

*This opinion is nonprecedential except as provided by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
A20-1337**

State of Minnesota,
Respondent,

vs.

Joshua Alan Galle,
Appellant.

**Filed May 17, 2021
Affirmed
Gaïtas, Judge**

Hennepin County District Court
File No. 27-CR-17-19854

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

Michael O. Freeman, Hennepin County Attorney, Mark V. Griffin, Senior 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 Gaïtas, Presiding Judge; Segal, Chief Judge; and
Kalitowski, Judge.*

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

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant Joshua Galle challenges the district court's upward durational sentencing departure for his third-degree assault conviction. In a pro se supplemental brief, Galle raises three additional arguments regarding his sentence. We affirm.

FACTS

In July 2017, D.E. was driving to work after drinking some cocktails with friends. Galle pulled up next to D.E. at a stoplight. D.E. and Galle then had a verbal altercation—a “what’s your problem” type of situation, as D.E. later testified. During this encounter, Galle flung his car door open and angrily ran toward D.E., who exited his car and tried to “deflect” Galle by “putting [his] foot to [Galle’s] chest to change trajectory.” The next moment D.E. could recall was waking up to police tapping on the window of his car in a parking lot.

There were two eyewitnesses to this altercation. According to the first witness, Galle dragged D.E. from his car, slammed him to the ground, and then kicked him in the head while continuing to punch him. This witness believed that Galle had “put [D.E.] to sleep” because D.E. seemed to be unconscious on the ground for “a good minute.” The second witness saw Galle get out of his vehicle and the ensuing loud argument. He could “tell it was gonna get bad” and noted that things “went south really fast.” According to the second eyewitness, Galle kicked D.E. in the head while he was on the ground, “like you’d kick a soccer ball,” and then D.E. went “limp.” The second witness approached Galle and said, “I think you just killed him.” Then, Galle’s demeanor instantly changed. Galle tried

to usher D.E. to a nearby curb, insisting that D.E. was okay, before he quickly drove away from the scene. Minutes later, D.E. stood up, got into his car, and drove off as well.

The two eyewitnesses reported the altercation to the police. An officer soon located D.E. in a nearby parking lot. D.E. was injured with a lump on his head and a bloody lip, and he was transported to the hospital for treatment. Police investigated the altercation and eventually located Galle and arrested him.

Following these events, Galle was charged with first- and third-degree assault. Minn. Stat. §§ 609.221, subd. 1, .223, subd. 1 (2016). Respondent State of Minnesota notified Galle that it would seek an aggravated sentencing departure. Galle pleaded not guilty and a jury trial occurred in August 2018.

The state called nine witnesses during Galle's trial, including D.E. and the two eyewitnesses to the assault. Much of the testimony focused on the extent of D.E.'s injuries, which included a concussion, fractured tibia, and sprained anterior cruciate ligament (ACL). D.E. suffered various symptoms following his concussion: difficulty staying awake for longer than 15 to 20 minutes at a time, terrible headaches, noise sensitivity, eyestrain, and memory fatigue. D.E. explained how the headaches worsened and, at times, became "debilitating" 10- to 20-second episodes that caused him to stop in his tracks. Due to his injuries, D.E. was unable to work for about four months. His speech pathologist and occupational therapist testified about how his symptoms were consistent with a "mild traumatic brain injury" and post-concussion syndrome. D.E.'s doctor testified that D.E.'s tibia fracture extended into his cartilage, his ACL sprain "was not significant," and that,

about four weeks after the assault, his x-rays appeared “normal” and his swelling continued to improve over time.

The jury found Galle guilty of first-degree assault, third-degree assault, and a lesser-included offense of fifth-degree assault, Minn. Stat. § 609.224, subd. 1 (2016). After receiving the verdicts, Galle waived his right to have the jury determine the presence of the state’s alleged aggravating factors, *see* Minn. R. Crim. P. 26.01, subd. 3; *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 2537 (2004), and the parties submitted the issue to the district court based on a stipulated record. The district court determined that there were two aggravating factors: (1) Galle was a “repeat offender” because he injured a victim here and during a prior assault resulting in a conviction, *see* Minn. Stat. § 244.10, subd. 5a(a)(3) (2016); and (2) Galle was a “dangerous offender,” *see* Minn. Stat. § 609.1095, subd. 2 (2016). Notwithstanding the presence of these aggravating factors, the district court sentenced Galle to the presumptive sentence of 146 months in prison for the first-degree assault conviction.

