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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1458**

State of Minnesota,
Respondent,

vs.

Zackery Charles Nathan Mills,
Appellant.

**Filed May 13, 2019
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge**

Redwood County District Court
File No. 64-CR-17-399

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Jenna M. Peterson, Redwood County Attorney, Redwood Falls, Minnesota (for respondent)

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Considered and decided by Bjorkman, Presiding Judge; Rodenberg, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his convictions of criminal vehicular homicide and criminal vehicular operation, arguing that the evidence was insufficient to establish his driving

conduct was grossly negligent. Appellant also challenges his sentence. We affirm appellant's convictions and the denial of a downward sentencing departure. But because the record does not support appellant's criminal-history score, we reverse in part and remand for resentencing.

FACTS

On June 2, 2017, appellant Zackery Mills was driving a commercial semi-truck with an empty 48-foot flatbed trailer southbound on County State Aid Highway (CSAH) 7. He had four years' experience as a commercial driver but had not previously driven on that highway. Mills was driving approximately 65 miles per hour, ten miles per hour above the posted speed limit, and conversing with his passenger.

As Mills approached the intersection with CSAH 4, several markers warned him to stop. Approximately 950 feet from the intersection, he drove over somewhat worn but functional "rumble strips." Approximately 775 feet from the intersection, he passed a yellow "Stop Ahead" sign. Approximately 500 feet from the intersection, he drove over additional "rumble strips." And he passed a standard red "Stop" sign just before the intersection. Mills failed to observe any of these markers—or the Tahoe traveling westbound on CSAH 4 toward the intersection.

Mills did not apply the brakes at all as he entered the intersection and crashed into the passenger side of the Tahoe. The impact lifted the Tahoe into the air, after which it rolled at least twice before coming to rest upside-down 80 to 100 yards southwest of the intersection. The Tahoe's OnStar device called 911. Emergency responders transported the Tahoe's driver and rear passenger to the local hospital, where they were treated for

numerous bruises and fractures. The front passenger was airlifted to North Memorial, where significant neurological damage and cardiac arrest led to his death.

Mills was charged with criminal vehicular homicide, two counts of criminal vehicular operation, and failing to stop at a stop sign. After a bench trial, the district court found Mills guilty of all offenses and sentenced him to 58 months' imprisonment. Mills appeals.

D E C I S I O N

I. Sufficient evidence supports Mills's convictions.

When considering a challenge to the sufficiency of the evidence, we view the record in a light most favorable to the conviction and will not disturb the verdict if the fact-finder, “acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could have reasonably concluded that the defendant was guilty of the charged offense.” *State v. Dorn*, 887 N.W.2d 826, 830 (Minn. 2016). This standard applies to both bench trials and jury trials. *Id.*

To convict Mills of criminal vehicular homicide or operation, the state was required to prove that he operated a motor vehicle “in a grossly negligent manner.” Minn. Stat. §§ 609.2112, subd. 1, .2113, subd. 1(1) (2016). Mills contends that his essentially undisputed driving conduct was merely negligent, not grossly negligent.

Whether conduct constitutes gross negligence is a question for the trier of fact. *State v. Al-Naseer*, 690 N.W.2d 744, 751 (Minn. 2005). Minnesota has long recognized that the difference between ordinary and gross negligence is one of degree:

Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. . . . Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances required of a person of ordinary prudence. . . . Ordinary and gross negligence differ in degree of inattention

State v. Bolsinger, 21 N.W.2d 480, 485 (Minn. 1946) (quoting *Altman v. Aronson*, 121 N.E. 505, 506 (Mass. 1919)); see *Al-Naseer*, 690 N.W.2d at 752 (recognizing that *Bolsinger* “adopted” the *Altman* definition of gross negligence).

The district court found that Mills’s actions, overall, “show a shocking lack of attention to the roadway.” In detailed findings of fact and a thorough memorandum of law, the court explained its conclusion that Mills’s driving conduct was grossly negligent. Despite driving a vehicle “appreciably larger than others” along an unfamiliar roadway, Mills exceeded the speed limit. And he completely disregarded four distinct indications that he was supposed to stop. Over a span of approximately 950 feet, he failed to observe the tangible and audible warning of rumble strips, the visual warning of a “Stop Ahead” sign, the tangible and audible warning of a second set of rumble strips, and even the visual instruction to “Stop.” He was not merely slow to respond to these warnings and traffic controls; he completely disregarded them. He did not take evasive action or apply the brakes until after his semi crashed into the Tahoe at 65 miles per hour. No external factors such as weather or visual obstructions impeded Mills’s ability to observe the warnings and comply with the speed limit and stop sign.

