

*This opinion is nonprecedential except as provided by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
A20-0369**

State of Minnesota,
Respondent,

vs.

Jeffrey Lo,
Appellant.

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

Washington County District Court
File No. 82-CR-19-2295

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

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Amy Lawler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Segal, Chief Judge; and Ross, Judge.

NONPRECEDENTIAL OPINION

BRYAN, Judge

In this direct appeal from the judgments of conviction for aggravated robbery and two counts of kidnapping, appellant argues that the district court erred in imposing upward departures for the kidnapping offenses and ordering the three sentences to run

consecutively. Because the district court properly considered the age and particular vulnerability of the one-year-old and three-year-old child victims in this case, we conclude that the district court did not abuse its sentencing discretion when it imposed the departures. Similarly, because of the unique aspects of appellant's criminal conduct in this case, we conclude that the district court did not abuse its sentencing discretion when it imposed consecutive sentences.

FACTS

In June 2019, appellant Jeffrey Lo hid in the vehicle belonging to the mother of his two daughters, ages three and one. After she and the daughters got into the vehicle and drove away from their residence, Lo came out of hiding to confront the mother. While she was driving, Lo argued with the mother and hit her. He ultimately took the children with him in the vehicle, leaving the mother behind. After police managed to locate him, Lo was arrested. Respondent State of Minnesota charged Lo with two counts of kidnapping, one count of second-degree assault with a dangerous weapon, and one count of violating an order for protection (OFP) while possessing a dangerous weapon. The state subsequently amended the complaint, adding three new charges, including one count of theft of a motor vehicle and two counts of deprivation of parental rights. The state also replaced the second-degree assault charge with one count of first-degree aggravated robbery. The state filed a notice of intent to seek an upward sentencing departure based on the victims being "particularly vulnerable due to their young age," the offenses being committed in the presence of children, and the offenses occurring in a location where the victims had an expectation of privacy.

Lo waived his right to trial, including a trial regarding aggravating factors, and agreed to plead guilty to both counts of kidnapping and to the aggravated robbery offense. As part of the plea agreement, Lo agreed that the offense conduct included aggravating factors because the child victims were particularly vulnerable given their age and inability to flee or resist, and because the assault of the mother and theft of her vehicle occurred in the presence of the children.

At the plea hearing, Lo admitted that he committed the offenses. Lo confirmed that he hid in the back of the mother's van until she had driven for a few minutes, then alerted the mother that he was in the car and confronted her. Lo stated that he got into an argument with the mother, "slapped her on the side of her face" and hit her "with the clip of the gun." Lo also admitted that after he struck the mother, she got out of the vehicle. Lo then "took the car" and drove away. During this encounter, the two child-victims were "in the back seat." Lo confirmed that he parked the vehicle, took the two child victims with him, left the vehicle behind, and spent two-to-three hours with the children.

The district court accepted Lo's guilty pleas and ordered a presentence investigation (PSI) report. The PSI indicated that there were mitigating and aggravating factors present. For example, the report noted that Lo had "minimal criminal history" and that the offenses were part of a single course of conduct. However, the report also emphasized that "the child victims were too young to resist [Lo]," that Lo assaulted the mother, "who thought he had a weapon," and that he did so "while inside the vehicle in the presence of the children." In addition, the PSI notes that "the van was moving when that assault occurred, placing all of them plus others on the roadways in potential harm's way." The report also

described Lo's relationship with the mother. The mother had an active OFP against Lo, which Lo violated on the offense date. According to the PSI, as a result of the force of Lo's assaultive actions, the mother sustained injuries that required medical care at a hospital. The report also noted that Lo was "unable to acknowledge" that his actions were wrong or harmful. The PSI correctly indicated that the severity level for each of the three offenses was eight and the criminal history score for each offense was zero. This resulted in presumptive guidelines sentences for each of the three offenses of between 41 and 57 months. Based on the aggravating factors, the PSI author recommended three consecutive sentences, with durations of 60 months each for a total term of 180 months. Each recommended 60-month sentence included a three-month upward departure from the presumptive term of 57 months.

At the sentencing hearing, both parties accepted the calculations in the PSI as correct. The state argued for three consecutive 60-month sentences, including the three-month upward departures, as recommended by the probation officer in the PSI. The state provided several reasons to support its position, including the following: the children's ages and vulnerability, the violent nature of Lo's conduct toward the mother, the presence of the children when Lo struck the mother, the planning required to hide and wait inside the mother's van, the circumstances of the ultimate confrontation between Lo and the police, the violation of the OFP in place at the time, and Lo's lack of remorse and understanding of the consequences of his actions. Lo's counsel conceded that consecutive sentencing was available because the court was sentencing on three separate crimes with

separate victims. Lo's counsel requested three, consecutive 48-month sentences, totaling 144 months.

The district court sentenced Lo to 57 months in prison for aggravated robbery, within the presumptive guidelines range. Then the district court sentenced Lo to 60 months in prison for each count of kidnapping "based on the aggravated factors that [he] admitted, specifically the very young age of the child[ren]." Both 60-month sentences were upward departures of three months from the top of the presumptive guidelines ranges for these offenses. The three consecutive prison terms total 177 months. Lo appeals the district court's sentencing decisions.¹

DECISION

Lo challenges the district court decisions to depart upward, arguing that the kidnapping offenses in this case are not more serious than the typical kidnapping offense. Because the victims of the kidnapping offenses in this case were especially young, we conclude that the district court did not abuse its discretion when it departed upward from 57 months to 60 months for each of the two kidnapping offenses. In addition, Lo challenges the district court's decisions to impose consecutive sentences, arguing that the total term of imprisonment unfairly exaggerates the criminality of his conduct. Given the nature of Lo's criminal conduct in this case, we conclude that the district court did not abuse its discretion.

