

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1755**

State of Minnesota,
Respondent,

vs.

Christopher Rayshawn Calloway,
Appellant.

**Filed March 4, 2019
Affirmed
Rodenberg, Judge**

Ramsey County District Court
File No. 62-CR-16-6907

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Bradford Colbert, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Reilly, Judge; and
Bratvold, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant Christopher Rayshawn Calloway appeals from his convictions for first-degree aggravated robbery and second-degree felony murder, arguing that the upward-

durational sentencing departure on the felony-murder conviction must be vacated because he did not validly waive his right to a jury determination of facts supporting the upward sentencing departure as required by *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), and because the district court failed to state on the record at the time of sentencing the factors supporting the upward sentencing departure. We affirm.

FACTS

Appellant shot and killed S.B. after making an agreement with his ex-girlfriend to rob S.B. The state charged appellant with aiding and abetting second-degree intentional murder, aiding and abetting second-degree felony murder (charged as causing the death of a person while committing an unspecified felony), and aiding and abetting first-degree aggravated robbery. The state separately charged appellant with criminal damage to property for an offense alleged to have occurred while appellant was in jail.

Appellant reached a plea agreement with the state that called for appellant to plead guilty to the second-degree felony murder and aggravated robbery charges in exchange for the state's dismissal of the charges of second-degree intentional murder and criminal damage to property. The plea agreement also contained a joint sentencing recommendation of a 129-month sentence for aggravated robbery and a 231-month sentence for second-degree murder—which included an upward durational departure of 51 months.¹ Appellant agreed that the sentences would be consecutive.

¹ The plea agreement called for appellant to be sentenced first on the aggravated-robbery offense and then on the second-degree felony-murder offense.

At the guilty-plea hearing, appellant acknowledged that he understood the terms of the plea agreement, and that he would receive a total sentence of 360 months. He waived his right to a *Blakely* trial on aggravating factors. During his plea testimony, appellant admitted to facts to support the upward departure. Appellant pleaded guilty to both offenses. The district court accepted his guilty pleas and found him guilty of both offenses.

At sentencing, and before the district court imposed sentence, the prosecutor expressed a desire to make “the record . . . very clear” concerning the plea agreement. The prosecutor clarified that the reasons for the upward departure were S.B.’s young age, the fact that there were three or more people who participated in committing the offense, S.B.’s particular vulnerability because she had been sleeping, and Minn. Stat. § 609.1095, subd. 4 (2016).² The district court heard multiple victim-impact statements and argument concerning sentencing from both attorneys. It then imposed sentence.

The district court stated that it was sentencing in conformity with the plea agreement and departing upward “pursuant to the plea agreement and based on the factors set forth in law.” For the aggravated robbery offense, the district court imposed a 132-month prison term, adding a 3-month enhancement because appellant was on supervised release at the

² Minn. Stat. § 609.1095, subd. 4, allows for increased sentences for certain dangerous and repeat felony offenders. The statute provides that when a person is convicted of a felony and the judge is imposing an executed sentence based on a presumptive guidelines sentence, “the judge may impose an aggravated durational departure from the presumptive sentence up to the statutory maximum sentence if the factfinder determines that the offender has five or more prior felony convictions and that the present offense is a felony that was committed as part of a pattern of criminal conduct.” Minn. Stat. § 609.1095, subd. 4.

time of the offense. For the second-degree murder offense, the district court imposed a 180-month sentence, which included an upward durational departure of 48 months, a 3-month reduction from the agreed-upon 51-month departure, to account for the enhancement that had been added to the aggravated-robbery sentence. The overall sentence was as the parties had agreed.

Following the sentencing hearing, the district court filed a timely departure report, indicating its reasons for departing as: “[v]ictim was a minor at the time of offense; victim was particularly vulnerable, being asleep and enclosed in a car; crime was committed as part of a group of three or more persons actively participating.” The departure report also referred to Minn. Stat. § 609.1095, subd. 4, noting that appellant “has eight prior felony convictions.” These were the factors identified by the prosecutor at the beginning of the sentencing hearing as the reasons for the agreed-upon departure.

This appeal followed.

