

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0278**

State of Minnesota,
Respondent,

vs.

Guy Robert Franklin Rabold,
Appellant.

**Filed October 7, 2019
Affirmed in part, reversed in part, and remanded
Hooten, Judge**

St. Louis County District Court
File No. 69DU-CR-15-1884

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

Mark S. Rubin, St. Louis County Attorney, Kristen E. Swanson, Assistant County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Hooten, Judge; and Klaphake, Judge.*

S Y L L A B U S

An upward sentencing departure based on a victim's particular vulnerability may be imposed when the victim is forced at gunpoint to disrobe during the commission of a crime.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

OPINION

HOOTEN, Judge

Appellant pleaded guilty to aiding and abetting aggravated robbery after he and his accomplice broke into the victims' home, forced the victims to undress, and robbed them at gunpoint. The district court granted the state's motion for an upward departure and sentenced appellant to the statutory maximum of 240 months for aggravated robbery—more than double the presumptive sentence. Appellant challenges the district court's order denying his request for resentencing. Because appellant's victims were forced at gunpoint to undress during the commission of the crime, they were particularly vulnerable, and we affirm in part. But we reverse in part and remand for resentencing because severe and aggravating circumstances do not exist to warrant a greater-than-double upward sentencing departure.

FACTS

This is appellant Guy Rabold's second sentencing appeal before this court. The facts are set out in *Rabold I* and are only briefly restated here. See *State v. Rabold*, No. A16-1046, 2017 WL 957715 (Minn. App. Mar. 13, 2017), *review denied* (Minn. May 16, 2017). In the middle of a June 2015 night, Rabold and his accomplice broke into the victims' home, waking them. When Rabold and his accomplice reached the victims' bedroom door, they yelled at the victims to open the door or they would shoot. After entering the bedroom, with a gun in hand, Rabold's accomplice ordered the victims to take off their clothes.

Once the victims were naked, Rabold placed a gun to the victims' heads and ordered them to go downstairs where a safe was located. Rabold instructed the naked male victim to unlock the safe and then to lie down next to the naked female victim while Rabold and his accomplice removed the contents of the safe. Rabold told the victims not to move and threatened to come back and kill them if they did. Rabold fled with the contents of the safe. Police arrested him shortly thereafter.

Rabold admitted to police that he took part in the robbery. He told police that he knew the victims, as he had previously dated the female victim's daughter and had been to her home before the night of the offense. He knew about the safe and planned to steal its contents to pay off his debts.

The state charged Rabold with aiding and abetting first-degree aggravated robbery, among other crimes. He pleaded guilty to all counts and waived his right under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), to a jury trial to determine whether aggravating factors existed for an upward sentencing departure.

After a bench trial to determine whether a sentencing departure was appropriate, the district court determined that Rabold was a danger to public safety and was a "dangerous offender" under Minn. Stat. § 609.1095, subd. 2 (2014). The district court also determined that an upward departure was justified based on the particular vulnerability of the victims because they were ordered to undress. The district court found that the victims' nudity made them particularly vulnerable and that this vulnerability was a substantial factor in completing the robbery.

At the sentencing hearing, the state requested the statutory maximum sentence of 240 months for aggravated robbery, which was more than double the presumptive sentence of 111 months.¹ The state asked the district court to impose the sentence solely based on the finding that Rabold was a “dangerous offender” and without regard to particular vulnerability. The district court imposed the statutory maximum sentence of 240 months on the aggravated-robbery conviction and sentenced Rabold to concurrent prison terms on the other counts.

Rabold appealed the upward departure based on his status as a dangerous offender and challenged one of the concurrent sentences because it arose from the same behavioral incident. In *Rabold I*, we affirmed Rabold’s sentence, but reversed and remanded to vacate the concurrent sentence as it was part of the same behavioral incident. *Rabold I*, 2017 WL 957715, at *4–5.

Shortly after *Rabold I* was before this court, the district court vacated one of Rabold’s prior convictions of being a felon in possession of a firearm based upon the holding in *State v. Haywood* that an air-powered BB gun is not a “firearm” for purposes of the ineligible-possession-of-a-firearm statute. 886 N.W.2d 485, 490 (Minn. 2016). The district court reasoned that because Rabold had been convicted of possessing a BB gun as a felon, he had been wrongly convicted for that offense. Because of this vacation, Rabold moved the district court for resentencing as he no longer qualified as a “dangerous

¹ Rabold was subject to a three-month custody enhancement, which is assigned when an offender has a custody status point and the offender’s total criminal-history score exceeds the maximum score of six. Minn. Sent. Guidelines 2.B.2.c (2018).

offender” under Minn. Stat. § 609.1095, subd. 2. He also challenged the district court’s finding that the victims were particularly vulnerable. Following a motion hearing, the district court held that Rabold was no longer considered a dangerous offender. But the district court again sentenced Rabold to 240 months for aggravated robbery, finding that the victims’ particular vulnerability supported the statutory maximum sentence.

