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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1014**

State of Minnesota,
Respondent,

vs.

Bradley Allen Bockwitz,
Appellant.

**Filed July 8, 2019
Affirmed in part, reversed in part, and remanded
Halbrooks, Judge**

Dakota County District Court
File No. 19HA-CR-16-3502

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

James C. Backstrom, Dakota County Attorney, Torrie J. Schneider, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Charles F. Clippert, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Halbrooks, Judge; and Slieter, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges his conviction of stalking (pattern of stalking conduct), arguing that the district court impermissibly prevented him from testifying in his own

defense and that the district court abused its discretion by imposing an upward dispositional and durational departure. We affirm the district court's denial of Bockwitz's motion to reopen the case to allow him to testify and the district court's imposition of an upward durational departure in sentencing Bockwitz. But because we reverse the district court's imposition of an upward dispositional sentencing departure, we remand for resentencing.

FACTS

In February 2011, appellant Bradley Allen Bockwitz and M.T. began a romantic relationship. They continued their relationship until February 2014, during which time they lived together for approximately two years. After February 2014, they had an on-again, off-again relationship until February 2016. According to M.T., Bockwitz was physically and emotionally abusive throughout their relationship. She indicated that Bockwitz would frequently yell at her, discouraged her from seeing her friends and family, locked her out of the house in the middle of the night on two occasions, and threatened to expose sexually explicit images and videos of her.

In February 2016, M.T. began dating A.A. Bockwitz learned of the relationship and became jealous. On February 19, Bockwitz sent M.T. approximately 80 text messages and called her 29 times in the span of three hours. He demanded that she send him a photograph of her vaginal area so that he could determine if she had recently had sexual intercourse with A.A. He threatened to delete all of M.T.'s photographs of her son if she did not comply with his demand. M.T. did so because she did not want to lose the photographs of her son.

When Bockwitz continued to call her, M.T. called the Apple Valley Police Department. Officer James Gibbs responded to the call. While Officer Gibbs was speaking with M.T., Bockwitz called. Officer Gibbs answered M.T.'s phone and told Bockwitz that his behavior bordered on stalking and harassment and that he should cease trying to contact M.T. He then mailed Bockwitz a form letter from the police department that indicated that the department had investigated a complaint against him, that his behavior could be interpreted as stalking, and that future stalking behavior could result in his arrest and prosecution.

On February 20, Bockwitz continued to contact M.T. He threatened to release sexually explicit photographs and videos of her because he was angry that she called the police. M.T. invited Bockwitz to her house to have sexual intercourse because she was afraid and wanted to "smooth things over" with him. Bockwitz went to her house and the two had sexual intercourse, but it did not resolve the situation. In the following days, Bockwitz continued to contact M.T. Between February 19 and March 2, Bockwitz called M.T. 127 times. Between February 19 and March 7, he sent her 675 text messages and 80 multimedia messages.

On March 3, M.T. applied for and was granted an emergency ex parte order for protection (OFP). Bockwitz requested a hearing to contest the OFP. At the conclusion of the hearing, the district court issued a harassment restraining order (HRO) rather than an OFP. On March 27, Bockwitz called M.T. from an unknown number and screamed at her that he hoped that she would lose her job. After hanging up the phone, M.T. discovered that the number belonged to a bar in Apple Valley that was approximately one mile from

her house. This frightened her because Bockwitz lives in North Branch. M.T. called the police, who took a report of the incident.

On April 5, M.T. received an email on her work email account from “John Betty.” “John Betty” is not a real person, but rather a fictitious account created and controlled by Bockwitz. The email contained a screenshot of a conversation that was purportedly between Bockwitz and “John Betty.” In the conversation, Bockwitz stated that M.T. “likes little girls” and illegally distributed pain medication to people for sexual purposes. M.T. immediately called the police to report the email. She was concerned that the false information in the email could negatively impact her employment because her email account is monitored by the IT department.