DECISION

- I. **Appellant validly waived his *Blakely* right to a jury determination of facts supporting an upward sentencing departure by acknowledging that he understood the rights he was waiving and admitting sufficient facts to support the departure.**

Appellant argues that his *Blakely* waiver was invalid because he did not “expressly, knowingly, voluntarily, and intelligently waive his right to a jury determination of facts supporting an upward sentencing departure.” Appellate courts review the validity of a *Blakely*-hearing waiver de novo. *State v. Dettman*, 719 N.W.2d 644, 648-49 (Minn. 2006).

Both the United States and Minnesota Constitutions guarantee criminal defendants the right to a trial by jury. U.S. Const. amend. VI; Minn. Const. art. I, § 6. “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Blakely*, 542 U.S. at 301, 124 S. Ct. at 2536 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000)).

“*Blakely* reformulated the definition of ‘statutory maximum’ as the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.” *Dettman*, 719 N.W.2d at 647 (quotation omitted). The presumptive sentence under the Minnesota Sentencing Guidelines is the “statutory maximum” for *Blakely* purposes. *State v. Shattuck*, 704 N.W.2d 131, 141 (Minn. 2005). A “verdict or guilty plea alone does not authorize [an] enhanced sentence,” but *Blakely* “permits a defendant to either stipulate to relevant facts or consent to judicial factfinding regarding sentencing factors.” *Id.* at 141-42. “[A] defendant must expressly, knowingly, voluntarily, and intelligently waive his right to a jury determination of facts supporting an upward sentencing departure before his statements at his guilty-plea hearing may be used to enhance his sentence.” *Dettman*, 719 N.W.2d at 650-51.

Minn. R. Crim. P. 26.01, subd. 1(2)(a), applies to waivers of the right to a jury trial on the elements of the offense and provides that a defendant “may waive a jury trial on the issue of guilt provided the defendant does so personally, in writing or on the record in open court, after being advised by the court of the right to trial by jury, and after having had an

opportunity to consult with counsel.” Minn. R. Crim. P. 26.01, subd. 1(2)(b), reads similarly and applies to waivers of the right to a sentencing jury when an aggravated sentence is sought. A waiver that complies with Minn. R. Crim. P. 26.01, subd. 1(2)(a), “meets the knowing, voluntary, and intelligent requirement.” *State v. Thompson*, 720 N.W.2d 820, 827 (Minn. 2006).

Appellant argues that his *Blakely* waiver was not made expressly, knowingly, voluntarily, and intelligently and was invalid because the district court did not strictly comply with Minn. R. Crim. P. 15.01, subd. 2, when obtaining his waiver.

The plea hearing transcript establishes that appellant’s *Blakely* waiver was valid. Although the district court did not go through each line of the template in Minn. R. Crim. P. 15.01, subd. 2, during the plea hearing, appellant was repeatedly reminded, and he acknowledged, that he was waiving both his right to a jury trial on the question of guilt and his *Blakely* jury-trial right. Appellant’s signed plea petition expressly provides that appellant waived his rights under *Blakely*. Moreover, appellant expressly agreed under oath during the plea colloquy to the upward departure of 51 months on the second-degree felony-murder offense as part of a package agreement.

Appellant agreed that he and his attorney had discussed “what a *Blakely* waiver is.” He also acknowledged that he had a right to have the jury or the fact-finder “find all aggravating factors that the state may seek to use to enhance [his] sentence before [he] could actually have that consequence where [he’s] looking at a departure upward.” Appellant’s attorney questioned appellant as follows:

By waiving your right to that hearing you're also waiving, in essence, another part of the jury trial. We could have two trials in one really. We'd have a trial to see whether or not you're guilty, and then if you're found guilty the next part of that trial or mini-trial is whether or not the State has proven their factors to show that they can sentence you beyond the guidelines of 309 months?

Appellant again answered that he understood. Appellant's *Blakely* waiver was knowing, voluntary, and intelligent.

Appellant further argues that his *Blakely* waiver was invalid because he did not admit sufficient facts authorizing an upward departure and that it is "not even clear what facts were used to justify the departure." This is a challenge to the accuracy of the *Blakely* waiver.

The record is clear that the state, appellant, and the district court understood that the reasons supporting the upward departure were: (1) S.B. was a minor at the time of the offense, (2) S.B. was particularly vulnerable at the time of the offense since she had been sleeping, (3) the crime was committed as part of a group of three or more people, and (4) Minn. Stat. § 609.1095, subd. 4, could be applicable to his sentence.