This appeal follows.

ISSUES

- I. Did the district court abuse its discretion by imposing the maximum sentence based on the victims’ particular vulnerability after they were ordered at gunpoint to undress?
- II. Did the district court abuse its discretion by imposing a greater-than-double upward departure?

ANALYSIS

Rabold challenges his sentence of 240 months for aggravated robbery. He argues that the district court abused its discretion by imposing the maximum sentence based on the victims’ particular vulnerability of being naked. He alternatively argues that the aggravating circumstances did not justify a greater-than-double upward departure. “We review a district court’s decision to depart from the presumptive guidelines sentence for an abuse of discretion.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). We apply a de novo standard when reviewing whether a particular reason for an upward departure is permissible. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). “Once we determine as a matter of law that the district court has

identified proper grounds justifying a challenged departure, we review its decision *whether* to depart for an abuse of discretion.” *Id.*

I. The victims were particularly vulnerable after being forced to undress at gunpoint.

An upward or downward departure must be supported by “substantial and compelling circumstances” as to why the offense is significantly more or less serious than a typical offense. Minn. Sent. Guidelines 2.D.1.c. (2018). The sentencing guidelines provide a nonexclusive list of aggravating factors that may properly support an upward departure. Minn. Sent. Guidelines 2.D.3.b. One such aggravating factor is when “[t]he victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, and the offender knew or should have known of this vulnerability.” *Id.*

A. Nudity may be considered as an aggravating factor for an upward departure.

Rabold argues that nudity does not render a victim particularly vulnerable to justify an upward departure under the sentencing guidelines. Minnesota caselaw has yet to address whether a victim’s nudity renders that person particularly vulnerable for purposes of an upward departure. The sentencing guidelines provide three specified grounds for finding that a victim is particularly vulnerable: age, infirmity, or physical or mental capacity. *Id.* But this list is “nonexclusive.” Minn. Sent. Guidelines 2.D.3. Because the guidelines’ list is nonexclusive, Minnesota courts have expanded “particular vulnerability” to non-listed grounds to warrant an upward departure. For example, we have found that a victim was particularly vulnerable because the crime was committed while the victim’s child was nearby, thereby compromising the victim’s ability to flee. *State v. Grampre,*

766 N.W.2d 347, 353 (Minn. App. 2009), *review denied* (Minn. Aug. 26, 2009). A victim of criminal sexual conduct was particularly vulnerable because the defendant “began touching her while she was asleep.” *State v. Skinner*, 450 N.W.2d 648, 654 (Minn. App. 1990), *review denied* (Minn. Feb. 28, 1990). And a victim was found to be particularly vulnerable because she knew and trusted the defendant. *State v. Schroeder*, 401 N.W.2d 671, 675 (Minn. App. 1987), *review denied* (Minn. Apr. 23, 1987). Even though the victim’s nudity does not specifically appear in the sentencing guidelines as an aggravating factor, we are not precluded from considering it as a basis for an upward departure.

B. Though a substantial-factor finding is not required, under the facts of this case, the district court did not abuse its discretion in finding that the victim’s nudity was a substantial factor in the completion of the crime.

Turning to his next argument, Rabold claims that, even if nudity can be a basis for an upward departure, his victims were not particularly vulnerable because their nudity was not a “substantial factor” in accomplishing the crime.

Minnesota caselaw has considered whether a particular vulnerability has played a substantial factor in the commission of a crime in order to determine whether an upward departure is justified. *State v. Givens*, 544 N.W.2d 774, 775 (Minn. 1996); *State v. Gardner*, 328 N.W.2d 159, 162 (Minn. 1983). In *Givens*, the supreme court ruled that the 74-year-old female victim who walked with a cane was particularly vulnerable. 544 N.W.2d at 775. The defendant knocked on the victim’s door, reached for her cane, and pushed her to the ground in order to rob her. The district court found that her vulnerability was a substantial factor in the commission of the crime. *See id.* at 776. The supreme court

held that an upward departure was justified because the defendant “exploit[ed] the victim’s vulnerability.” *Id.*

Conversely, in *Gardner*, the victim of a sexual assault had epilepsy and at one point during the assault was fearful an epileptic seizure might be triggered. 328 N.W.2d at 162. The supreme court held that her condition did not render her particularly vulnerable because there was “no basis for concluding that this was a substantial factor in defendant’s accomplishing sexual penetration.” *Id.* Similarly in *State v. McClay*, the supreme court found that the victim’s short stature was not a substantial factor in a bank robbery. 310 N.W.2d 683, 685 (Minn. 1981). As the defendant and his accomplice were leaving the bank, the defendant grabbed the receptionist, a five-foot-tall woman weighing 95 pounds, and forced her to walk with them down the block, where the defendant released her. *Id.* The supreme court held that an upward departure was not warranted based on the victim’s vulnerability of having a small stature, as she is not “any more vulnerable in the face of a gun than a larger person because a gun can kill either quite easily.” *Id.*