On September 16, 2016, respondent State of Minnesota charged Bockwitz with one count of stalking (pattern of stalking conduct). On January 22-26, 2018, the district court held a jury trial. M.T. testified about her relationship with Bockwitz and the impact that his behavior had on her. She testified that she was fearful for both her and her son’s safety and worried that Bockwitz would release sexually explicit photographs and videos of her without her permission. After the state rested, Bockwitz waived his right to testify in his own defense. The parties then finalized the jury instructions, and the state indicated that it was seeking an aggravated sentence based on its assertions that the offense was committed with particular cruelty and occurred within M.T.’s zone of privacy.

Prior to closing arguments, Bockwitz’s counsel indicated that Bockwitz was “reconsidering his decision on testifying.” The state opposed the request. The district court denied the request, noting that the defense had rested and that the district court had

inquired about Bockwitz's decision regarding testifying very carefully during the waiver colloquy. The jury found Bockwitz guilty. The jury found that the offense did not occur in M.T.'s zone of privacy but answered affirmatively to three questions regarding particular cruelty.

The district court determined that these facts made the offense particularly cruel and sentenced Bockwitz to 24 months in prison, an upward dispositional and durational departure. This appeal follows.

D E C I S I O N

I.

Bockwitz argues that the district court abused its discretion by denying his request to reopen the case and allow him to testify in his own defense. The district court may, in the interests of justice, "allow any party to reopen that party's case to offer additional evidence." Minn. R. Crim. P. 26.03, subd. 12(g). To determine whether to permit a party to reopen its case, the district court should consider three factors: (1) when the request was made; (2) whether the evidence concerned a controlling issue and was material, not cumulative; and (3) whether failure to produce the evidence earlier was motivated by an improper purpose. *State v. Thomas*, 891 N.W.2d 612, 618 (Minn. 2017). We review the denial of a motion to reopen for an abuse of discretion. *State v. Caine*, 746 N.W.2d 339, 353 (Minn. 2008).

Bockwitz contends that all three factors weigh in his favor, and therefore it was an abuse of discretion to deny his request. The state acknowledges that, while it is unclear what Bockwitz's testimony would have consisted of, it would likely have been material,

concerning a controlling issue. But the state argues that the other two factors weigh against Bockwitz.

In addressing the timing of the request, the district court noted that the defense had rested. After the defense rested, the jury was informed “the trial is over” and dismissed for lunch. The parties then finalized the jury instructions and recessed for lunch and to prepare closing arguments. When the district court reconvened and Bockwitz indicated that he was reconsidering his decision to testify, the district court and parties were fully prepared to begin closing arguments. With the *Thomas* factors in mind, the district court also questioned why Bockwitz had not offered to testify earlier.

Notably, Bockwitz does not argue that his waiver was invalid; he argues that he should have been permitted to change his mind. But the district court observed that it had already given Bockwitz “numerous opportunities to change [his] mind” about testifying and had been “exceptionally” careful when inquiring about Bockwitz’s decision to waive his right to testify. The district court noted that, at one point, it believed that Bockwitz had changed his mind, but that after the district court re-inquired about the decision, Bockwitz reiterated that he wished to waive his right to testify.

On this record, we conclude that the district court did not abuse its discretion by denying Bockwitz’s request to reopen the case. The district court properly considered that the defense had rested, that the parties had prepared for closing arguments, and that Bockwitz had already been given numerous opportunities to change his mind about his decision not to testify.

II.

The second issue raised by appellant is the district court's imposition of a sentence that departed from the guidelines. The "district court may depart from the presumptive guidelines sentencing range only if there exist identifiable, substantial, and compelling circumstances to support a sentence outside the range on the grids." *Tucker v. State*, 799 N.W.2d 583, 586 (Minn. 2011) (quotation omitted). "We review a district court's decision to depart from the presumptive guidelines sentence for an abuse of discretion." *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015). "If the reasons given for an upward departure are legally permissible and factually supported in the record, the departure will be affirmed. But if the district court's reasons for departure are improper or inadequate, the departure will be reversed." *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009) (quotation omitted). We apply a de novo standard of review to the question of whether a particular reason for an upward departure is valid. *State v. Jackson*, 749 N.W.2d 353, 357 (Minn. 2008).

The presumptive sentence in this case was a stayed sentence of 18 months. The district court imposed an executed sentence of 24 months, an upward durational and dispositional departure. Bockwitz challenges both the upward durational and upward dispositional departure. We shall address each in turn.

