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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0392**

State of Minnesota,
Respondent,

vs.

Eli Samuel Anderson,
Appellant.

**Filed January 21, 2020
Affirmed in part, reversed in part, and remanded
Worke, Judge**

Becker County District Court
File No. 03-CR-18-1709

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General,
St. Paul, Minnesota; and

Brian W. McDonald, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his convictions for second- and third-degree assault, and
argues that: (1) the evidence was insufficient to prove that the metal curtain rod appellant

used during the assault was a dangerous weapon, (2) the district court erred by failing to define “assault” during its jury instructions, (3) the district court erred by imposing an aggravated durational departure, (4) the district court erred by sentencing appellant as a career offender, and (5) the district court erred by admitting written judicial findings from previous offenses at the sentencing phase of his trial. We affirm in part, reverse in part, and remand.

FACTS

Appellant, Eli Samuel Anderson, was charged with two counts of second-degree assault and one count of third-degree assault for striking an individual in the head with a metal curtain rod. The victim suffered a laceration on the side of his head that required six staples to close. Prior to trial, the state moved to seek an aggravated sentence based on Anderson being a dangerous and repeat felony offender. The district court granted the state’s motion and bifurcated his jury trial into a guilt phase and a sentencing phase.

At trial, Anderson testified that he knew the victim because they had used methamphetamine together since at least 2012 and had been in treatment together. He stated that after being let into the victim’s home, he injected himself with methamphetamine. Later, while under the effects of the methamphetamine, Anderson acted erratically by moving furniture and going through drawers and closets in the victim’s home. When the victim asked him to stop and leave the home, Anderson picked up a metal curtain rod. Anderson then warned the victim not to come closer to him. When the victim stepped towards him, Anderson swung the curtain rod, hitting the victim on the side of the head, which resulted in the victim’s injury.

During jury instructions, the district court instructed the jury about the elements of second- and third-degree assault, but did not define the term “assault.” However, when the district court instructed the jury on self-defense, it instructed that, “[a]n assault is the intentional infliction of bodily harm on another or an intentional attempt to inflict bodily harm upon another or an act done with intent to cause fear of immediate bodily harm or death in another.” The jury found Anderson guilty of second-degree assault with a dangerous weapon and third-degree assault.

During the sentencing phase of Anderson’s trial, the jury found that Anderson was a danger to public safety, he committed the offense in a location where the victim had an expectation of privacy, he had five or more felony convictions, and he committed the offense as part of a pattern of criminal conduct. The district court sentenced Anderson to 80 months in prison for second-degree assault with a dangerous weapon and credited him for time served for third-degree assault. This appeal followed.

D E C I S I O N

Dangerous weapon

First, Anderson argues that his conviction for second-degree assault with a dangerous weapon must be reversed because the state failed to prove, beyond a reasonable doubt, that Anderson’s use of a metal curtain rod constituted a dangerous weapon. When reviewing the sufficiency of the evidence supporting a jury’s verdict, our review is limited to determining whether the evidence, when viewed in the light most favorable to the verdict, was sufficient to allow the jury to reach its verdict. *State v. Salyers*, 858 N.W.2d 156, 160 (Minn. 2015). It is assumed that the fact-finder disbelieved any testimony to the

contrary. *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016). “The verdict will not be overturned if the fact-finder, upon application of the presumption of innocence and the [s]tate’s burden of proving an offense beyond a reasonable doubt, could reasonably have found the defendant guilty of the charged offense.” *Id.*

The state was required to prove beyond a reasonable doubt that Anderson “assault[ed] another with a dangerous weapon” to convict him of either form of second-degree assault pursuant to Minn. Stat. § 609.222 (2018). A dangerous weapon includes any device “that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.” Minn. Stat. § 609.02, subd. 6 (2018). The definition of what constitutes a dangerous weapon is “broad and inclusive.” *State v. Graham*, 366 N.W.2d 335, 337 (Minn. App. 1985). The determination of whether an everyday object was used as a dangerous weapon requires an examination of the totality of the circumstances. *See State v. Born*, 159 N.W.2d 283, 284-85 (Minn. 1968).