Galle appealed to this court, mainly challenging the sufficiency of evidence on the first-degree assault conviction. Because we concluded “that D.E.’s injuries [did] not amount to great bodily harm,” an essential element of first-degree assault, we reversed Galle’s conviction for first-degree assault. *State v. Galle*, A19-0126, 2020 WL 1845966 at *4-6 (Minn. App. Apr. 13, 2020). But we were “more than satisfied” that Galle caused D.E. “substantial bodily harm,” a critical element of third-degree assault, and accordingly affirmed his third-degree assault conviction and remanded for resentencing. *Id.* at *6.

On remand, the state asked the district court to impose the statutory maximum sentence of 60 months, which would have been more than a double durational departure from the presumptive sentence under the sentencing guidelines. *See* Minn. Stat. § 609.223, subd. 1 (2016). Galle requested a presumptive sentence, arguing that the offense was a typical third-degree assault. Relying on the district court’s previous determinations that Galle was a repeat offender and a dangerous offender, the district court resentenced Galle to 54 months in prison—a double durational departure from the presumptive sentence.

Galle now appeals.

DECISION

I. The district court did not abuse its discretion in imposing an upward durational departure from the sentencing guidelines based on Galle’s status as a repeat offender.

Galle challenges the district court’s decision to depart from the sentencing guidelines. He contends that the district court improperly relied on the dangerous-offender and repeat-offender aggravating factors. And he argues that the district court’s double durational departure resulted in an excessive sentence.

Appellate review of a district court’s sentencing departure generally involves a twofold inquiry. *See State v. Rabold*, 935 N.W.2d 902, 906 (Minn. App. 2019). First, we review de novo whether the district court’s reason for the sentencing departure is permissible. *Id.* Second, we review the district court’s decision whether to depart for an abuse of discretion. *Id.* Ultimately, a reviewing court has the responsibility of determining whether a disputed sentence “is inconsistent with statutory requirements, unreasonable,

inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court.” Minn. Stat. § 244.11, subd. 2(b) (2020).

“[A] sentencing court can exercise its discretion to depart from the guidelines only if aggravating or mitigating circumstances are present, and those circumstances provide a substantial and compelling reason not to impose a guidelines sentence.” *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotations and citations omitted). “If the reasons given for an upward departure are legally permissible and factually supported in the record, the departure will be affirmed. But if the district court’s reasons for departure are improper or inadequate, the departure will be reversed.” *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015) (quotation omitted). “The presence of a single aggravating factor is sufficient to uphold an upward departure.” *State v. Rushton*, 820 N.W.2d 287, 289 (Minn. App. 2012); *see State v. Ayala-Leyva*, 848 N.W.2d 546, 558 (Minn. App. 2014) (“[A] departure can be affirmed even if based on a single aggravating factor.”).

Galle first argues, and the state concedes, that the district court erroneously determined that Galle was a dangerous offender under Minnesota Statutes section 609.1095, subdivision 2, because Galle does not have two or more separate and sequential convictions for violent crimes. We agree.

Under section 609.1095, subdivision 2, the district court may depart from the presumptive sentence if, at the time of sentencing, the offender is at least 18 years old, has two or more “prior convictions for violent crimes,” and is found to be “a danger to public safety.” Minn. Stat. § 609.1095, subd. 2(1)-(2). A “prior conviction” is “a conviction that 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) (2016). In other words, convictions must be separate and sequential to one another to qualify: “i.e., offense/conviction, offense/conviction, offense/conviction, etc.” *State v. Huston*, 616 N.W.2d 282, 283 (Minn. App. 2000).