¹ Lo does not directly challenge the aggravated robbery sentence, which was within the presumptive guidelines range. He indirectly challenges this sentence, but only as part of his challenge to the aggregate term of imprisonment.

I. Upward Departures

The Minnesota Sentencing Guidelines Commission has promulgated sentencing guidelines to be used by a district court. See Minn. Stat. § 244.09 (2018). The guidelines require district courts to impose a sentence within the presumptive sentencing range unless there are “substantial and compelling circumstances . . . showing that 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); see also Minn. Sent. Guidelines 2.D.1 (2019) (requiring pronouncement of sentences within the applicable prison range absent identifiable, substantial, and compelling circumstances to support a departure), 2.D.3.b (2019) (providing a nonexclusive list of aggravating factors used to justify an upward departure). Evidence relied on to prove an element of the criminal offense cannot also be relied on to justify an upward departure. *State v. Williams*, 608 N.W.2d 837, 840 (Minn. 2000).²

In this case, the district court articulated a single reason for its decision to depart upward by three months: the particular vulnerability of the young children. See Minn. Sent. Guidelines 2.D.3.b.(1) (stating that a district court may properly depart upward when an offender commits a crime against a victim who “was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, and the offender knew or should have

² Although Lo observes that the kidnapping statute differentiates between kidnapping an adult and kidnapping a person under the age of 16, Lo does not raise a challenge to the validity of the district court’s stated departure ground under *Williams*. Lo conceded that the elements of the instant kidnapping offenses do not preclude consideration of the especially young ages of the child victims as a valid departure ground.

known of this vulnerability.”).³ Because Lo does not challenge the validity of the district court’s stated reason for departures, we review the departure decisions for an abuse of discretion. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 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.” (emphasis in original)), *review denied* (Minn. May 11, 2010). We also afford great deference to the district court regarding the extent of the departure. *Id.* at 596 (“We have generally deferred entirely to the district court’s judgment on the proper length of departures that result in sentences of up to double the presumptive term.”) (citation omitted). “The shorter the departure, the greater the deference given to the district court’s discretion.” *Id.* The imposition of an upward durational departure will be affirmed so long as the district court’s reasons for departing are “legally permissible and factually supported in the record.” *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015) (quotation omitted).

Lo challenges the district court’s three-month upward durational departures for each of his kidnapping offenses on the ground that his offenses were not more serious than the typical kidnapping offense. Lo relies on a number of unpublished decisions to support this contention. *See, e.g., State v. Kost*, No. A18-1770, 2019 WL 3774586, at *1 (Minn. App. Aug. 12, 2019); *State v. White*, No. A16-1529, 2017 WL 2333029, at *2 (Minn. App. May 30, 2017); *State v. Thao*, No. A16-0212, 2016 WL 4069327, at *1 (Minn. App. Aug. 1,

³ Lo also does not argue that the stated reason is inadequate or that a single reason is insufficient. *See State v. Solberg*, 882 N.W.2d 618, 624 (Minn. 2016) (holding that a single mitigating factor may justify a downward departure and listing cases affirming upward departures based on a single aggravating factor).

2016). We have reviewed these decisions and conclude that they do not support Lo's position and have no bearing on our review of the district court's decisions in this case. The district court determined that the aspect of Lo's conduct that distinguished it from the typical kidnapping offenses was the extremely young ages and particular vulnerability of the child victims. The cases cited by Lo involve kidnapping of adults, not children, toddlers, or infants. Accordingly, none of Lo's cited cases are persuasive or compel a reversal of the district court's decision to depart. Given the harm to the mother witnessed by the children and given the especially young age and vulnerability of the children, we conclude that the district court acted well within its discretion when it departed upward by three months on each of the kidnapping offenses.

II. Consecutive Sentences

Lo also argues that the aggregated term of imprisonment unfairly exaggerates the criminality of his conduct. Given the multiple victims present, and the facts of this case, we are not persuaded.

A district court's decision to impose consecutive sentences is reviewed for an abuse of discretion. *E.g.*, *State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007). We do not interfere with the district court's discretion to depart or to impose consecutive sentences unless the sentence is disproportionate to the offense or unfairly exaggerates the criminality of the defendant's conduct. *State v. Fardan*, 773 N.W.2d 303, 322 (Minn. 2009). In cases with multiple victims, consecutive sentences are rarely, if ever, disproportionate to the offense. *State v. Ali*, 855 N.W.2d 235, 259 (Minn. 2014).

Lo challenges the aggregate length of the prison term imposed (177 months) by comparing it to the presumptive guidelines sentence for second-degree unintentional murder, with a criminal history score of zero (150 months). We recognize the severity of unintentional murder, but this comparison does not persuade us to reverse the district court. Lo's comparison fails to account for the presence of multiple victims. Lo also overlooks the young ages of the child victims and the other distinguishing aspects of his conduct in this case. As noted by the state, Lo's conduct includes violence against the mother, some degree of premeditation and planning, violating an active OFP, and a lack of remorse or understanding of the consequences of his actions. Based on this record, we discern no abuse of discretion by the district court in determining that the nature of Lo's criminal conduct is commensurate with an aggregate term of imprisonment of 177 months.

Affirmed.