

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0957**

State of Minnesota,
Respondent,

vs.

Brandon Joseph Rossbach,
Appellant.

**Filed June 22, 2020
Affirmed
Slieter, Judge**

Beltrami County District Court
File No. 04-CR-15-3928

Keith Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

David Hanson, Beltrami County Attorney, Bemidji, Minnesota (for respondent)

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

Considered and decided by Slieter, Presiding Judge; Bjorkman, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

SLIETER, Judge

Appellant challenges his sentence, arguing that the district court exceeded the scope of this court's remand and violated his double-jeopardy rights by convening a sentencing

jury. He also argues that the district court violated his Confrontation-Clause rights during the sentencing trial, ruled improperly on a hearsay challenge, erred in limiting the facts that the state was required to prove, and abused its discretion by imposing an upward durational departure.

The district court properly convened a sentencing jury, which was not a second prosecution for the same offense and did not violate Rossbach's rights under the Confrontation Clause. Also, the district court did not err in its evidentiary rulings and properly imposed an upward durational departure at sentencing. For these reasons, we affirm.

FACTS

Appellant Brandon Joseph Rossbach was convicted of aiding an offender pursuant to Minn. Stat. § 609.495, subd. 3 (2016). *State v. Rossbach*, No. A17-0406, 2018 WL 1701837 *1, *3 (Minn. App. Apr. 9, 2018) (*Rossbach I*), review denied (Minn. June 27, 2018). The principal offender caused the death of his girlfriend as he was physically assaulting her and she fell down a flight of stairs. *Id.* at *1. Rossbach, despite being close to the victim's family, helped convince the principal offender to burn and bury the body and went to Walmart with him to buy supplies to aid in this process. *Id.* at *1-2.

This court in *Rossbach I*, which affirmed the conviction but remanded for resentencing, found no clear error with the jury instructions and found that the severity level assigned by the court for this offense was proper. This court concluded, however, that the district court erred by failing to obtain Rossbach's jury waiver regarding the level

of the predicate offense, a necessary sentencing fact. *Id.* at *4. Therefore, this court “reverse[d] Rossbach’s sentence and remand[ed] for resentencing.” *Id.* at *7.

Upon remand, the district court convened a sentencing jury, reasoning that the court of appeals did not limit its scope of its remand in *Rossbach I*, and the sentencing jury did not implicate double jeopardy to Rossbach. In a subsequent pretrial evidentiary ruling, the district court ordered that the state “will not be required to prove that Rossbach knew or had reason to know the specific degree of homicide committed by [the principal].” Based on the jury’s verdict that the principal offender committed second-degree murder and the previously found aggravating factor, the district court resentedenced Rossbach to 201 months in prison. This sentence was a 41-month upward durational departure. This appeal follows.

D E C I S I O N

Rossbach raises four arguments on appeal. We analyze each argument in turn.

I. The district court did not err by convening a sentencing jury.

Rossbach argues that the district court exceeded the scope of this court’s remand and violated double jeopardy by convening a sentencing jury.

A. Scope of Remand

District courts have a duty to strictly follow the remand instruction terms from appellate courts. *See State v. Roman Nose*, 667 N.W.2d 386, 394 (Minn. 2003). But district courts are given broad discretion on remand so long as they act consistent with the remand instructions provided. *State v. Montermini*, 819 N.W.2d 447, 454 (Minn. App. 2012). A district court’s compliance with a remand instruction is reviewed for an abuse of discretion. *Id.*

In *Rossbach I*, this court decided to “reverse Rossbach’s sentence and remand for resentencing.” 2018 WL 1701837 at *7. Rossbach argues that the district court was strictly limited to holding a sentencing hearing without convening a jury and sentencing him to a bottom-of-the-box prison term. We disagree. Because this court in *Rossbach I* determined as the basis for remand that the district court had erred in failing to obtain Rossbach’s jury waiver as to the predicate offense before sentencing, the district court convened a sentencing jury to determine that predicate offense. That was precisely the purpose of this court’s remand and, therefore, within its scope. Rossbach provides no authority to support his proposition that the district court was limited to sentence Rossbach to a bottom-of-the-box sentence. The district court’s decision to convene a sentencing jury was within the scope of the remand and, therefore, not an abuse of discretion.

B. Double Jeopardy

The Fifth Amendment states that “[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. This Double-Jeopardy Clause “protects criminal defendants from three distinct abuses: [1] a second prosecution for the same offense after acquittal; [2] a second prosecution for the same offense after conviction; and [3] multiple punishments for the same offense.” *Hankerson v. State*, 723 N.W.2d 232, 236-37 (Minn. 2006) (quotation omitted). Rossbach argues that the sentencing trial violated the second abuse. Appellate courts review alleged double-jeopardy violations *de novo*. *State v. Large*, 607 N.W.2d 774, 778 (Minn. 2000).