During the plea hearing, appellant testified in detail about the events leading up to S.B.'s death and admitted to facts sufficient to support the upward departure. Appellant testified that, on the night of S.B.'s death, he agreed to help his ex-girlfriend fake a robbery. Appellant admitted that two other men, D.B. and V.H., helped him carry out this plan, and that D.B. "had a gun and [V.H.] had a gun" and he "needed them to participate, because they were gonna be the muscle." Appellant further testified that he got into a car, hit one

of the women in the car with a gun, and saw a person, later identified as S.B., sleeping in the backseat. Appellant admitted that S.B. had been asleep at the beginning of the robbery. When he heard D.B. fire a shot, appellant almost immediately also fired behind him. He agreed that S.B. was hit by his shot and died from the gunshot. These facts are sufficient to support the bases for the agree-upon upward departure, making appellant's waiver accurate.

II. Although the district court's statement of its reasons for departing could have been clearer, it reasonably adopted the expressly stated and agreed-upon bases for departing from the guidelines identified by the state at the beginning of the sentencing hearing, which were then included in the district court's departure report.

Appellant argues that the district court erred as a matter of law by not expressly stating the reasons for imposing the upward departure on the record at the time of sentencing. Questions of law are reviewed de novo. *State v. Misquadace*, 644 N.W.2d 65, 68 (Minn. 2002).

If a district court departs from the sentencing guidelines, it must make findings of fact supporting the departure and the grounds for departure must be stated in the sentencing order or recorded in a departure report. Minn. R. Crim. P. 27.03, subd. 4(C). A district court is required to state its reasons for departure at the time of sentencing so that the defendant has "an opportunity to evaluate and prepare an appeal and to provide for meaningful review." *State v. Peterson*, 405 N.W.2d 545, 547 (Minn. App. 1987).

In *Williams v. State*, the Minnesota Supreme Court, to ensure future compliance with sentencing departures, adopted a clear rule stating that "[i]f no reasons for departure

are stated on the record at the time of sentencing, no departure will be allowed.” 361 N.W.2d 840, 844 (Minn. 1985). In *State v. Geller*, the supreme court reaffirmed the requirement that the sentencing court must state the reasons for departure on the record at the time of sentencing. 665 N.W.2d 514, 517 (Minn. 2003). There, the supreme court concluded that, because the district court had not stated its reasons for departing on the record at the time of sentencing, it was error for this court to remand to the district court to allow reasons for the departure to be given after sentencing had occurred. *Id.* Instead, the supreme court remanded to the district court with instructions to impose the presumptive guidelines sentence. *Id.* Later, in *State v. Rannow*, and relying on *Geller*, we remanded to the district court for imposition of the presumptive sentence where the district court departed upward based on a plea agreement and the district court did not provide so, orally or in writing, any reason for the sentencing departure. 703 N.W.2d 575, 579 (Minn. App. 2005). The supreme court has explained that an upward departure from the guidelines must be supported by both a recognized aggravating factor (the reason for departure) and facts providing a substantial and compelling basis for the departure. *State v. Rourke*, 773 N.W.2d 913, 920 (Minn. 2009).

Appellant argues that, under these authorities, the district court did not sufficiently provide the reasons for departing from the sentencing guidelines, and therefore the upward departure must be vacated and the case remanded to the district court for imposition of a presumptive guidelines sentence.

At the outset of the sentencing hearing, the prosecutor explained that the state wanted to make the record “very clear” that

the reasons for the departure are the aggravating factors that exist, including the young age of the victim, the fact that there were three or more persons that were part of the commission of the offense, and the particular vulnerability of the victim as she was sleeping at the time of the offense.

The state also noted that “pursuant to 609.1095, subdivision 4, [appellant] does have eight prior felony convictions. So there are plenty of bases by which the court can upward depart in this case.” The district court then again clarified the grounds for departure with both the state and appellant’s trial counsel.³

³ In support of their arguments, both the state and appellant cite to unpublished opinions of this court, each of which rely on *Williams* and *Geller*. The facts of each of those cases are significantly different than this case.

Appellant cites to *State v. Barnard*, No. A17-0116, 2017 WL 5559905, at *1, 3 (Minn. App. Nov. 20, 2017), *review denied* (Minn. Jan. 24, 2018). In *Barnard*, the district court did not provide *any* departure grounds on the record at the time of sentencing, and the only reference to the grounds for a departure had been recited at an earlier plea hearing and were not again referenced at sentencing. *Id.* at *1.

