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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0933**

State of Minnesota,
Respondent,

vs.

Omar Auquil Muhammad,
Appellant.

**Filed June 3, 2019
Affirmed
Reilly, Judge**

Washington County District Court
File No. 82-CR-17-2274

Keith Ellison, 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, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

REILLY, Judge

In this direct appeal from the judgment of conviction, appellant argues that (1) the district court erred by denying his motion to suppress custodial, non-*Mirandized* statements

he made to a social worker; and (2) he is entitled to resentencing because the district court improperly imposed an aggravated departure based on particular vulnerability and particular cruelty. We affirm.

FACTS

On May 13, 2017, police investigated a report that appellant Omar Auquil Muhammad assaulted C.M., who is a vulnerable adult. After speaking with the police, C.M. went to an urgent care facility where she told a doctor that “she had been beaten, punched, and kicked repeatedly” by Muhammad over the past week while they had been living together in C.M.’s apartment. Officers arrested Muhammad and he was charged with misdemeanor domestic assault.

On May 22, Tina Gullickson, a social worker for Washington County Community Services, was assigned to investigate the maltreatment of C.M. Gullickson is an adult-protection investigator, which means that when a report is filed regarding the maltreatment of a disabled person, she would complete “an assessment of the person and their disabilities while looking into the allegation of maltreatment that is reported.” While investigating the maltreatment, Gullickson may work with law enforcement “as needed,” and help the victim connect with services and resources.

Gullickson spoke with C.M. twice, and an officer was present at one of the interviews. C.M. told Gullickson and the officer that Muhammad stayed with her in her apartment for around two weeks. C.M. stated that Muhammad had sex with her after she asked him to stop and kicked her when she did not comply. Following her interview with

C.M., Gullickson spoke with Muhammad, who was in custody at the Washington County Jail.

During the interview with Muhammad, Gullickson identified herself as a social worker. She told Muhammad that she works alongside the police to advocate for vulnerable adults. Gullickson further stated:

So when there's a report and there's an allegation against someone, we always give them the opportunity to give their side of the story, let us know what's going on as far as they're concerned. So that's why we're here. Just hoping you'd talk with us for a few minutes. You don't have to. You know – you know you can end the conversation whenever you want. . . . If we need to, we can share information with law enforcement. . . . [W]hen we're done with the assessment, you get notified of the findings in writing. And that just means the result of the assessment is, whether maltreatment might have occurred or not.

Gullickson asked Muhammad questions about whether any physical or sexual abuse had taken place between him and C.M. Muhammad denied all allegations.

On June 2, Muhammad was charged with first-degree criminal sexual conduct, use of force or coercion to accomplish sexual penetration and causing personal injury, in violation of Minn. Stat. § 609.342, subd. 1(e) (2016).

On June 12, Gullickson sent Muhammad the official-findings letter she had mentioned during the interview. The letter stated that Washington County Community Services determined that the allegations of physical and sexual abuse were substantiated. The letter also informed Muhammad that these findings may affect future employment opportunities, and that if he does “not agree with the county lead investigative agency’s

determination, [he] may ask the county lead investigative agency to reconsider its determination.”

Muhammad sent a letter to Gullickson on June 26, writing that he felt the determination was incorrect. The letter contained multiple incriminating statements by Muhammad about the physical abuse allegations. Muhammad wrote that he would hit and kick C.M. because she would often grab his face. He also stated that C.M. “would aggressively spring up and grab [his] face and try to pull it toward her and . . . [he] would punch her.”

During pretrial proceedings, Muhammad moved to suppress both his oral statements to Gullickson and his written letter because Gullickson did not *Mirandize* him. The district court denied Muhammad’s motion to suppress his oral statements, finding that although Muhammad was in custody at the time of Gullickson’s interrogation, she was not acting as a law-enforcement agent. The district court also denied Muhammad’s motion to suppress his written statements, finding that Gullickson’s letter was a routine administrative process and not an interrogation for *Miranda* purposes.

A jury found Muhammad guilty. Following a *Blakely*¹ trial, the jury found the existence of three aggravating factors: particular vulnerability, particular cruelty, and

¹ When departing from the presumptive sentence, the district court “must afford the accused an opportunity to have a jury trial on the additional facts that support the departure and to have the facts proved beyond a reasonable doubt.” Minn. Sent. Guidelines 2.D; see also *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004) (stating that any fact, other than a prior conviction, that supports a departure above the prescribed statutory maximum “must be submitted to a jury, and proved beyond a reasonable doubt” (quotation omitted)).

multiple penetrations. The district court relied on the jury's *Blakely* findings and sentenced Muhammad to 312 months in prison, an upward durational departure.

