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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1202**

State of Minnesota,
Respondent,

vs.

Marin Parpaut,
Appellant.

**Filed June 17, 2019
Reversed and remanded
Johnson, Judge**

Hennepin County District Court
File No. 27-CR-17-13535

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Ross, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Marin Parpaut rear-ended a full minivan when he drove his car at an extremely high speed while he was extremely intoxicated. One of the minivan passengers died, and two

were seriously injured. Parpaut pleaded guilty to multiple charges of criminal vehicular homicide and criminal vehicular operation. The district court imposed three consecutive sentences of 70, 28, and 17 months of imprisonment, for a total duration of 115 months. We conclude that the district court erred by entering three convictions with respect to each of the three victims. We also conclude that the district court erred by making multiple departures from the presumptive sentences without making separate findings to support each departure. Therefore, we reverse and remand for resentencing.

FACTS

On February 5, 2017, at approximately 1:45 a.m., Parpaut was driving south on interstate highway 35W in south Minneapolis at approximately 90 miles per hour in a 55-miles-per-hour zone. Near the 46th Street exit, he rear-ended a minivan that had seven persons inside. The three passengers in the third row of the minivan bore the brunt of the collision. H.B. died eight days after the collision from multiple blunt-force injuries. K.J. suffered multiple spinal injuries, a skull fracture, and permanent hearing loss in her right ear. N.R. suffered a moderate-to-severe traumatic brain injury and a scalp laceration. A state trooper who gave first aid to Parpaut detected “an overwhelming odor of an alcoholic beverage.” A blood sample was drawn from Parpaut within two hours of the collision, and subsequent testing showed that Parpaut’s alcohol concentration was 0.239.

In June 2017, the state charged Parpaut with nine criminal offenses—three offenses for each of the three victims mentioned above. In counts 1, 2, and 3, the state charged Parpaut with criminal vehicular homicide, in violation of Minn. Stat. § 609.2112, subds. 1(a)(4), 1(a)(2)(i), and 1(a)(1) (2016), for the death of H.B. In counts 4, 5, and 6, the state

charged Parpaut with criminal vehicular operation causing great bodily harm, in violation of Minn. Stat. § 609.2113, subds. 1(4), 1(2)(i), and 1(1) (2016), for the injuries sustained by K.J. And in counts 7, 8, and 9, the state charged Parpaut with criminal vehicular operation causing substantial bodily harm, in violation of Minn. Stat. § 609.2113, subds. 2(4), 2(2)(i), and 2(1), for the injuries sustained by N.R.

In September 2017, the state gave notice of its intent to seek upward departures from the presumptive sentences on the grounds that Parpaut was driving at an extremely high rate of speed, that he was driving on a revoked driver's license, that he had recently been convicted of driving while impaired, and that he had an extremely high alcohol concentration.

In January 2018, on the day set for trial, Parpaut pleaded guilty to all nine charges. He waived his right to have a jury find the aggravating factors necessary for a sentencing departure. The district court conducted a hearing in March 2018 at which the parties stipulated to the introduction of a packet of exhibits. Neither party presented any testimony. The district court allowed the parties to submit memoranda of law concerning the order in which the offenses should be sentenced and whether the district court should depart from the presumptive sentences based on the aggravating factors alleged by the state. The district court also allowed Parpaut to file a memorandum in support of his motion for a downward departure from the presumptive sentences.

The sentencing hearing was held in April 2018. At the outset of the hearing, the district court stated that it did not need to hear oral arguments concerning the order of sentencing but that it wished to receive arguments concerning whether the district court

should depart from the presumptive sentences and, if so, what sentences should be imposed. The state presented five victim-impact statements from K.J., K.J.'s father, and members of H.B.'s family. The state argued for an upward durational departure of 180 months of imprisonment on count 1 and presumptive stayed sentences on counts 4 and 7. Parpaut's counsel argued for a lengthy period of probation. Parpaut spoke briefly in allocution, expressing remorse for his conduct.

After a recess, the district court found that the state had proven all four of the alleged aggravating factors. The district court noted that the combination of the aggravating factors "make this crime more onerous than usual" and noted that there were multiple victims. The district court also stated that, with respect to the order of sentencing, it would impose a sentence on the criminal-vehicular-homicide offenses before the criminal-vehicular-operation offenses. For counts 1, 2, and 3, the district court imposed an executed sentence of 70 months of imprisonment, an upward durational departure, based on the four aggravating factors. For counts 4, 5, and 6, the district court imposed an executed sentence of 28 months of imprisonment, which the district court described as an upward dispositional departure, without reference to the four aggravating factors or any other factors. And for counts 7, 8, and 9, the district court imposed an executed sentence of 17 months of imprisonment, which the district court described as an upward dispositional departure, with reference to the four aggravating factors. The district court stated that the total duration of Parpaut's imprisonment would be 115 months. On the following day, the district court filed a departure report stating that it had made a durational departure on count 1 and dispositional departures on counts 4 and 7. Parpaut appeals.

