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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0979**

State of Minnesota,
Respondent,

vs.

Tarey Marquan Hill,
Appellant.

**Filed May 6, 2019
Affirmed
Reilly, Judge**

Hennepin County District Court
File No. 27-CR-17-23126

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara J. Euteneuer, 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UNPUBLISHED OPINION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 judgment of conviction, appellant argues that (1) the district court erred by imposing an upward departure at sentencing, and (2) the sentencing departure violated appellant's jury trial rights under *Blakely*. We affirm.

FACTS

On September 12, 2017, appellant Tarey Marquan Hill and two other individuals “knocked out and robbed” M.R.M. in Minneapolis. M.R.M. was left bleeding and there was blood on the sidewalk where the attack occurred. Video camera footage showed appellant and two other individuals strike M.R.M. several times, take items from M.R.M., and run away. After a short chase, police officers detained appellant and the two other individuals and found M.R.M.'s personal items on one of appellant's co-defendants. M.R.M. was transported to the hospital with a broken nose and a broken orbital bone.

The state charged appellant with first-degree aggravated robbery under Minn. Stat. § 609.245, subd. 1 (2016). Appellant agreed to enter a plea of guilty to an amended charge of third-degree assault, substantial bodily harm, in violation of Minn. Stat. § 609.223, subd. 1 (2016). The parties agreed to an upward departure from the presumptive sentence of 24 months in prison, to a sentence of 36 months in prison. At the guilty-plea hearing, defense counsel questioned appellant as to each of his rights. Appellant acknowledged that he reviewed the plea petition before signing, understood the terms of the document and the rights he was giving up, and understood that by the terms of the agreement he was “going to be sentenced to the Department of Corrections for 36 months.” During the factual basis

portion of the plea hearing, appellant admitted that he “struck” M.R.M., breaking his nose and orbital bone. Appellant agreed that breaking a person’s nose and orbital bone “could generally be considered substantial bodily harm.” Appellant acknowledged that when he hit M.R.M., the victim was “prone” and “on the ground or close to being on the ground.”

The district court accepted appellant’s guilty plea to the crime of third-degree assault, substantial bodily harm, and sentenced him to 36 months in prison under the terms of the negotiated plea agreement. The district court noted that the sentence was a dispositional and durational departure from the sentencing guidelines based on the agreement of the parties and the seriousness of the offense. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by imposing an upward departure from the presumptive guidelines sentence.

Appellant challenges the district court’s decision to depart from the sentencing guidelines. The Minnesota Sentencing Guidelines were created to ensure “uniformity, proportionality, rationality, and predictability in sentencing.” *State v. Misquadace*, 644 N.W.2d 65, 67 (Minn. 2002). A district court may depart from the guidelines “only when substantial and compelling circumstances are present.” *Taylor v. State*, 670 N.W.2d 584, 587 (Minn. 2003). “Substantial and compelling circumstances are present when 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. Abrahamson*, 758 N.W.2d 332, 337-38 (Minn. App. 2008) (quotation omitted). Where the district court states its reasons for departure on the record, we determine if the reasons justify the

departure; if they do, the departure will be allowed. *Id.* at 338. We review a district court’s decision to depart from the presumptive sentence for an abuse of discretion. *Taylor*, 670 N.W.2d at 588. “A district court abuses its discretion when its reasons for departure are legally impermissible and insufficient evidence in the record justifies the departure.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016).

Appellant argues that the district court erred by imposing an upward departure. Appellant’s sentence is the result of a negotiated plea agreement. “The essence of plea agreements . . . is that they represent a bargained-for understanding between the government and criminal defendants in which each side foregoes certain rights and assumes certain risks in exchange for a degree of certainty as to the outcome of criminal matters.” *State v. Meredyk*, 754 N.W.2d 596, 603 (Minn. App. 2008) (quotation omitted). “[N]egotiated plea agreements that include a sentencing departure are justified . . . in cases where substantial and compelling circumstances exist.” *Misquadace*, 644 N.W.2d at 71. However, a plea agreement standing alone does not create substantial and compelling circumstances. *Id.* Instead, a district court must articulate proper and adequate reasons for an upward departure, and the record must include evidence supporting the departure. *Tucker v. State*, 799 N.W.2d 583, 586 (Minn. 2011); Minn. Sent. Guidelines 2.D.1.c (2016).

