

*This opinion is nonprecedential except as provided by  
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A20-0327**

State of Minnesota,  
Respondent,

vs.

Joshua Lewis Duane Dow,  
Appellant.

**Filed March 8, 2021  
Affirmed  
Bjorkman, Judge**

Hennepin County District Court  
File No. 27-CR-19-10503

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

Michael O. Freeman, Hennepin County Attorney, Jacqueline Bailey, 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 Bjorkman, Presiding Judge; Bratvold, Judge; and Bryan, Judge.

**NONPRECEDENTIAL OPINION**

**BJORKMAN**, Judge

Appellant challenges his conviction of second-degree unintentional murder, arguing that (1) the district court erred by denying his motion to dismiss because he was previously

convicted of another offense—interfering with a dead body—arising out of the same behavioral incident, and (2) the district court abused its discretion by imposing an aggravated sentence. We affirm.

## **FACTS**

Early in the morning of Wednesday, November 18, 2015, appellant Joshua Lewis Duane Dow was in the living room of his apartment with A.J., the mother of his child. They argued, and he shot her in the head, causing her death. His brother L.D., who also lived in the apartment, awakened at the sound of the shot. Dow went to L.D.'s room and told him that the gun went off accidentally, and L.D. went back to sleep. Dow then rolled A.J.'s body up in a rug and placed it in the basement. He also cleaned the blood from the living room and removed A.J.'s possessions. At some point, he took a large piece of plastic down to the basement, unrolled the rug, wrapped A.J.'s body in the plastic, and rolled the rug around her again.

That afternoon, a friend came to the apartment. Dow told him the couch was stained because a cat soiled it, and, along with L.D., they moved the couch to the porch. A short time later, Dow told his brother that the gun had not fired accidentally and that A.J. had actually shot herself. He threatened L.D. with the gun and demanded that he help hide the body and clean the apartment. They cleaned the living room and painted over a wall that had blood on it. After dark, the two men placed A.J.'s body in a large box, took the box to a warehouse where Dow used to work, and hid it in a closet. They also disposed of the couch, and Dow told L.D. to clean and hide the gun.

By late Wednesday evening, A.J.'s parents were concerned that they had not heard from her and went to the Carver County Sheriff's Office to report her missing. A deputy contacted Dow that evening; Dow said he had not seen A.J. since around 3:30 a.m. and believed she had left town.

On Thursday, Dow gave a statement to the sheriff's office. He reported that he saw A.J. walking away from his apartment early Wednesday morning, she refused to return, and that was the last time he saw her.

At some point on Friday, Dow and L.D. returned to the warehouse and moved A.J.'s body to a storage locker.

On Saturday, Dow accompanied A.J.'s parents to report her disappearance to the Minneapolis Police Department. After they left the police station, Dow returned and told officers that A.J. had gone missing twice before and they recently had an argument that turned physical.

Late Saturday night, Dow returned to the warehouse on his own. He cut A.J.'s body into small pieces and packaged them for disposal. He spent Sunday driving around Minneapolis and placing the packages containing A.J.'s body parts in various trash receptacles. Sunday evening, L.D. contacted the police to report A.J.'s death. Police began searching for Dow and A.J.'s body.

On Monday, Dow told a friend that A.J. was dead and he had dismembered and disposed of her body. The friend contacted police, and Dow was arrested.

Respondent State of Minnesota charged Dow with interfering with a dead body with the intent to conceal evidence; second-degree assault with a dangerous weapon, based on

his threat to shoot L.D. if he did not help move A.J.'s body; and first-degree sale of a controlled substance, based on cocaine police found when they arrested him. The state agreed to dismiss the assault charge in exchange for Dow's guilty pleas to the other two offenses. During the plea colloquy, Dow stated that A.J. shot herself, and he hid and then dismembered her body so their child would not find out she killed herself. The district court convicted Dow and sentenced him to prison.

In May 2019, the state charged Dow with second-degree intentional murder, alleging that he shot and killed A.J. Dow moved to dismiss the charge, arguing that Minn. Stat. § 609.035, subd. 1 (2014), bars the prosecution because he was previously convicted of interfering with A.J.'s body and committed that offense "to avoid apprehension for her death." The district court denied the motion.

Dow pleaded guilty to second-degree unintentional murder, waived a sentencing jury, and agreed to a sentence of 240 months' imprisonment, an upward durational departure.<sup>1</sup> As part of his plea, Dow admitted, contrary to his 2016 plea, that he and A.J. had argued, he tried to wrest the gun from her in order to hit her with it (a second-degree assault), and he accidentally shot her in the head, killing her. He also admitted facts about his subsequent conduct. The district court imposed the aggravated sentence based on "particular cruelty to the family." Dow appeals.