DECISION

I. Multiple Convictions and Sentences

Parpaut argues that the district court erred by entering three convictions with respect to each victim and by imposing three sentences with respect to each victim, for a total of nine convictions and sentences. He requests that this court reverse and remand with instructions to vacate the convictions and sentences on counts 2, 3, 5, 6, 8, and 9.

We first consider Parpaut's argument concerning multiple convictions. A defendant "may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2016). The supreme court has interpreted section 609.04 to "bar[] multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident." *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985) (citing cases); *see also State v. Folley*, 438 N.W.2d 372, 373 (Minn. 1989); *State v. Grampre*, 766 N.W.2d 347, 353-54 (Minn. App. 2009), *review denied* (Minn. Aug. 26, 2009).

Parpaut contends that the district court erred by entering three convictions on counts 1, 2, and 3, all of which concern the death of H.B., because the three convictions are based on a single behavioral incident and three subdivisions of the same statute, specifically, subdivision 1(a)(4), subdivision 1(a)(2)(i), and subdivision 1(a)(1) of section 609.2112. Parpaut makes essentially the same contentions concerning the convictions on counts 4, 5, and 6, which concern the injuries suffered by K.J., and the convictions on counts 7, 8, and 9, which concern the injuries suffered by N.R. The state concedes that the district court erred by entering three convictions with respect to each victim. The state's concession is consistent with the applicable caselaw, which we have cited above.

Thus, the district court erred by entering multiple convictions with respect to each victim. On remand, the district court shall vacate the convictions and resulting sentences on counts 2, 3, 5, 6, 8, and 9. The district court shall not disturb the findings of guilt on counts 2, 3, 5, 6, 8, and 9 but shall leave those six counts unadjudicated. *See State v. Hallmark*, ____ N.W.2d ____, ____, 2019 WL 2128253, at *11 (Minn. May 15, 2019); *State v. Walker*, 913 N.W.2d 463, 467 (Minn. App. 2018). In light of our resolution of Parpaut's multiple-convictions argument based on section 609.04, we need not consider his multiple-sentences argument based on section 609.035.

II. Multiple Sentencing Departures

Parpaut also argues that the district court erred by making multiple departures from the presumptive sentences on counts 4 and 7 without stating separate reasons for each departure.

A.

Parpaut explains the district court's error as follows. The district court stated its intention to impose an upward durational departure on count 1 by imposing a 70-month prison sentence instead of a presumptive sentence of between 50 and 69 months of imprisonment and by referring to the four aggravating factors as the reasons justifying that departure. The district court stated its intention to impose an upward dispositional departure on count 4 by executing that sentence rather than staying it. Similarly, the district court stated its intention to impose an upward dispositional departure on count 7 by executing that sentence rather than staying it. The district court's departure report confirms its intention to impose an upward durational departure on count 1 and upward dispositional

departures on counts 4 and 7. But, Parpaut contends, the district court also effectively imposed (apparently without intending to do so) upward *durational* departures on counts 4 and 7, in two ways: first, by ordering the sentences on counts 4 and 7 to run consecutively to (rather than concurrently with) the sentence on count 1 and, second, by not using a criminal-history score of 0 when imposing consecutive sentences. Parpaut contends that the district court erred by not stating additional reasons to justify the additional departures on counts 4 and 7. Parpaut relies on a provision of the sentencing guidelines that provides as follows:

Departures with respect to disposition and duration are separate decisions. A court may depart from the presumptive disposition without departing from the presumptive duration, and vice versa. *A court departing from the presumptive disposition as well as the presumptive duration has made two separate departure decisions, each requiring written departure reasons.*

Minn. Sent. Guidelines 2.D.1.a. (2016) (emphasis added).

In response, the state argues that the district court did not err because consecutive sentences may be combined with upward durational departures. For this argument, the state cites *Rairdon v. State*, 557 N.W.2d 318 (Minn. 1996). But *Rairdon* is distinguishable because the district court in that case expressly stated reasons for both types of departures. *See id.* at 326-27. The state also cites *State v. Anderson*, 361 N.W.2d 896 (Minn. App. 1985), a case involving convictions of criminal vehicular homicide and criminal vehicular operation, for the proposition that a district court may depart both dispositionally and durationally. But, again, *Anderson* is distinguishable because the district court stated reasons for both types of departures. *See id.* at 897-99.

We conclude that the district court erred by not stating separate reasons for each departure, as required by section 2.D.1.a. of the sentencing guidelines.

B.