Great bodily harm is any injury which “creates a high probability of death,” “causes serious permanent disfigurement,” “causes a permanent or protracted loss or impairment of the function of any bodily member or organ,” or constitutes “other serious bodily harm.” Minn. Stat. § 609.02, subd. 8 (2018). Examples include cases where a jury determined that a severe cut or a lost tooth constituted great bodily harm. *See, e.g., State v. Upton*, 306 N.W.2d 117, 117-18 (Minn. 1981) (severe cut); *State v. Bridgeforth*, 357 N.W.2d 393, 394 (Minn. App. 1984) (lost tooth).

Anderson maintains that the metal curtain rod was not a dangerous weapon based on the manner in which he used it. However, a review of the record indicates that the

evidence was sufficient to sustain the jury’s verdict that Anderson assaulted the victim with a dangerous weapon. Throughout trial, witnesses referred to the curtain rod as “a metal rod” and “a heavy duty curtain rod.” The jury heard evidence that the curtain rod, which was two feet long and one inch in diameter, had a screw inserted perpendicularly at one end.¹ The jury also saw the curtain rod because it was admitted into evidence. Anderson also testified that he swung the curtain rod at the victim’s head and that it was the cause of the cut on the victim’s head. Therefore, the evidence presented to the jury regarding the metal curtain rod was sufficient to allow the jury to conclude that the manner in which Anderson used it made it a dangerous weapon.

Jury instructions

Anderson argues that the district court erred by failing to provide the jury with a definition of assault when instructing the jury on the elements of second- and third-degree assault.² Because Anderson did not object to the instructions, we review whether the jury instructions constituted plain error. *State v. Matthews*, 779 N.W.2d 543, 548 (Minn. 2010). A showing of plain error requires: “(1) error; (2) that is plain; and (3) the error must affect

¹ We note that the record does not indicate whether Anderson struck the victim with this end of the curtain rod.

² Minn. Stat. § 609.02, subd. 10 (2018), defines assault as “an act done with intent to cause fear in another of immediate bodily harm or death” or “the intentional infliction of or attempt to inflict bodily harm upon another.” The CRIMJIGs for the second- and third-degree assault charges as applicable to this case recommend to, “[i]nset CRIMJIG 13.02 for infliction of harm.” See 10 *Minnesota Practice*, CRIMJIG 13.10, .12, .16 (2015). CRIMJIG 13.02 recommends to define assault as, “the intentional infliction of bodily harm upon another or the attempt to inflict bodily harm upon another.” The record reflects that the district court did not define assault in accordance with the statute or CRIMJIG 13.02 when it instructed the jury on each assault charge.

substantial rights. If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.” *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

A district court has “considerable latitude” in the selection of language for the jury instructions. *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011) (quotation omitted). In evaluating the district court’s jury instructions, this court will read them as a whole. *State v. Daniels*, 361 N.W.2d 819, 831-32 (Minn. 1985). Jury instructions must define the crime charged and the elements of the offense to the jury. *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002).

The record indicates that while the district court did not instruct the jury on the statutory definition of assault during its instructions on the assault charges, it provided the jury with an accurate definition of assault during its instruction on self-defense. *See State v. Richardson*, 633 N.W.2d 879, 886 (Minn. App. 2001) (finding no error when allegedly omitted element was included elsewhere in instructions). In addition, the district court instructed the jury that its instructions were to be considered as a whole. We determine that, in light of the jury instructions as a whole, the district court did not plainly err by failing to define assault to the jury during its instructions.

Sentencing claims

Anderson challenges his sentence on three grounds. First, he argues that the district court abused its discretion by imposing an aggravated sentence. Second, he argues that he was improperly sentenced as a career offender. Finally, he contends that the district court erred by admitting inadmissible hearsay during the sentencing phase of his trial.