Additionally, a district court may not base an upward departure on factors the legislature already took into account in determining the degree of the seriousness of the offense. *State v. Thompson*, 720 N.W.2d 820, 830 (Minn. 2006). Something more than

the elements of the offense must exist to justify a departure. *State v. Blegen*, 387 N.W.2d 459, 464 (Minn. App. 1986), *review denied* (Minn. July 31, 1986).

Appellant entered a guilty plea to an amended charge of third-degree assault. The statute provides that, “Whoever assaults another and inflicts substantial bodily harm may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both.” Minn. Stat. § 609.223, subd. 1. “Substantial bodily harm” is “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member.” Minn. Stat. § 609.02, subd. 7a (2016).

Here, appellant admitted that he struck M.R.M., breaking the victim’s nose and orbital bone. Appellant admitted that breaking M.R.M.’s nose and orbital bone “could generally be considered substantial bodily harm.” The district court held that substantial and compelling reasons justified a departure from the guidelines sentence based on appellant’s admission that he broke two of the victim’s bones. Appellant cites to three unpublished cases to support his argument that the victim’s broken nose and broken orbital bone are consistent with injuries suffered by victims in other third-degree assault cases and do not make this offense significantly more serious than the typical offense.¹ We agree

¹ See *Maddox v. State*, 2005 WL 287533, *1-2 (Minn. App. Feb. 8, 2005) (reversing and remanding for evidentiary hearing on calculation of criminal-history score in third-degree assault case where defendant broke his girlfriend’s orbital socket and nose); *State v. Hunter*, 2003 WL 21386479, *2 (Minn. App. June 17, 2003) (affirming third-degree assault conviction where defendant broke victim’s nose and fractured her orbital bone); *State v. Anderson*, 2002 WL 857694, *1-2 (Minn. App. May 7, 2002) (affirming third-degree

that appellant's conduct was not "significantly more . . . serious than that typically involved in the commission of the crime in question." *Abrahamson*, 758 N.W.2d at 337-38 (quotation omitted). And the district court departed upwards based on factors that the legislature already took into account in determining the seriousness of a third-degree assault crime. Because the reasons relied upon by the district court relate to elements of the offense itself, they do not justify an upward departure.

When the reasons given for a departure are improper or inadequate, we examine the record to determine whether there is sufficient evidence in the record to justify the departure. *See State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003) (requiring appellate courts to independently review record to determine the sufficiency of the district court's reasons for departure). A single aggravating factor may support an upward sentencing departure. *State v. O'Brien*, 369 N.W.2d 525, 527 (Minn. 1985). A victim's particular vulnerability is an aggravating factor that may support an upward departure. Minn. Sent. Guidelines 2.D.3.b (2018). This court has previously affirmed an upward departure where the defendant kicked a victim who was lying on the ground. *See State v. Davis*, 540 N.W.2d 88, 91 (Minn. App. 1995) (determining that defendant exhibited particular cruelty against a particularly-vulnerable victim where defendant kicked a pregnant woman on the ground while she was without an effective means of defense), *review denied* (Minn. Jan. 31, 1996). Here, appellant admitted during the factual-basis portion of his plea hearing that he hit

assault conviction where defendant broke victim's nose and fractured orbital bone). The state attempts to distinguish these cases by arguing that they are not sentencing-departure cases. Because we agree that M.R.M.'s injuries do not make this case more serious than a typical third-degree assault case, we do not find the state's argument persuasive.

M.R.M. while the victim was “prone” on the ground or near to the ground. Witnesses at the scene told the responding police officers that appellant and two other individuals “knocked out” the victim, and there was blood on the sidewalk where the attack occurred.

On this record, we determine that there is sufficient evidence to justify a departure based on the particular vulnerability of the victim. We therefore conclude that the district court did not abuse its discretion by imposing an upward departure at sentencing.