In denying Rossbach's double-jeopardy argument, the district court relied on the supreme court's holding in *Hankerson*. We agree that the reasoning of *Hankerson* directs our decision to affirm the district court.

In *Hankerson*, the appellant petitioned for postconviction relief to the district court to apply the presumptive sentence for her crime after the United States Supreme Court issued the *Blakely* decision. 723 N.W.2d at 233. Hankerson challenged her aggravated sentence because it was based on judicial fact finding, which violated *Blakely*. *Id.* The district court rejected her petition to apply the presumptive sentence and, instead, scheduled a sentencing trial. *Id.* The supreme court held that a sentencing trial that follows a *Blakely* infringement does not violate a defendant's double-jeopardy rights because it is not a second prosecution. *Id.* at 237. Rather than present a double-jeopardy violation, it is the appropriate action to take when a defendant argues that a sentencing issue was not before the jury. *See id.* at 239. Jeopardy does not attach until a jury affirmatively rejects the presence of the possible aggravating factors in a manner that can reasonably be considered an acquittal. *Id.* at 237.

Rossbach makes two arguments against *Hankerson's* applicability to his claim. First, Rossbach notes that *Hankerson* is distinguishable because Hankerson's original sentence occurred before *Blakely* was decided. This argument lacks merit because the supreme court, in reaching its decision in *Hankerson*, did not base its decision on a new legal development created by *Blakely*. The *Hankerson* court aptly stated, "Because it is Hankerson who requests the vacation of the sentence, she can hardly complain that she is still in jeopardy—her options are to accept the original sentence or face resentencing if the

original sentence is vacated at her request.” *Id.* at 239. This equally applies to Rossbach’s claim. The district court, therefore, properly denied Rossbach’s request to impose a presumptive sentence for the lowest possible level of predicate offense.

Second, Rossbach notes that *Hankerson* involved a sentencing trial that would decide for the first time whether aggravating sentencing factors exist. Rossbach argues that his case, in contrast to *Hankerson*, requires the sentencing jury to decide an element of the offense for which Rossbach was already convicted. The *Hankerson* reasoning compels our disagreement. Rossbach’s sentencing trial, like that in *Hankerson*, was a continuing prosecution of the same offense for which he had been found guilty. The jury was asked, consistent with this court’s remand for resentencing, to determine one issue that was not addressed in his original sentencing phase—the principal offender’s predicate crime. Rossbach was not subject to a second prosecution for the same element.

In sum, jeopardy had not yet attached. Therefore, the district court did not abuse its discretion by convening a sentencing jury.

II. The district court did not violate Rossbach’s Confrontation-Clause rights.

Rossbach argues that his Confrontation-Clause rights were violated when the district court allowed the state to play for the jury, in lieu of the testimony of the principal offender, a segment of the principal offender’s testimony from Rossbach’s first trial.

The Confrontation Clause states, “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him.” U.S. Const. amend. VI. Minnesota’s constitution contains similar language. Minn. Const. art. I, § 8; *State v. Holliday*, 745 N.W.2d 556, 565 (Minn. 2008). “[T]he Confrontation Clause prohibits the

‘admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.’” *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354 (2004)). Whether an appellant’s Confrontation-Clause rights were violated is a question of law that appellate courts review *de novo*. See *id.*

The principal offender was present at the sentencing trial on remand, took the witness stand and, as was anticipated by all parties, refused to testify. The district court allowed the state to use the principal offender’s previous testimony from Rossbach’s first trial and play it to the sentencing jury. The district court concluded that use of the prior testimony did not violate the Confrontation Clause because the principal offender’s refusal to testify made him unavailable and Rossbach had an opportunity to cross examine the principle when he last testified.

First, a witness is deemed unavailable when he or she is brought to the witness stand but refuses to testify. *State v. Irlas*, 888 N.W.2d 709, 713 (Minn. App. 2016). Here, the principal offender took the witness stand and refused to testify, and so the district court properly considered him unavailable pursuant to the Confrontation-Clause analysis.

Second, the defendant was provided a prior opportunity for cross-examination of the principal offender. Rossbach argues that, although he conducted an extensive cross-examination in the underlying trial, this does not satisfy the Confrontation Clause because the sentencing trial involved a different issue. Rossbach provides no legal authority to support this distinction and we are aware of none. Additionally, as the state points out,

Rossbach conducted an extensive cross-examination of the principal offender that spanned over fifty pages of transcript.

The district court's decision to allow the principal offender's testimony from Rossbach's initial trial during the sentencing trial did not violate Rossbach's Confrontation-Clause rights.

III. The district court did not err in its evidentiary rulings.

Rossbach also challenges two evidentiary rulings by the district court. He argues that (1) the district court erred in admitting the recorded testimony analyzed in the previous section because it was inadmissible hearsay, and (2) the district court erred by not requiring the state to prove that Rossbach knew, or should have known, the level of homicide the principle committed.