Mills does not challenge the district court’s findings regarding the events leading up to the collision. But he contends that his conduct does not rise to the level of gross negligence because it did not involve “the presence of some egregious driving conduct coupled with other evidence of negligence,” that this court required in *State v. Miller*, 471 N.W.2d 380, 384 (Minn. App. 1991). This argument is unavailing. *Miller* involved a semi driver who caused a fatal accident because his brakes did not work properly. 471 N.W.2d at 383. In concluding that such conduct alone cannot establish gross negligence, *Miller* did not impose an “egregious driving conduct plus negligence” rule, as Mills suggests. Rather, as this court observed in rejecting a similar argument, *Miller* holds only that maintenance shortfalls, such as failure to inspect and maintain brakes, “cannot alone support criminal gross negligence.” *State v. Pelawa*, 590 N.W.2d 142, 145 (Minn. App. 1999), *review denied* (Minn. Apr. 28, 1999), *overruled on other grounds by Al-Naseer*, 690 N.W.2d at 751-52. The undisputed evidence of Mills’s excessive speed, disregard of traffic signs and warnings, and inattentiveness while driving his semi amply meets the gross negligence standard. Accordingly, sufficient evidence supports Mills’s convictions.

II. The district court did not abuse its discretion by denying a downward sentencing departure.

A district court must impose a presumptive sentence unless “identifiable, substantial, and compelling circumstances” justify a departure with respect to disposition or duration. Minn. Sent. Guidelines 2.D.1 (2016). Even when a mitigating factor is present, the district court is not obligated to depart. *State v. Pegel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011) (citing *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984)). We review

a district court's denial of a sentencing departure for an abuse of discretion, *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003), and will reverse a presumptive sentence only in "rare" cases, *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006) (quotation omitted).

Mills sought both a dispositional and a durational departure. The district court denied both and imposed a mid-range guidelines sentence of 58 months in prison. Minn. Sent. Guidelines 4.A, 5.A (2016). Mills challenges both aspects of his sentence.

Disposition

"A dispositional departure places the offender in a different setting than that called for by the presumptive guidelines sentence." *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). Such a departure is based on the defendant's characteristics, rather than the nature of the offense. *Id.* A dispositional departure may be warranted if the defendant is "particularly amenable to probation." Minn. Sent. Guidelines 2.D.3.a.(7) (2016). In determining whether the defendant is particularly amenable to probation, the district court may consider his age, prior record, remorse, cooperation, attitude in court, and the support of friends and family. *State v. Soto*, 855 N.W.2d 303, 310 (Minn. 2014).

The record indicates that the district court carefully considered these departure factors and explained on the record why it declined to depart dispositionally. The district court weighed Mills's relatively young age (27) against his four years of commercial driving experience, reasoning that neither "age [n]or inexperience" established a basis to depart. The court considered his relatively limited criminal record but also the fact that he was on probation for assault at the time of the offense, finding that factor also did not favor departure. The court likewise did not find Mills's expressed remorse to be a basis for

departure because it was remorse both “for what has occurred” and for the consequences to Mills himself. *See Solberg*, 882 N.W.2d at 626 (“[A] district court is properly tasked with deciding whether a defendant’s actions express genuine remorse and how much weight to give to that remorse.”). And the district court noted Mills’s family support and “positive attitude” in court but reasoned that, on balance, substantial and compelling circumstances did not exist to deviate from the presumptive sentence. On this record, we discern no abuse of discretion.

Duration

A durational departure occurs when the district court imposes a sentence that is outside of the presumptive guidelines range. Minn. Sent. Guidelines 1.B.5.b (2016). Unlike a dispositional departure, a durational departure must be based on factors bearing on the seriousness of the offense, not the characteristics of the offender. *Solberg*, 882 N.W.2d at 623. A downward durational departure is justified only if the defendant’s conduct was “significantly less serious than that typically involved in the commission of the offense.” *Id.* at 624. But the fact that the defendant did not engage in conduct that would constitute a variation on the same offense, or other criminal conduct, does not mitigate the seriousness of the defendant’s conduct. *See id.* at 627 (rejecting argument that committing third-degree criminal sexual conduct through coercion rather than violence makes the offense less serious than typical since the offense may be based on either).