This appeal follows.

DECISION

I. The district court did not err in denying appellant's motion to suppress.

Suspects who are subjected to a custodial interrogation must be given a *Miranda* warning, otherwise any statements made to the law-enforcement officer must be suppressed. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966). Custodial interrogation is “questioning initiated by law-enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Thompson v. Keohane*, 516 U.S. 99, 107, 116 S. Ct. 457, 463 (1995) (citing *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612). Interrogation is not only express questioning, but also “any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689-90 (1980). This court reviews the district court's factual findings relating to the circumstances of the interrogation for clear error, but independently reviews the district court's determinations for the need for a *Miranda* warning. *State v. Heinonen*, 909 N.W.2d 584, 590 (Minn. 2018); *see also State v. Wiernasz*, 584 N.W.2d 1, 3 (Minn. 1998).

Muhammad argues that the district court erred by denying his motion to suppress and admitting his two statements: (1) his oral statement to Gullickson, and (2) his letter written to Gullickson. Muhammad contends that because Gullickson acted on behalf of

law enforcement agents, failed to give him a *Miranda* warning, and conducted a custodial interrogation, his oral statements must be suppressed. He also argues that his written statements must be suppressed because Gullickson's official-findings letter constituted an interrogation.

a. Gullickson was not acting on behalf of law-enforcement agents.

The admissibility of Muhammad's non-*Mirandized* statements to Gullickson depends on whether Muhammad was subjected to a custodial interrogation by a law-enforcement officer. The district court found and the parties agree that Muhammad was interrogated by Gullickson while in custody. This finding is supported by the record as Muhammad was in jail at the time of the interview and Gullickson questioned him about whether he had physically or sexually assaulted C.M. *See State v. Tibiatowski*, 590 N.W.2d 305, 309 (Minn. 1999) (noting an interrogation takes place when the questioning is "reasonably likely to elicit an incriminating response" (quotation omitted)). The question before this court is whether Gullickson acted as a law-enforcement officer when she spoke with Muhammad. *See Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612 (holding that the procedural safeguards against self-incrimination are necessary when a law-enforcement officer interrogates a suspect in custody).

A *Miranda* warning "must be given by all those who use the power of the state to elicit an incriminating response from a suspect, regardless whether they are law enforcement personnel." *Tibiatowski*, 590 N.W.2d at 310 (citing *Estelle v. Smith*, 451 U.S. 454, 467, 101 S. Ct. 1866, 1875 (1981)). Muhammad argues that Gullickson was acting on behalf of law-enforcement officers and cites *Estelle* to support his argument that

Gullickson was required to *Mirandize* him. In *Estelle*, the Supreme Court found that a court-designated psychiatrist who examined the defendant while he was in prison should have given a *Miranda* warning. *Estelle*, 451 U.S. at 469, 101 S. Ct. at 1876. But this case is distinguishable as Gullickson was not ordered by the court or police to question Muhammad. Instead, Gullickson was acting within her role as a social worker to review the allegations made by C.M. as required by statute. See Minn. Stat. § 626.557, subd. 9b (2018) (requiring investigative agency to complete investigate reports of maltreatment of vulnerable adults).

Moreover, the Minnesota Supreme Court has found that a human-relations officer, who questioned a juvenile while he was at a detention center, was not acting as a law-enforcement officer. *Tibiatowski*, 590 N.W.2d at 311. The human-relations officer's relationship to the juvenile was instead "limited to matters relating to the legal care, custody, and control of the children she worked with and did not include either conditions of probation or law enforcement duties." *Id.* (quotations omitted). Gullickson's role is also limited. She began her interview with Muhammad by stating, "The reason we're here is we got a report of some issues regarding a vulnerable adult named C.M., okay? And so we're not the police, but we're social workers that kind of work alongside to advocate for the person with disabilities." While Gullickson may have shared information with police officers, this does not undermine her principal duty that is tied to the welfare of C.M. rather than investigating on behalf of law enforcement.

Because Gullickson was not acting as a law-enforcement officer or on behalf of law-enforcement officers, she was not required to provide Muhammad with a *Miranda* warning.

