangers the health and lives of users.³ By placing thousands of people in danger, Ayala-Leyva’s conspiracy constitutes egregious conduct beyond that associated with many crimes of personal violence.

In sum, the district court did not err in its legal determination that the three aggravating factors proved in this case indicate severe aggravating circumstances that justify a greater-than-double upward departure.

B. Extent of the Departure

We turn next to whether the district court abused its discretion in imposing a sentence of 309 months—a triple upward departure. While we review all decisions regarding sentence duration for an abuse of discretion, our review is “less deferential” when reviewing sentences that more than double the presumptive sentence. *Dillon*, 781 N.W.2d at 598. We will “reduce a sentence for uniformity’s sake when the departure results in a term that is longer than sentences for similar or more serious crimes . . . or longer than sentences imposed on the appellant’s coconspirators.” *Id.*

Ayala-Leyva first argues that his 309-month sentence is unwarranted because it exceeds sentences imposed for similar crimes. But as the district court observed, finding cases similar to Ayala-Leyva’s in Minnesota courts is essentially impossible. *See Ayala-*

³ The legislature has underscored the unique dangerousness of methamphetamine by making the manufacture of “any amount” of methamphetamine a first-degree controlled-substance crime. Minn. Stat. § 152.021, subd. 2a (2016).

Leyva, 848 N.W.2d at 558 (noting district court’s observation that this case represents the biggest methamphetamine-distribution case yet in state court). Ayala-Leyva points us to the 268-month sentence imposed in *State v. Osborne*, 715 N.W.2d 436 (Minn. 2006), for conspiring to commit first-degree sale and other controlled-substance offenses as proof that his sentence is excessive. We are not persuaded. While the two cases are superficially similar because they involve defendants who played a high-level role in multi-party conspiracies to move substantial quantities of controlled substances across state lines for sale in Minnesota, Ayala-Leyva’s conspiracy dwarfs Osborne’s in all respects. Osborne distributed heroin and crack cocaine within one city, and law enforcement’s multi-year investigation uncovered about 55 grams of crack cocaine and 10 grams of heroin. *State v. Osborne*, No. C1-03-253, 2004 WL 333469, at *1-4 (Minn. App. Feb. 24, 2004), *review granted, cause remanded* (Minn. Aug. 17, 2004). In contrast, Ayala-Leyva’s conspiracy involved distribution of more than 7,200 grams of methamphetamine to a large number of communities in Minnesota and Wisconsin. Indeed, the combination of massive volume⁴ and a sophisticated distribution system means that there are no similar state cases outside of this conspiracy with which to compare Ayala-Leyva’s sentence. We therefore turn to the sentences Ayala-Leyva’s co-conspirators received.

Ayala-Leyva notes that his co-conspirators all received sentences substantially shorter than 309 months, arguing that this discrepancy demonstrates an abuse of discretion.

⁴ In one month, police seized more than 700 times the statutory threshold amount for first-degree sale of a controlled substance. See Minn. Stat. § 152.021, subd. 1(1) (2010) (sale of ten grams or more of methamphetamine within 90-day period).

We disagree. Ayala-Leyva recites the sentences of various participants in the conspiracy—ranging from a stay of imposition to 240 months’ imprisonment—without any discussion of the individuals’ role in the conspiracy, the charges against them, or the factors that may have yielded more lenient sentences, such as the fact that many of them pleaded guilty. As we noted above, the only other apparently comparable co-conspirator is Julian Sanchez-Sanchez, who despite living in California occupied a “top level” position in the drug network similar to that of Ayala-Leyva. *Sanchez-Sanchez*, 2015 WL 1880196, at *1. His 240-month aggravated sentence was based on essentially the same aggravating factors at issue here but also on mitigating factors, including the fact that he pleaded guilty and took responsibility for his actions. *Id.* With that case as a reference point, we discern no abuse of discretion in the district court’s determination that 309 months in prison is an appropriate sentence for Ayala-Leyva’s aggravated offense.

II. The district court did not abuse its discretion by admitting the prior trial testimony of two absent witnesses.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend IV; *accord* Minn. Const. art. I, § 6. The Confrontation Clause prohibits the admission of testimonial statements of witnesses absent from trial unless the declarant is “unavailable” and the defendant “has had a prior opportunity to cross-examine.” *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369 (2004); *see also State v. Rodriguez*, 754 N.W.2d 672, 680 (Minn. 2008) (holding “that the right of confrontation guaranteed by the Sixth Amendment applies in jury sentencing trials”). An unavailable witness’s prior

testimony “is admissible . . . if the defendant had an adequate opportunity to cross-examine.” *Crawford*, 541 U.S. at 57, 124 S. Ct. at 1367. The defendant is thus guaranteed “an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *State v. Holliday*, 745 N.W.2d 556, 566 (Minn. 2008) (quotation omitted). Whether a defendant’s confrontation rights have been violated is a question of law that we review de novo. *State v. Warsame*, 735 N.W.2d 684, 689 (Minn. 2007).

Ayala-Leyva concedes that co-conspirators Mario Castro and Obet Moreno-Guerrero were deported after trial and therefore unavailable to testify at his resentencing trial. But he contends he did not have an adequate opportunity to cross-examine them at his first trial with respect to the aggravating sentencing factors. We disagree. Ayala-Leyva’s first trial involved one presentation of all evidence, addressing guilt and sentencing factors. Minn. R. Crim. P. 11.04, subd. 2(a) (permitting unitary trial on guilt and aggravated sentence). When Ayala-Leyva cross-examined witnesses, including Castro and Moreno-Guerrero, he was aware that the state was trying to prove both the elements of the charged offense and the three aggravating factors. Ayala-Leyva’s resentencing trial addressed the same three aggravating factors; the only difference is that the jury answered specific interrogatories related to those factors in the second trial. Because the two trials involved the same issues and substantially the same evidence, we conclude that Ayala-Leyva’s prior opportunity to cross-examine Castro and Moreno-Guerrero was more than adequate under *Crawford*. See *State v. Hannon*, 703 N.W.2d 498, 507 (Minn. 2005) (holding *Crawford*’s “key requirements” fulfilled when initial trial and retrial for which

witness was unavailable involved the same theory of the crime and “largely the same” evidence).

Moreover, any error in admitting the absent witnesses’ testimony would not require reversal. Confrontation violations “are subject to harmless error analysis,” and reversal is not warranted if the verdict actually rendered was “surely unattributable to the error.” *Rodriguez*, 754 N.W.2d at 682 (quotation omitted). That is the case here. The evidence at the resentencing trial included the testimony of six law-enforcement officials and four other co-conspirators, who collectively described numerous controlled purchases of methamphetamine, police searches of vehicles and residences revealing pounds of methamphetamine, a sophisticated and extensive network for moving methamphetamine from California to stash houses in Minnesota and out to communities in Minnesota and Wisconsin, and Ayala-Leyva’s role at the top of this organization. And all of this testimony was thoroughly corroborated by hundreds of exhibits. The testimony of Castro and Moreno-Guerrero may have presented a clearer picture of certain aspects of the aggravating circumstances, but given the depth and breadth of the state’s evidence, it surely did not affect the jury’s findings.

Affirmed.