A. Hearsay

Hearsay is an out-of-court statement used to prove the truth of the matter asserted, and it is generally inadmissible unless an exception applies. Minn. R. Evid. 801, 802. "A determination that a statement meets the foundational requirements of a hearsay exception is reviewed for an abuse of discretion." *Holt v. State*, 772 N.W.2d 470, 483 (Minn. 2009).

The district court allowed the principal offender's prior trial testimony as having been given "[i]n a criminal proceeding involving a retrial of the same defendant for the same, or an included offense, testimony given as a witness at the prior trial or in a deposition taken in the course thereof." Minn. R. Evid. 804(b)(1).

Rossbach argues that this exception does not apply because the sentencing trial was not a retrial. The sentencing trial was a continuation of the underlying trial to properly

present the issue of the predicate offense for sentencing purposes to the jury. Rossbach has not shown the district court erred in concluding that the hearsay exception applies.

B. The State's Burden

Rossbach next argues that the district court erred when it determined that the state did not need to prove whether Rossbach knew, or had reason to know, the level of homicide that the principal offender committed. The district court explained, as part of its basis for this evidentiary ruling, that the court of appeals already resolved this issue in *Rossbach I* when it affirmed Rossbach's conviction. We agree with the district court's interpretation of our prior decision.

In *Rossbach I*, we concluded that the district court did not commit reversible error by failing to require that the state specifically prove the level of homicide that the principal offender committed. 2018 WL 1701837 at *5. Rossbach's sentence was the only issue on remand. *Id.* at *7. Therefore, the district court did not err in concluding that this issue has been resolved and is unrelated to this sentencing phase of the trial.

IV. The district court did not abuse its discretion by imposing an upward durational departure.

Finally, Rossbach argues that the district court erred in imposing an upward durational departure because it failed to properly explain the substantial and compelling circumstances which warrant the departure.¹ Rossbach believes that emotional distress

¹ Rossbach also argues that the district court erred at the original sentencing trial by relying on facts not found by the jury. We need not address this argument because Rossbach succeeded in *Rossbach I* in obtaining a reversal of his original sentence. This issue is moot. See *In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989) (stating that issues are dismissed as moot "[i]f the court is unable to grant effectual relief.").

caused by the duration the body was missing, which is the reason provided by the district court in support of the departure, is a necessary component to aiding an offender of second-degree murder and cannot be used to justify an upward durational departure.

Appellate courts review upward sentencing departures for an abuse of discretion. *State v. Parker*, 901 N.W.2d 917, 927 (Minn. 2017). We will affirm a district court's departure so long as the reasons given are permitted and factually supported. *See State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009).

The district court must explain why the jury's additional findings of fact "create a substantial and compelling reason to impose a sentence outside the range on the grid." *State v. Rourke*, 773 N.W.2d 913, 919 (Minn. 2009). A district court does not need to explain why a factor justifies departure if the justification is indistinguishable from the fact itself. *See State v. Alvarez*, 820 N.W.2d 601, 623 (Minn. App. 2012), *aff'd* (Minn. Sept. 11, 2013). (stating that not explaining why jury's finding of "group of three or more" factors "did not preclude the court from using it as a reason for departure" because the facts and reasons supporting departure are "indistinguishable.") A district court needs to articulate only one reason to justify departure. *State v. Solberg*, 882 N.W.2d 618, 624 (Minn. 2016).

During sentencing, the district court stated, "I am going to be imposing the same sentence that I imposed in December of 2016. . . . I am going to, at this point, indicate that that is going to be a top-of-the-box 160 months and 41 months for the aggravating factors that the jury found at the time of the original trial." The aggravating factor that the jury found from the original trial was that the family of the victim suffered emotional distress

in not knowing whether the victim “was alive or dead from October 21 until December 9.” Like *Alvarez*, the facts supporting the jury’s finding and the reasons supporting departure on this finding are indistinguishable. See 820 N.W.2d at 623. The district court imposed an upward durational departure, sentencing Rossbach to 201 months in prison. *Id.*

In *State v. Hicks*, the supreme court said, “The offender’s conduct in concealing the victim’s body is more serious than the typical second-degree unintentional murder because family and friends of a victim suffer additional trauma by not knowing whether their relative or friend is dead or alive, and concealment is contrary to the proper respectful treatment due to the remains of a deceased person.” 864 N.W.2d 153, 159 (Minn. 2015). We find this reasoning persuasive and applicable to Rossbach’s aiding-an-offender conviction. The victim’s body was missing for several weeks, and Rossbach lied to the police three times about having any knowledge pertaining to the victim. The emotional distress that the family faced while the victim’s body was missing provided the district court a sufficient and compelling reason to impose a heightened sentence. The district court did not abuse its discretion by imposing an upward durational departure.

Affirmed.