Rabold argues that, based on the above cases, his victims’ nudity was not a substantial factor in the completion of the crime. But these cases do not hold that a victim’s particular vulnerability is a valid ground for departure *only* if it assists the defendant in accomplishing the crime. And the sentencing guidelines do not require a specific finding that a victim’s particular vulnerability played a “substantial part” in the commission of the crime. We further note that our court has previously described a particular vulnerability as a condition that “impairs the victim’s ability to seek help, fight back, or escape harm,” and did not impose a substantial-factor requirement. *State v. Mohamed*, 779 N.W.2d 93, 98

(Minn. App. 2010), *review denied* (Minn. May 18, 2010). And in a series of cases dating back to 1989, both the Minnesota Supreme Court and this court have upheld the grant of upward sentencing departures when the victim's ability to flee was compromised because a child was present. *State v. Johnson*, 450 N.W.2d 134, 135 (Minn. 1990); *Grampre*, 766 N.W.2d at 353; *State v. Hart*, 477 N.W.2d 732, 740 (Minn. App. 1991), *review denied* (Minn. Jan. 16, 1992); *State v. Dalsen*, 444 N.W.2d 582, 584 (Minn. App. 1989), *review denied* (Minn. Oct. 13, 1989). Our reading of the caselaw would indicate that a substantial-factor finding is not required in order to justify an upward departure based on particular vulnerability.

But we need not decide as a matter of law whether a substantial-factor finding is required because, even assuming that one is required, the facts of this case support such a finding. We agree with the district court's analysis as follows:

As an initial matter, it seems glaringly obvious to the Court that nudity should be considered a particular vulnerability. Indeed, that would seem to be the entire purpose of making victims disrobe. It is designed to make people feel vulnerable. While in theory a naked victim would [be] just as capable of seeking help, fighting back or escaping harm as a clothed victim, this vulnerability is more psychological. . . . [T]he victims' nudity was a substantial factor for the Defendant and his accomplice to carry out their robbery. Simply put, the victims' nudity was not necessary to carry out the robbery, but it helped, because it made the victims feel more vulnerable. . . . [I]t would be easier to get [the victim] to [open the safe] if he was at a psychological disadvantage.

It was no coincidence that the victims were naked during the crime. The victims were forced to undress at gunpoint, after being awakened in the middle of the night by the sound of two men breaking into their home. Rabold and his accomplice not only created

the vulnerability, but used it to further manipulate the situation to rob the victims in the privacy of their home, causing a psychological disadvantage in the victims and limiting their ability to seek help or fight back. *See Mohamed*, 779 N.W.2d at 98 (describing particular vulnerability as a condition that hinders a victim from seeking help); *see also Hart*, 477 N.W.2d at 740 (finding “invasion of a victim’s zone of privacy . . . is an aggravating factor to consider for an upward departure”). The district court did not err in concluding that the victims’ nudity was a substantial factor in the completion of the crime. Accordingly, we affirm the district court’s grant of an upward departure based on the victims’ particular vulnerability of being forced to fully undress at gunpoint.

II. The district court abused its discretion by imposing a greater-than-double departure.

Rabold argues next that the district court abused its discretion by sentencing him to the statutory maximum term of 240 months.

“Once we determine as a matter of law that the district court has identified proper grounds justifying a challenged departure, we review its decision *whether* to depart for an abuse of discretion.” *Dillon*, 781 N.W.2d at 595. “Despite having general discretion to make departure decisions, the district court has less discretion to decide the length of the upward departure than it does to decide whether to depart: The shorter the departure, the greater the deference given to the district court’s discretion.” *Id.* at 596. Greater discretion is given when the sentence falls between the presumptive sentence and double the presumptive sentence. *Id.*; *see also State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981).

We afford less deference to sentences that are greater than double the presumptive sentence. *See Dillon*, 781 N.W.2d at 596.

“Only in cases of *severe aggravating circumstances* may the district court impose a greater-than-double departure from the presumptive sentence.” *State v. Shattuck*, 704 N.W.2d 131, 140 (Minn. 2004) (emphasis added) (quotation omitted). While there is no “easy-to-apply test” to make this determination, our decision “must be based on our collective, collegial experience in reviewing a large number of criminal appeals from all the judicial districts.” *State v. Norton*, 328 N.W.2d 142, 146–47 (Minn. 1982); *see also Dillon*, 781 N.W.2d at 597 (applying test at this court).

In sentencing Rabold to a greater-than-double departure, the district court found “substantial and compelling reasons” to grant the upward departure, but failed to address whether “severe and aggravating circumstances” existed to justify the more than double durational departure.