Aggravated departure

Anderson argues that the district court abused its discretion by aggravating his sentence based on the expectation-of-privacy factor. Appellate courts review upward sentencing departures for an abuse of discretion. *State v. Parker*, 901 N.W.2d 917, 927 (Minn. 2017). A district court must impose a sentence within the presumptive guidelines unless “identifiable, substantial, and compelling circumstances” warrant a departure. Minn. Sent. Guidelines 2.D.1 (2018). Substantial and compelling circumstances are those showing that the defendant’s conduct was significantly more serious than that typically involved in the commission of the offense. *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). A district court may impose an aggravated durational departure if the defendant committed the offense “in a location in which the victim had an expectation of privacy.” Minn. Sent. Guidelines 2.D.3.b (14) (2018); Minn. Stat. § 609.1095, subd. 2(2)(ii) (2018). A district court’s departure must be affirmed so long as it is factually supported and the reasons given are legally permissible. *Edwards*, 774 N.W.2d at 601.

Pursuant to the sentencing guidelines, “[a] pronounced sentence for a felony conviction that is outside the appropriate range on the applicable [g]rid . . . is a departure.” Minn. Sent. Guidelines 2.D.1. The facts underlying the departure must be found by a jury unless waived by the defendant. *State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009). Then, “the district court must explain why the circumstances or additional facts found by the jurors . . . provide the district court a substantial and compelling reason to impose a sentence outside the range on the grid.” *State v. Rourke*, 773 N.W.2d 913, 920 (Minn. 2009).

Here, the district court sentenced Anderson to 80 months in prison, which is a departure from the sentencing guidelines. Under the guidelines, the presumptive sentence for an individual with Anderson’s criminal history score of 8 was 57 months, with a presumptive range of 49-68 months. While the district court referenced the jury’s findings—including that Anderson committed the offense where the victim had an expectation of privacy—it did not explain why the jury’s findings provided the district court with substantial and compelling reasons to depart.³ Thus, the district court imposed an unsupported durational departure, which is an impermissible aggravated sentence.

The remedy for an unsupported durational departure is to remand for resentencing within the presumptive range. *State v. Geller*, 665 N.W.2d 514, 517 (Minn. 2003). Therefore, we remand for the district court to modify Anderson’s sentence to within the applicable presumptive guidelines range.

Career offender

Next, Anderson argues that he was improperly sentenced as a career offender. The career-offender statute allows the district court to impose an upward durational departure from the guidelines for a felony conviction where an offender has five or more prior felony convictions and the present offense is part of a pattern of criminal conduct. Minn. Stat. § 609.1095, subd. 4 (2018). Under the statute, a prior conviction means “a conviction that

³ The district court also did not make findings of fact supporting a departure in Anderson’s sentencing order, nor did it include a departure report with its sentencing order pursuant to Minn. R. Crim. P. 27.03. While “a departure from the guidelines will not be precluded for lack of a departure report,” in this case the departure was not supported by the district court’s statements on the record. *Black v. State*, 725 N.W.2d 772, 777 (Minn. App. 2007).

occurred before the offender committed the next felony resulting in a conviction and before the offense for which the offender is being sentenced.” *Id.*, subd. 1(c) (2018). To qualify as a prior conviction, the statute requires “five sequential felony offenses and convictions . . . (i.e., offense/conviction, offense/conviction, offense/conviction, etc.).” *State v. Huston*, 616 N.W.2d 282, 283 (Minn. App. 2000).

The state concedes that Anderson should not have been sentenced as a career offender. However, because the district court’s aggravated departure was unsupported and it is not clear whether he was sentenced as a career offender, we remand for resentencing in accordance with this opinion.

Admission of previous judicial order at sentencing

Finally, Anderson argues that the district court erred by improperly admitting hearsay evidence in the form of the district court’s prior orders denying his motion for a downward dispositional departure on his three prior convictions. Because we are remanding for the district court to impose the presumptive sentence, we decline to consider Anderson’s evidentiary argument relating to an upward departure.

Affirmed in part, reversed in part, and remanded.