The state cites to *State v. Bennett*, No. A11-1009, 2013 WL 599128, at *1, 8-9 (Minn. App. Feb. 19, 2013), *review denied* (Minn. Apr. 30, 2013). There, Bennett argued that “the district court failed to make specific findings on the aggravating factors.” *Id.* at *9. At sentencing, the district court stated that it was imposing its sentence “by reason of the agreement on the *Blakely* factors.” *Id.* at *9. We concluded that, because the record plainly disclosed the aggravating factors to which Bennett admitted, the district court’s adoption of the agreed-upon factors was a sufficient finding and recitation of those factors. *Id.*

Here, the district court did not expressly refer to the parties’ “agreement on the *Blakely* factors.” Instead, it indicated that it was departing from the guidelines “pursuant to the plea agreement and based on the factors set forth in law.” This case is an exemplar of why this court issues unpublished opinions and why such opinions are not precedential. See Minn. Stat. § 480A.08, subd. 3(b) (2018) (limiting “officially published” opinions to

The district court pronounced appellant’s sentence at the end of the more-than-30-minute-long hearing and following four victim-impact statements. The district court stated that it was departing “pursuant to the plea agreement and based on the factors set forth in law.” This statement clearly refers back to the agreed-upon bases for departure from the guidelines identified at the outset of the sentencing hearing. The district court also filed a timely departure report, indicating that it had departed upward because the victim was a minor at the time of the offense, was particularly vulnerable, and the crime was committed by three or more people. The report also referenced Minn. Stat. § 609.1095, subd. 4. These are the same factors identified at the sentencing hearing. Appellant’s plea colloquy established sufficient facts supporting the agreed-upon reasons for departure. *Cf. Rourke*, 773 N.W.2d at 920.

The district court’s reasons for imposing the departure certainly could have been expressed more clearly. Nevertheless, the district court did make a clear reference to the prosecutor’s earlier statement concerning the reasons for the agreed-upon departure. The departure was part of a detailed plea agreement. At no point during the proceedings did

certain parameters and providing that opinions not so published “must not be cited as precedent”). In this case, just as in *Barnard* and *Bennett*, we apply well-established law to the facts of the individual case. Of course, the facts of each case are different. Our unpublished opinions applying settled law are not precedential precisely because the facts to which the law is applied differ from case to case. Our function is to correct errors, not to make law. *State v. McCormick*, 835 N.W.2d 498, 510 (Minn. App. 2013) (explaining that, as an error-correcting court, our role is to find the law, to state it, and to apply it to the facts, and only when there are no statutory or judicial precedents will we make new law), *review denied* (Minn. Oct. 15, 2013).

appellant object to or express any uncertainty concerning those reasons, and the record indicates that the parties and counsel all well understood the reasons for the departure. This is not a case where “no reasons for departure are stated on the record at the time of sentencing.” *Williams*, 361 N.W.2d at 844. Although the district court’s explanation was imperfect, it reasonably adopted the prosecutor’s earlier identification of the bases for departure. *Williams* and *Geller* do not require reversal where the district court has identified its bases for departing. It did so sufficiently here.

Moreover, although the departure report alone would not be a sufficient statement of the reasons for departure, here the departure report includes the earlier-mentioned reasons for departure and therefore further supports our interpretation of the district court’s statement at sentencing. The district court adequately stated its reasons for departing from the sentencing guidelines.

In sum, because appellant validly waived his *Blakely* rights and because the district court’s statement of its reasons for departing were sufficient, the district court properly sentenced appellant to the upward durational departure.⁴

Affirmed.

⁴ In response to appellant’s proposed remedy on remand, the state argues that appellant would not be entitled to a presumptive guidelines sentence on remand. The state argues that, because the plea agreement was part of a package deal, where the state dismissed the intentional second-degree murder offense (based on his criminal history score of six or more, the presumptive sentence range is 360 to 480 months), the state should have the opportunity on remand to withdraw from the plea agreement. While it appears that appellant received a substantial benefit under the plea agreement, because we conclude that the district court did not reversibly err under either *Williams* or *Geller*, we do not reach the state’s alternative argument.