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<sup>1</sup> The upper end of the presumptive sentencing range was 216 months' imprisonment. Minn. Sent. Guidelines 4.A (2014).

## DECISION

### **I. Dow’s conviction for interfering with A.J.’s dead body does not preclude prosecuting him for the separate act of murdering her.**

Subject to several exceptions not implicated here, “if a person’s conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them.” Minn. Stat. § 609.035, subd. 1. The purpose of the statute is “to protect against exaggerating the criminality of a person’s conduct and to make both punishment and prosecution commensurate with culpability.” *State v. Krech*, 252 N.W.2d 269, 272 (Minn. 1977).

To justify multiple sentences or prosecutions, the state must prove that the defendant did not commit the offenses as part of a single behavioral incident. *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016); *see Krech*, 252 N.W.2d at 272 (stating that the central issue is “whether the conduct underlying the multiple offenses was unitary or divisible”). Determining whether that standard is met is not a “mechanical” exercise but “involves an examination of all the facts and circumstances.” *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997). In the context of two intentional offenses, we consider whether the offenses (1) share a common time and place and (2) were motivated by the same criminal objective. *Bakken*, 883 N.W.2d at 270. This determination involves “a mixed question of law and fact.” *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014). We review factual findings for clear error and the application of the law to those facts de novo. *Id.*

Dow first argues that A.J.'s murder and the interference with her body were part of the same behavioral incident because they "shared a unity of time and place." He contends that because he killed A.J. at the apartment and moved her body from the apartment to the warehouse that same day, his interference with her body "began right after her death in the same place as her death." The record defeats this argument. Dow's interference-with-a-body conviction is not based on moving A.J.'s body. The complaint alleged that Dow committed the interference offense "on or about" November 21, 2015. And Dow's guilty plea was based on his factual admission that he dismembered her body on November 21 and disposed of the parts "to get rid of the evidence of the death."

Moreover, Dow's conduct between the time he killed A.J. and the time he dismembered and disposed of her body confirms the two offenses were not part of a continuous course of conduct. The day he shot her, Dow quickly removed her body from the apartment then forced his brother to help move her body to the warehouse, over four miles away. Dow spent at least a full day away from the warehouse and A.J.'s body. Two days after A.J.'s death, Dow and his brother moved her body to a different location at the warehouse. Dow was again away from A.J.'s body for a day. Only on the night of the third day did Dow return to the warehouse, on his own, to undertake the significantly more gruesome act of dismembering A.J.'s decomposing body. And throughout the fourth day he drove around, again on his own, scattering her body parts across the city. Given the lapse of several days, the significant interruptions and changes in Dow's conduct, and the geographical separation between the act of killing A.J. and the acts of dismembering and disposing of her body, we conclude the two offenses do not share a unity of time and place.

Dow next contends that the two offenses were motivated by the same criminal objective because he interfered with A.J.'s body for the purpose of concealing evidence of—and thereby avoiding apprehension for—the killing. Under the avoidance-of-apprehension doctrine, a defendant cannot be subject to multiple punishments or prosecutions when a second offense was committed “in an attempt to avoid apprehension for the first offense.” *State v. Bookwalter*, 541 N.W.2d 290, 296 (Minn. 1995). The offense committed in avoidance of apprehension need not have been “part of a prearranged scheme” to bar multiple sentencing or prosecution. *State v. Hicks*, 864 N.W.2d 153, 160 (Minn. 2015). But it must have been committed “substantially contemporaneous” with the first offense. *Bookwalter*, 541 N.W.2d at 296.

Two offenses are substantially contemporaneous if the second offense follows immediately after the first. *See, e.g., State v. Hawkins*, 511 N.W.2d 9, 13-14 (Minn. 1994) (concluding that defendant's attempt to take the gun of an officer who kicked him down the stairs in order to “do” the officer was substantially contemporaneous with his aggravated robbery of the officer); *State v. Gibson*, 478 N.W.2d 496, 497 (Minn. 1991) (holding that criminal-vehicular-operation and leaving-the-scene-of-an-accident offenses were substantially contemporaneous where the defendant left the scene on foot “immediately after” the accident). When the defendant completes the second offense hours after the first, the two are substantially contemporaneous only if the second began immediately and continued substantially uninterrupted until its completion. *See Hicks*, 864 N.W.2d at 161 (concluding defendant's efforts to conceal murder victim's body were substantially contemporaneous with the murder, despite the passage of “some hours,”

because he began “devising a plan” just after the murder, left the scene of the murder only to further the plan, and completed it that night). And when numerous distinct other acts occur between the principal offense and the offense committed to avoid apprehension, they are not substantially contemporaneous. *See Bookwalter*, 541 N.W.2d at 297 (concluding defendant did not commit attempted murder to avoid apprehension for sexual assault because of “the multiplicity and disjointed nature of events between the [two offenses]”).