Upward Durational Departure

The sentencing guidelines provide "a nonexclusive list of factors which may be used as reasons for departure." *Hicks*, 864 N.W.2d at 157. One such factor that justifies an upward durational departure is when the victim is treated with "particular cruelty." Minn.

Sent. Guidelines 2.D.3.b.(2) (2016). “Particular cruelty involves the gratuitous infliction of pain and cruelty of a kind not usually associated with the commission of the offense in question.” *Tucker*, 799 N.W.2d at 586 (quotations omitted). “Elements of the offense cannot be used as aggravating factors” to support an upward departure. *State v. Thompson*, 720 N.W.2d 820, 830 (Minn. 2006) (quotation omitted).

At trial, the state submitted a special-verdict form to the jury that asked five questions about aggravating factors. The jury found that the state had established three aggravating factors. The jury determined that Bockwitz coerced M.T. into sending him a picture of her vaginal area so that he could determine if she had recently had sex, that he threatened to disseminate sexually explicit photographs of M.T. if she did not comply with his demands, and that he sent an email to M.T.’s work email account accusing her of being sexually attracted to “little girls” and of illegally distributing medication to people for sexual purposes.

Bockwitz argues that these incidents were “elements of the offense and therefore should not have been used as aggravating factors.” The state responds that the three facts found by the jury were not elements of the offense. At trial, the state sought to prove that Bockwitz had engaged in a pattern of stalking based on the underlying offenses of domestic assault, violation of the HRO, and the general crime of stalking by repeatedly making phone calls and sending M.T. text messages, and that he followed, monitored, or pursued M.T. by tracking her online accounts and phone records. The state presented evidence that Bockwitz violated the HRO, accessed M.T.’s electronic accounts to track her, and called and texted her hundreds of times. M.T. testified that this made her fear for both her own

safety and that of her son. This evidence addresses the underlying elements that the state was required to establish. The aggravating factors found by the jury do not relate to underlying elements of the crime, but rather Bockwitz's conduct that was particularly humiliating, demeaning, and degrading.

At sentencing, the district court determined that Bockwitz's behavior in the case amounted to "vengeful mental torture." The district court also observed, based on its own experience, that these acts were not typical of standard stalking cases. We agree. Bockwitz forced M.T. to comply with his demands by threatening to release sexually explicit photos and videos of her or to delete the only photos she had of her son and made her concerned for her employment prospects by sending messages containing false and damaging allegations to her work email account. Thus, in addition to making M.T. fear for her safety, Bockwitz was emotionally manipulating M.T. to force her to comply with his demands. On this record, the district court did not abuse its discretion by imposing an upward durational departure.

Upward Dispositional Departure

Bockwitz argues that the district court abused its discretion by imposing an upward dispositional departure because it is based on a judicial, instead of a jury, determination that he is unamenable to probation. We agree.

"[A] defendant's particular unamenability to probation may be used to justify an upward dispositional departure." *State v. Allen*, 706 N.W.2d 40, 46 (Minn. 2005). But in Minnesota, any fact, other than a prior conviction, that is necessary to justify an upward departure must be found by a jury or admitted to by the defendant. *State v. Greenough*,

915 N.W.2d 915, 918 (Minn. App. 2018). In *Allen*, our supreme court addressed a challenge to the imposition of an upward dispositional departure based on a judicial determination that the defendant was unamenable to probation. 706 N.W.2d at 43. The supreme court held that “when the district court found that [the defendant] was unamenable to probation, and on that basis executed his presumptively stayed sentence, it violated [the defendant’s] Sixth Amendment right to have a jury make that determination using a reasonable-doubt standard.” *Id.* at 47. The supreme court also determined that, to the extent the sentencing guidelines permitted the district court to impose an upward dispositional departure without the aid of a jury, the provision was unconstitutional as applied. *Id.*

Here, a jury did not find, and Bockwitz did not admit, that Bockwitz is unamenable to probation. Accordingly, the district court abused its discretion by imposing an upward dispositional departure. We therefore reverse the imposition of an upward dispositional departure and remand for resentencing.

Affirmed in part, reversed in part, and remanded.