The stipulated record on the aggravating factors establishes that Galle committed two acts of third-degree assault in July 2001. He then committed a first-degree burglary in October 2001. In April 2002, he pleaded guilty to the assault offenses and was convicted of those offenses in June 2002. He was not charged with the burglary offense until April 2003. Thus, the sequence here was offense/offense, conviction/conviction rather than offense/conviction, offense/conviction, and the district court therefore erred by departing based on section 609.1095, subdivision 2.

Even when some reasons for a departure are improper or insufficient, we may affirm a sentence “if we conclude that the district court would have departed based on other aggravating factors supported by its findings.” *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010); *see also State v. Vance*, 765 N.W.2d 390, 395-96 (Minn. 2009) (affirming sentencing departure notwithstanding district court’s reliance on an improper aggravating factor because two remaining departure bases independently supported the departure and it was “reasonable to conclude that the district court would have imposed the same sentence”). Because the district court also based its upward departure on the repeat-offender aggravating factor, we next examine whether this second factor was a valid departure basis.

Minnesota Statutes section 244.10, subdivision 5a(a)(3) sets forth the repeat-offender aggravating factor. That section allows an upward departure where “the current conviction is for . . . an offense in which the victim was otherwise injured and there is a prior felony conviction for . . . an offense in which the victim was otherwise injured.” *See* Minn. Sent. Guidelines 2.D.3.b.(3) (2016).

Galle argues that the district court abused its discretion by relying on the repeat-offender aggravating factor because “this was not an atypical third-degree assault” and the court failed to make a finding that his offense was more serious than a typical offense. He acknowledges that this aggravating factor applied, but he claims that “more than any degree of injury must be required for a district court to exercise its discretion to depart upward.” The state counters that the upward departure was justified based on the statutory authority alone, “without consideration of whether the offense was atypical.”

The state is correct. “[T]he Legislature, through the repeat offender aggravating factor, has expressly determined that recidivism for particular felonies [(those which injure victims)] is a valid basis for an upward sentencing departure.” *State v. Meyers*, 869 N.W.2d 893, 900 (Minn. 2015). Accordingly, the supreme court held in *Meyers* that “the existence of the repeat offender aggravating factor is sufficient, by *itself*, to justify up to a double durational departure.” *Id.* at 901. This aggravating factor does not require the district court to make an additional finding that the instant offense was atypical or more serious than usual. *See id.* at 900-01; Minn. Stat. § 244.10, subd. 5a(a)(3). All that must be shown is that the instant offense and a prior felony conviction both involved victim injury. *See id.*

Here, as Galle acknowledges, the record supports the district court's factual finding that Galle's current conviction and his prior convictions were for offenses where victims were injured. The current conviction resulted from Galle's assault of D.E., which caused D.E. to suffer a concussion, a bone fracture, an ACL sprain, and various prolonged symptoms relating to those injuries. And in 2002, Galle was convicted of two counts of third-degree assault because he stabbed two victims who ultimately received medical care for their injuries. Accordingly, because Galle's current conviction and prior convictions involved offenses where victims were injured, the district court correctly determined as a matter of law that Galle is a repeat offender as defined by section 244.10, subdivision 5a(a)(3).

“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 (emphasis added). Galle argues that the district court abused its discretion because his 54-month sentence is “excessive, disproportionate to the offense, unduly exaggerates [his] culpability and seriously undermines the goals of the sentencing guidelines.”

Once more, Galle's argument is misguided. When a disputed sentence is not more than double the presumptive term, we generally defer entirely to the district court's discretion. *Id.* at 596. This deference applies when the repeat-offender aggravating factor is the basis of a given departure. *See, e.g., Meyers*, 869 N.W.2d at 902 (upholding 240-month sentence where 135 months was presumed); *State v. Lomax*, 437 N.W.2d 409, 410 (Minn. 1989) (upholding 140 month-sentence where 70 months was presumed); *State v.*

O'Brien, 369 N.W.2d 525, 527 (Minn. 1985) (upholding 130-month sentence where 65 months was presumed). Here, given the nature of Galle's conduct during the assault, the particular injuries he inflicted on the victim, and his prior assaults, we see no abuse of discretion in the district court's decision to impose a double durational departure from the presumptive sentence of 27 months.