We agree that Dow’s motivation for dismembering and disposing of A.J.’s body likely was to avoid apprehension for her murder. But we are not persuaded that the circumstances as a whole support application of the avoidance-of-apprehension doctrine. Dow’s offenses were not at all contemporaneous; he killed A.J. one day and dismembered and scattered her body three to four days later. And unlike the sustained concealment efforts in *Hicks*, the intervening days were not marked by a substantially uninterrupted course of conduct. Rather, Dow spent much of that time engaged in other activities, nowhere near A.J.’s body. In short, Dow’s act of dismembering and disposing of A.J.’s body was temporally and qualitatively distinct from the act of murdering her, and even moving her body around. The record convinces us that prosecuting and punishing Dow for both offenses is commensurate with the criminality of his conduct. His conviction of interfering with a dead body does not preclude his prosecution and sentence for murder.

**II. The district court did not abuse its discretion by imposing an upward durational sentencing departure.**

A district court must impose a sentence within the presumptive sentencing range unless there are “identifiable, substantial, and compelling circumstances” to warrant an

upward departure. Minn. Sent. Guidelines 2.D (2014). Substantial and compelling circumstances are those that show the defendant’s conduct was “significantly more . . . serious than that typically involved in the commission of the offense in question.” *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009) (quotation omitted). On appeal, we review an upward durational sentencing departure for an abuse of discretion. *State v. Shattuck*, 704 N.W.2d 131, 140 (Minn. 2005). A district court abuses its discretion if its reasons for departure are improper or there is insufficient evidence on which to base a departure. *State v. Vance*, 765 N.W.2d 390, 395 (Minn. 2009).

The district court determined that an upward departure is warranted because “there was particular cruelty to the family in this case.” Treating a victim with “particular cruelty” is a recognized departure ground, Minn. Sent. Guidelines 2.D.3.b.(2) (2014), and “involves the gratuitous infliction of pain and cruelty of a kind not usually associated with the commission of the offense in question,” *State v. Barthman*, 938 N.W.2d 257, 270 (Minn. 2020) (quotations omitted). The victims of a homicide include the family members of the deceased person. See Minn. Stat. § 611A.01(b) (2020) (defining the term “victim” for purposes of establishing crime-victim rights). And Minnesota courts have consistently recognized that committing murder in a manner that inflicts gratuitous pain and suffering on the victim’s family makes the offense particularly serious. See *Hicks*, 864 N.W.2d at 157-59 (discussing evolution of caselaw and concluding that concealment of a homicide victim’s body may be an aggravating factor because it causes family and friends “additional trauma”); *State v. Robideau*, 817 N.W.2d 180, 186 (Minn. App. 2012) (concluding that committing a murder “in such a way that the victim’s teenage son was intended to be the

first to discover the body of his murdered mother” is a legally permissible aggravating factor).

Dow does not dispute that particular cruelty toward a victim’s family is a valid departure ground. But he contends the district court abused its discretion by basing its particular-cruelty determination on his separate offense of interfering with a dead body. We are not persuaded. Dow admitted several facts in support of his agreement to an aggravated sentence, some of which concerned his dismembering and disposing of A.J.’s body four days after her death. But Dow’s other admissions provide ample evidentiary support for the district court’s sentencing decision. Dow admitted that he “concealed” A.J.’s body, moving it multiple times over the course of the several days following her death. He also admitted that, during that time, he “joined others in reporting her missing”—conduct that undisputedly included telling police that he believed she left town and had gone missing previously. These acts prevented A.J.’s family from knowing whether she was dead or alive and were “contrary to the proper, respectful treatment due to the remains of a deceased person.” *Hicks*, 864 N.W.2d at 159. We are satisfied that the record supports the district court’s determination that Dow committed the offense of unintentional murder in a way that was particularly cruel to A.J.’s family. Accordingly, the district court did not abuse its discretion by imposing an aggravated sentence.

**Affirmed.**