This case is much like *Solberg*. Mills emphasizes that he was not texting or under the influence of drugs or alcohol at the time of the accident, and that he remained at the scene to render aid. *See* Minn. Stat. § 609.2112, subd. 1(a)(2) (including in definition of

criminal vehicular homicide negligent driving while under the influence of alcohol or a controlled substance that causes another's death), (7) (including in definition of criminal vehicular homicide leaving the scene after causing a fatal collision). While that may be true, it does not change the fact that Mills's excessive speed and wholly inattentive driving conduct were grossly negligent, nor does it diminish the magnitude of that negligence. And the district court aptly noted that Mills's culpability was not mitigated by external factors such as poor road conditions or limited visibility. We are not persuaded that the district court abused its discretion by determining that Mills's conduct was no less serious than that of other persons who commit criminal vehicular homicide or criminal vehicular operation. Accordingly, we conclude that this is not one of the rare cases in which we will reverse a presumptive sentence.

III. The record does not support the district court's calculation of Mills's criminal-history score.

When calculating the defendant's criminal-history score, the district court must assign the defendant one criminal-history point if at the time of the current offense he was on probation for a felony, a non-traffic gross misdemeanor, or a "targeted misdemeanor." Minn. Sent. Guidelines 2.B.2.a (2016). That calculation must account for qualifying out-of-state convictions, Minn. Sent. Guidelines 2.B.5 (2016), provided the state lays the necessary foundation, *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006). "The state has the burden of proving by a preponderance of the evidence the facts necessary to justify consideration of out-of-state convictions in determining a defendant's criminal history score." *State v. Outlaw*, 748 N.W.2d 349, 355 (Minn. App. 2008) (quotation omitted),

review denied (Minn. July 15, 2008). We review a district court’s determination of a defendant’s criminal-history score for an abuse of discretion. *Maley*, 714 N.W.2d at 711.

At sentencing, Mills did not challenge his criminal-history score or dispute that he was convicted of and on probation for a Texas misdemeanor assault, as reported in the presentence-investigation report (PSI). He now argues that the district court abused its discretion by assigning him a custody-status point for being on probation at the time of the current offense because the state failed to prove that the Texas offense was a qualifying conviction.¹ This argument has merit.

Under Minnesota law, fifth-degree assault is a “targeted misdemeanor.” Minn. Sent. Guidelines 2.B.3.a.(1) (2016); *see* Minn. Stat. § 299C.10, subd. 1(e) (2016). Mills’s Texas assault conviction may be treated as a “targeted misdemeanor” for sentencing purposes only if it is the equivalent of the Minnesota offense. The PSI does not identify the Texas statute that Mills was convicted of violating or detail the facts underlying the conviction. And the Texas definition of assault encompasses a broader range of conduct than does the Minnesota definition. *Compare* Tex. Penal Code Ann. § 22.21(a)(1) (West 2016) (defining assault, in part, as “intentionally, knowingly, or recklessly caus[ing] bodily injury to another”) *with* Minn. Stat. § 609.02, subd. 10 (2016) (defining assault, in part, as “the

¹ The state questions whether this issue is properly before this court because Mills raises it for the first time on appeal. But “a defendant may not waive review of his criminal history score.” *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007). A defendant may equally pursue sentence correction through a motion for sentence correction, as in *Maurstad*, 733 N.W.2d at 144, and *Maley*, 714 N.W.2d at 711, or on direct appeal, as in *Outlaw*, 748 N.W.2d at 355, and *State v. Scovel*, 916 N.W.2d 550, 553 & n.5 (Minn. 2018) (noting that “[a] defendant cannot forfeit appellate review of his criminal history score” and addressing challenge to calculation raised for the first time on appeal).

intentional infliction of or attempt to inflict bodily harm upon another”). In short, the record presented to the district court does not establish that Mills was on probation for a qualifying offense at the time he committed the current offenses. Accordingly, we reverse Mills’s sentence and remand to the district court for resentencing following the state’s development of the record regarding Mills’s Texas assault conviction.

Affirmed in part, reversed in part, and remanded.