In order to affirm the greater-than-double departure, we would need to find circumstances so severe that this case is “one of the extremely rare cases in which more than a double durational departure is justified.” *Norton*, 328 N.W.2d at 146. Although the circumstances here support an upward departure as the victims were particularly vulnerable because they were subjected to mortal fear and humiliation, we cannot conclude that this case is one of those “extremely rare cases.” Our analysis is guided by a review of cases in which a greater-than-double departure was warranted. Because Minnesota appellate courts have yet to address a greater-than-double departure in an aggravated robbery case, we look to cases addressing this issue with other crimes for guidance.

In *Norton*, the supreme court upheld a greater-than-double departure when Norton kidnapped a five-year-old girl from her front lawn and sexually abused her. 328 N.W.2d at 147. The supreme court used its prior decision in *State v. Partlow*, 321 N.W.2d 886 (Minn. 1982), for comparison. In that case, the supreme court reversed a greater-than-double departure. 321 N.W.2d at 887. Although the defendant in *Partlow* was charged with a higher severity crime when he sexually penetrated a two-and-one-half-year-old girl with his finger, the supreme court found that Norton's crime was more severe because he kidnapped his victim from her front lawn and proceeded to terrorize her. *Norton*, 328 N.W.2d at 147. Because "[p]arents cannot protect their children from people like [Norton] without turning their yards into the neighborhood equivalent of a police state," the supreme court found severe and aggravating circumstances to warrant the greater-than-double departure. *Id.*

Notably, in *Perkins v. State*, the defendant knew he had "full-blown AIDS" when he raped the victim, essentially handing her a "death sentence" by passing to her the human immunodeficiency virus (HIV). 559 N.W.2d 678, 692 (Minn. 1997). The supreme court upheld the district court's greater-than-double departure. *Id.*

In *State v. Glaraton*, the supreme court found severe and aggravating circumstances were present when the defendant "stuck the gun in the victim's mouth and in his rectum, causing the victim to think he was going to die a horrible death." 425 N.W.2d 831, 834 (Minn. 1988). The victim was also subjected to multiple acts of penetration and "gratuitous physical injury." *Id.* The defendant urinated on the victim's face and then made him lie in it. *Id.* The defendant also ridiculed the victim for his religious beliefs. *Id.* Based on

Glaraton's appalling behavior, the supreme court reinstated his greater-than-double sentencing departure. *Id.* at 835.

A number of first-degree assault cases also provides guidance. In *Dillon*, we upheld a greater-than-double departure when the defendant struck and kicked his wife while she lay on the floor. 781 N.W.2d at 591. The beating was so severe that his wife needed life-saving surgery, spent three weeks in intensive care, and then required another month in the hospital. *Id.* Her injuries were so significant that she lost her sense of smell and the feeling in half of her face, and her vision was blurry because one eye was pushed farther back in her skull. *Id.* at 602. She lost part of her large intestine, making it difficult for her to control her bowels. *Id.* Doctors also had to remove her gallbladder and part of her liver. *Id.* at 602.

In *State v. Leonard*, this court upheld a greater-than-double departure when the defendant committed continued assaults on an infant. 400 N.W.2d 206, 210 (Minn. App. 1987). Leonard admitted that he assaulted the infant on more than 20 occasions from the time she was three- to four-weeks old until she was nearly six months old. *Id.* And he continued to assault her even after she was hospitalized and was in a fragile physical and mental condition. *Id.* In *State v. Steinhaus*, a father severely beat his five-week-old son over two days. 405 N.W.2d 270, 270–71 (Minn. App. 1987). On the first day, the father struck the infant five times with his open hand, causing the “infant’s eyes to turn black and blue almost immediately.” *Id.* at 270. The next day, the father “repeatedly struck the baby on the cheeks,” and when the baby began crying, he “began punching the baby in the

stomach” until the baby suddenly became limp. *Id.* at 271. This court upheld a greater-than-double departure as the circumstances were “unusually severe.” *Id.*

Based upon our collective collegial experience and a review of the “extremely rare cases” when such departures are permitted, we reverse the district court’s imposition of a greater-than-double departure under these facts. We note that, at one point during the robbery, Rabold covered the naked victims with a bathrobe and stopped his accomplice from further committing a sexual assault. While we in no way minimize what the victims experienced that night, the circumstances here—being forced to undress—are not so severe as to be considered the extremely rare case in which a greater-than-double departure is warranted.

DECISION

A district court may grant an upward sentencing departure based on a victim’s particular vulnerability when the victim is forced at gunpoint to disrobe during the commission of a crime. For that reason, we affirm Rabold’s upward sentencing departure. But we reverse the greater-than-double departure and remand for resentencing consistent with this opinion.

Affirmed in part, reversed in part, and remanded.