Finally, notwithstanding the district court's reliance on the improper dangerous-offender ground for departure, it is reasonable to conclude that the district court would have imposed the same sentence based solely on the repeat-offender aggravating factor. *See Vance*, 765 N.W.2d at 395-96. At the sentencing hearing on remand, the district court observed that the repeat-offender aggravating factor is "actually . . . more applicable." The district court also stated that the departure was "primarily" based on the "244.01 [sic] subdivisions as originally stated." Given these statements, we conclude that the district court would have imposed the same sentencing departure based on the repeat-offender aggravating factor alone. We accordingly affirm Galle's sentence.

II. Galle's pro se arguments do not entitle him to relief.

We next consider Galle's arguments raised in his pro se supplemental brief. Galle raises three additional challenges to his sentence.

First, Galle argues that the judge who sentenced him on remand from this court's decision reversing his first-degree assault conviction—a different judge than the judge who presided over his trial and original sentencing hearing—was biased. He contends that the resentencing judge demonstrated bias against him by relying on the trial judge's

determinations and ignoring certain mitigating factors, resulting in a sentence that was arbitrary, unethical, and “fits the definition of caprice.”

All district court judges must “perform the duties of judicial office . . . without bias or prejudice.” Minn. Code. Jud. Conduct 2.3(A). But, “[t]he mere fact that a party declares a judge partial does not in itself generate a reasonable question as to the judge’s impartiality.” *State v. Burrell*, 743 N.W.2d 596, 601-02 (Minn. 2008). Adverse rulings, without more, are not a demonstration of judicial bias. *State v. Sailee*, 792 N.W.2d 90, 96 (Minn. App. 2010), *review denied* (Minn. Mar. 15, 2011).

Galle appears to argue that the resentencing judge’s reliance on the trial judge’s findings regarding the presence of aggravating factors constitutes judicial bias. This claim is without merit because the record reveals no indication of judicial bias. The resentencing judge’s reliance on the trial judge’s findings does not, in itself, establish bias. Moreover, our review of the record convinces us that the resentencing judge considered a variety of factors, including some mitigating factors, before arriving at Galle’s 54-month sentence.

Second, Galle asserts that the state only requested an aggravated departure after he successfully appealed the first-degree assault conviction and therefore the departure constitutes a “trial penalty.”¹ Galle’s argument is unsupported by the record. The state

¹ Galle also suggests that the resentencing judge erred by declining to compare the facts of this case to other third-degree assaults. Appellate courts may look to sentences given to other offenders for the same conviction when considering whether a particular sentence “exaggerates the defendant’s criminality.” *State v. Willis*, 559 N.W.2d 693, 701 (Minn. 1997). But, as discussed, the 54-month sentence imposed by the district court neither exaggerated Galle’s criminality nor was it an abuse of discretion. Thus, we do not engage in the comparative analysis requested by Galle.

noticed its intent and moved for an upward departure well before Galle’s first appeal based on the same two aggravating factors later applied on remand. That the state renewed its request for an upward departure when Galle was resentenced for third-degree assault in no way constitutes a “trial penalty.”

Finally, Galle appears to argue that upward sentencing departures are unconstitutional when a departure is left to the district court’s discretion. The Minnesota Legislature has “[t]he power to define the conduct which constitutes a criminal offense and to fix the punishment for such conduct.” *Meyers*, 869 N.W.2d at 896 (quotation omitted). Section 244.10, subdivision 5a(a)(3)—which served as the basis for departure in this case—reflects the legislature’s decision that “recidivism can justify increased punishment.” *Id.* And it has long been held that a decision to depart from the guidelines rests within the sound discretion of the district courts. *Wells v. State*, 839 N.W.2d 775, 778 (Minn. App. 2013), *review denied* (Minn. Feb. 18, 2014). For the reasons already discussed, we conclude that the district court appropriately exercised its discretion, treated Galle as a defendant who qualifies under the repeat-offender aggravating factor (unlike certain other defendants), and, thus, justifiably sentenced him to more time than was presumed under the sentencing guidelines. Lastly, Galle’s insistence that departures are unconstitutional because they are discretionary lacks any supporting authority and is therefore without merit.

Affirmed.