The district court did not err by denying Muhammad's motion to suppress his oral statements.

b. Gullickson's official-findings letter did not constitute an interrogation.

Even though we may end our analysis because Gullickson was not acting as a law-enforcement officer, we will still address Muhammad's argument that Gullickson's official-findings letter amounted to an interrogation.

This court considers the totality of the circumstances when determining whether a law-enforcement officer's questions are "reasonably likely to elicit an incriminating response," and thus constitute an interrogation. *Heinonen*, 909 N.W.2d at 589-90. Because officers "cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Innis*, 446 U.S. at 302, 100 S. Ct. at 1690 (emphasis in original).

Here, nothing in Gullickson's letter was seeking to elicit an incriminating response. After reaching a final disposition regarding maltreatment allegations, social services must notify various persons, including "the alleged perpetrator, if known." Minn. Stat. § 626.557, subd. 9c(f) (2018). The letter informed Muhammad that Washington County Community Services concluded that the allegations of abuse were substantiated; that this finding may adversely affect Muhammad's ability to become licensed or employed in certain fields; and informed Muhammad that he can seek reconsideration. The letter requested no additional information from Muhammad. Muhammad argues that any reasonable person who received this letter "would most certainly avail himself of the

opportunity to submit a written request for reconsideration.” However informing Muhammad of his right to ask for reconsideration does not mean the letter was seeking to elicit an incriminating response. Muhammad could have requested reconsideration without including any additional statements.

Because Gullickson’s official-findings letter did not amount to an interrogation, the district court did not err by denying Muhammad’s motion to suppress his written response.

II. The district court properly sentenced appellant to an upward durational departure.

The Minnesota Sentencing Guidelines prescribe a range of sentences and the sentencing court “must pronounce a sentence within the applicable range unless there exist identifiable, substantial, and compelling circumstances that distinguish a case and overcome the presumption in favor of the guidelines sentence.” *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotation omitted); *See* Minn. Sent. Guidelines 2.D.1. (2016). “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.” *State v. Hicks*, 864 N.W.2d 153, 157 (Minn. 2015) (quotation omitted). The district court has broad discretion to depart and we review its decision for an abuse of discretion. *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009).

The guidelines provide a non-exclusive list of aggravating factors that may justify a departure. Minn. Sent. Guidelines 2.D.3.b (2016). Before imposing an upward departure, the district court “must submit to a jury the question of whether the State has proven beyond

a reasonable doubt the existence of additional facts . . . which support reasons for departure.” *State v. Rourke*, 773 N.W.2d 913, 921 (Minn. 2009). Then, based on the factual determinations made by the jury, the district court must “explain why the circumstances or additional facts found by the jurors in a *Blakely* trial provide the district court a substantial and compelling reason to impose a sentence outside the range on the grid.” *Id.* at 920. Here, the district court granted an upward durational departure because of three aggravating factors: (1) the victim’s particular vulnerability; (2) the particular cruelty inflicted; and (3) multiple penetrations of the victim. Muhammad argues that this court must remand for resentencing because the jury’s findings are inadequate to support particular vulnerability and particular cruelty, and the district court did not follow proper procedure before imposing an upward departure.

a. The record supports the district court’s reliance on particular cruelty.

Particular cruelty “involves the gratuitous infliction of pain and cruelty of a kind not usually associated with the commission of the offense in question.” *Rourke*, 773 N.W.2d at 922 (quotation omitted). Muhammad was charged with first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(e), for engaging in sexual penetration with C.M. while using force or coercion and causing personal injury. For Muhammad’s conduct to be particularly cruel, it must be “significantly more cruel than conduct typically associated with the offense of conviction.” *Dillon v. State*, 781 N.W.2d 588, 600 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

The jury found, as reflected on the special verdict form, that Muhammad: inflicted “more injury than necessary”; caused “multiple bruises”; punched C.M. more than once;

and kicked C.M. more than once. The district court relied on these findings and determined that “the violence level used by Mr. Muhammad” constituted particular cruelty.