In light of the district court's error, this court must determine the appropriate appellate remedy. Parpaut argues that this court should leave intact the sentence imposed on count 1 and remand with instructions to impose concurrent prison sentences of 28 and 17 months on counts 4 and 7, thereby preserving the dispositional departures but disallowing the durational departures on those counts. Parpaut contends that this court should not give the district court a second opportunity to state reasons for the durational departures on counts 4 and 7. In support of that contention, Parpaut cites *Williams v. State*, 361 N.W.2d 840 (Minn. 1985), in which the supreme court stated, "If no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed." *Id.* at 844. Parpaut also cites *State v. Geller*, 665 N.W.2d 514 (Minn. 2003), in which the supreme court applied *Williams* and concluded that, because "the sentencing court did not state the reasons for departure on the record at the time of sentencing, . . . it was error for the court of appeals to remand to allow reasons for the departure to be given after the fact." *Id.* at 517; *see also State v. Rannow*, 703 N.W.2d 575, 580 (Minn. App. 2005).

In response, the state argues that, if the district court erred, this court should reverse and remand with instructions to impose a sentence that is not greater than 115 months, which is the sum of the three consecutive sentences originally imposed. The state contends that "there was more than one sentencing option available to the district court" and notes that the district court could have imposed sentences in a different order. *See State v.*

Hernandez, 311 N.W.2d 478, 480-81 (Minn. 1981). In support of its argument for a less-constrained remand, the state cites *State v. Coe*, 411 N.W.2d 180 (Minn. 1987); *State v. Hutchins*, 856 N.W.2d 281 (Minn. App. 2014), review granted (Minn. Dec. 30, 2014), and appeal dismissed (Minn. July 20, 2015); and *State v. Nunn*, 411 N.W.2d 214 (Minn. App. 1987). In both *Hutchins* and *Nunn*, the district court resentenced a defendant on remand by reconsidering one or more of the multiple sentences that previously had been lawfully imposed, and this court affirmed in a subsequent appeal. See *Hutchins*, 856 N.W.2d at 283, 286; *Nunn*, 411 N.W.2d at 215-17. In *Coe*, this court reversed an upward durational departure on one of two sentences imposed and reduced it to the statutory maximum without giving the district court an opportunity to resentence the defendant on that conviction or on two other convictions. 411 N.W.2d at 181. But the supreme court reversed this court's opinion and remanded to the district court for an opportunity to impose an upward durational departure on another conviction for which the district court previously had not imposed a sentence. *Id.* at 182.

The various opinions cited by the parties do not appear to be intertwined and are not easily reconciled. The 1987 opinion in *Coe* does not cite the 1985 opinion in *Williams*, and the 2003 opinion in *Geller* does not cite *Coe*. It appears that there are two separate lines of cases, each to be applied in its own context. The defendant in *Williams* received multiple sentences, but the part of the opinion on which Parpaut relies is a general statement of law that applies to all sentencing departures, even in cases with only a single conviction. 361 N.W.2d at 844; see also *State v. Williams*, 337 N.W.2d 387, 388 (Minn. 1983). In *Geller*, the district court did not state any reasons for departing from the sentencing

guidelines. 665 N.W.2d at 517. In *Coe*, the district court entered three convictions and imposed two sentences, and the supreme court expressly stated that, on remand, the district court could reconsider the matter by imposing sentences on all three convictions and could impose a durational departure on the conviction for which no sentence previously had been imposed, so long as all sentences are authorized by law and the total duration of the sentences does not exceed the total duration of the sentences originally imposed. See *Coe*, 411 N.W.2d at 181-82. The supreme court cited *Coe* in *State v. Chaklos*, 528 N.W.2d 225 (Minn. 1995), in which the defendant was convicted of criminal vehicular homicide and criminal vehicular operation after he rear-ended a vehicle while intoxicated. *Id.* at 226-27. The district court imposed consecutive executed prison sentences, which this court deemed to be an unjustified upward dispositional departure. *Id.* at 226. The supreme court reversed this court's opinion and stated in a footnote that, if no departure is warranted in the circumstances that were present, "the correct remedy is to remand to give the trial court an opportunity to impose a longer sentence for the first offense," *i.e.*, to impose an upward durational departure on a conviction for which no durational departure previously had been imposed. *Id.* at 228-29 n.2 (citing *Coe*, 411 N.W.2d at 181-82).

The circumstances of this case are more similar to the circumstances of *Coe* and *Chaklos* than the circumstances of *Williams* and *Geller*. Thus, we agree with the state that, at resentencing, the district court is not constrained by the sentence previously imposed on count 1 or by the order in which it originally imposed sentences.

In sum, we reverse and remand to the district court with instructions to vacate Parpaut's convictions on counts 2, 3, 5, 6, 8, and 9 and to resentence Parpaut on counts 1, 4, and 7.

Reversed and remanded.