II. The district court did not violate appellant’s *Blakely* rights.

Appellant argues that the district court violated his right to a *Blakely* trial. “[A]ny facts supporting a departure above the maximum guidelines sentence requires either a jury to find those facts beyond a reasonable doubt or the defendant to admit to those facts.” *State v. Bradley*, 906 N.W.2d 856, 858 (Minn. App. 2017), *review denied* (Feb. 28, 2018); *see also Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 2537 (2004). A *Blakely* hearing may be waived if the defendant provides “[a]n express, knowing, voluntary, and intelligent waiver of the right to a jury determination of facts supporting an upward sentencing departure . . . before a defendant’s statements at his guilty-plea hearing may be used to enhance his sentence.” *State v. Dettman*, 719 N.W.2d 644, 646 (Minn. 2006). Under the Minnesota Rules of Criminal Procedure,

Where the prosecutor seeks an aggravated sentence, the defendant, with the approval of the court, may waive a jury trial on the facts in support of an aggravated sentence 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 a trial by jury, and after having had an opportunity to consult with counsel.

Minn. R. Crim. P. 26.01, subd. 1(2)(b). Whether a *Blakely* error occurred is a legal question subject to de novo review. *Dettman*, 719 N.W.2d at 648-49.

Appellant contends that a *Blakely* error occurred. We agree. While appellant pleaded guilty to third-degree assault, he did not specifically waive his right to a jury finding on aggravating factors. The state concedes that the district court erred.

Next, we consider whether the error is harmless beyond a reasonable doubt. A *Blakely* error does not constitute a “structural error,” *Washington v. Recuenco*, 548 U.S. 212, 222, 126 S. Ct. 2546, 2553 (2006), and is “subject to a harmless error analysis,” *State v. Chauvin*, 723 N.W.2d 20, 30 (Minn. 2006). “An error is not harmless if there is any reasonable doubt the result would have been different if the error had not occurred.” *State v. DeRosier*, 719 N.W.2d 900, 904 (Minn. 2006).

We determine that the error is harmless beyond a reasonable doubt because the result of the proceedings would have been the same without the error. It is clear from the record that appellant would have waived his *Blakely* rights to take advantage of the plea deal offered by the state. Appellant chose to enter a plea of guilty in exchange for the state amending the charge from first-degree aggravated robbery to third-degree assault. First-degree aggravated robbery is a severity-level 8 offense and, given appellant’s criminal history, carried a presumptive sentence of 78 months in prison. See Minn. Stat. § 609.245, subd. 1 (providing that violations of the first-degree robbery statute may result in imprisonment for up to 20 years); see also Minn. Sent. Guidelines 4.A (2016) (Sentencing Guidelines Grid).

In exchange for his guilty plea to an amended offense, the parties agreed that appellant would instead serve only 36 months in prison. During the plea hearing, the district court judge engaged in the following exchange with appellant:

COURT: And you understand that . . . the agreement that you've made with the prosecutor calls for what we call an upward departure to this assault in the third degree, right?

APPELLANT: Yes

COURT: Upward departure meaning you're going to do more time than normally on an assault in the third degree, but that's what you want to do, right?

APPELLANT: Yeah. Yes.

COURT: Okay. And then I want to make sure, though. I want to make sure you understand every single thing.

APPELLANT: That's the offer that was given to me, yes.

COURT: And that's the offer you chose to accept, correct?

APPELLANT: Yes.

Given the facts of this case, we determine that if the district court asked appellant if he waived his right to have a jury determination of facts supporting an upward sentencing departure, appellant would have provided such a waiver.² We therefore affirm.

Affirmed.

² Appellant urges this court to remand to the district court for imposition of the presumptive guidelines sentence for third-degree assault. The presumptive sentence for third-degree assault with three criminal-history points is 21 months stayed. See Minn. Sent. Guidelines 4.A. Such a result would violate the terms of the negotiated plea agreement, and “it would be inappropriate for [appellate courts] to make piecemeal corrections without regard to the effect of the corrections on the plea bargain.” *State v. Misquadace*, 629 N.W.2d 487, 491 (Minn. App. 2001), *aff'd*, 644 N.W.2d 65 (Minn. 2002). Otherwise a defendant would be allowed to retain the benefits of the plea agreement without experiencing the consequences to which he agreed. See *id.* (agreeing with state's argument that defendant should not be allowed to escape consequences while retaining benefits of plea bargain). If we reversed the case—which we do not—appellant would face the original first-degree aggravated robbery charge.