Muhammad argues that his conduct was not significantly more serious than the conduct involved in a typical first-degree sexual assault. While some of Muhammad’s actions may have been typical conduct associated with his crime, the jury still found that he inflicted “more injury than necessary.” *See State v. Jeno*, 352 N.W.2d 82, 85 (Minn. App. 1984) (holding that “though some of [defendant’s] acts may not have differed in kind from that of other rapists’, other acts were sufficiently different in degree to justify a departure upward”). The jury’s findings were adequate to support particular cruelty and the district court did not err by relying upon this factor for the upward departure.

b. The record does not support the district court’s reliance on particular vulnerability.

When the victim of an offense is “particularly vulnerable due to age . . . or reduced physical or mental capacity, which was known or should have been known to the offender,” that vulnerability may support an upward durational departure. Minn. Sent. Guidelines 2.D.2.b.(1). Here, to determine if circumstances existed to support particular vulnerability, the district court provided the jury with a special verdict form that asked, in pertinent part:

[a.] Does [C.M.] legally qualify as a vulnerable adult? “Vulnerable adult” is defined as a person 18 years of age or older who possesses a physical or mental infirmity or other physical, mental, or emotional dysfunction that impairs the individual’s ability to provide adequately for the individual’s own care without assistance, including the provision of food, shelter, clothing, health care, or supervision; and because of the dysfunction or infirmity and the need for care or services, the individual has an impaired ability to protect the individual’s self from maltreatment.

[b.] If your answer to the previous question is “Yes,” did the defendant know or should he have known that [C.M.] was a vulnerable adult?

The jury determined that C.M. did qualify as a vulnerable adult, but that Muhammad did not know nor should he have known that she was a vulnerable adult.

The state argues that it is enough that the jury found that C.M. was developmentally delayed and that Muhammad knew about it. Perhaps the facts would have established particular vulnerability had the special verdict form not contained the direct question: “Did the defendant know or should he have known that [C.M.] was a vulnerable adult.” Because the jury specifically found that Muhammad did not know C.M. was a vulnerable adult, the district court erred by finding that particular vulnerability existed and relying on this factor when deciding to depart.

c. The district court sufficiently stated its reasons for departure and would have imposed the same sentence absent its reliance on particular vulnerability.

When the 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. The district court must explain why the additional facts found by the jury provide the court with a substantial and compelling reason to depart and this is satisfied by applying a recognized aggravating factor to the underlying facts. *Id.* If reasons for the departure are stated on the record, this court then “examine[s] the record to determine if the reasons given justify the departure.” *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985).

Here, the district court stated on the record:

[T]he court finds that substantial and compelling circumstances as found by the jury do exist to justify departure from the sentencing guidelines in this case. Specifically, those substantial and compelling circumstances are:

First, multiple penetrations and/or orifices. This is the sexual acts themselves. Second – and in my opinion this is not double counting – the particular cruelty. That is the violence level used by Mr. Muhammad to accomplish the multiple penetrations. They are separate and distinct. And then finally the particular vulnerability of our victim, [C.M.].

The court cited the facts found by the jury and applied them in finding three aggravating factors. The district court sufficiently explained why the circumstances found by the jurors provided the substantial and compelling reasons to depart.

However, because the district court relied on a combination of proper and improper aggravating factors, we must next determine if remanding this case to the district court for resentencing is necessary. *State v. Mohamed*, 779 N.W.2d 93, 100 (Minn. App. 2010), review denied (Minn. May 18, 2010). When deciding whether to affirm or remand, “we must determine whether the district court would have imposed the same sentence absent reliance upon the improper aggravating factor.” *State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009) (citation omitted). “In doing so, we consider the weight given to the invalid factor and whether any remaining factors found by the court independently justify the departure.” *Id.* This court will affirm the district court if the record shows the district court would have imposed the same sentence absent its reliance on the improper aggravating factor. *Mohamad*, 779 N.W.2d at 100; see also *Williams*, 361 N.W.2d at 844 (stating “[i]f

the reasons given are improper or inadequate, but there is sufficient evidence in the record to justify departure, the departure will be affirmed”).

Here, the district court relied upon two proper aggravating factors – particular cruelty and multiple penetrations – to justify the upward departure. These factors independently support the upward departure. *See State v. Vance*, 765 N.W.2d 390, 395-96 (Minn. 2009) (stating that “when two out of three [aggravating] factors are valid, it is reasonable to conclude that the district court would have imposed the same sentence absent reliance on the [improper] factor”). We are convinced that the district court would have imposed the same sentence even without reliance on particular vulnerability given that the remaining two aggravating factors justify the upward departure.

Affirmed.