

*This opinion is nonprecedential except as provided by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
A22-0321**

State of Minnesota,
Respondent,

vs.

Abdirahin Omar Ali,
Appellant.

**Filed March 6, 2023
Affirmed
Larson, Judge**

Stearns County District Court
File No. 73-CR-20-7552

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

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

Considered and decided by Larson, Presiding Judge; Gaïtas, Judge; and Klaphake, Judge.*

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

NONPRECEDENTIAL OPINION

LARSON, Judge

A jury found appellant Abdirahin Omar Ali guilty of three counts of first-degree criminal sexual conduct and one count of aiding and abetting kidnapping.¹ The jury also found several aggravating facts supporting an upward departure for sentencing purposes. The district court imposed a 360-month statutory maximum sentence. On appeal, appellant challenges his conviction on the grounds that (1) he was deprived of his constitutional right to 12 qualified jurors and (2) prosecutors engaged in prosecutorial misconduct. Appellant also argues that, if his convictions are not reversed, the district court abused its discretion when it imposed a 360-month statutory maximum sentence. We affirm.

FACTS

On October 17, 2020, victim spent the evening with her roommates, who were also her friends. The group began the evening drinking alcohol and socializing at their residence, later departing for a downtown St. Cloud, Minnesota, bar around 9:00 p.m. Victim gave her phone to a friend to ensure she would not lose it. Victim's friends left the bar before she did, and victim agreed to meet her friends at a second bar later in the evening. Victim did not drink at the bar and was "not very intoxicated." Victim later left the bar to

¹ Specifically, the jury found appellant guilty of: (1) one-count aiding and abetting first-degree criminal sexual conduct—actor causes personal injury to complainant and uses force or coercion to accomplish the act under Minn. Stat. § 609.342, subd. 1(e)(i) (2020); (2) one-count first-degree criminal sexual conduct—accomplice uses force under Minn. Stat. § 609.342, subd. 1(f)(i) (2020); (3) one-count first-degree criminal sexual conduct—fear of great bodily harm under Minn. Stat. § 609.342, subd. 1(c) (2020); and (4) one-count aiding and abetting kidnapping to facilitate a felony or flight under Minn. Stat. § 609.25, subd. 1(2) (2020).

meet her friends. The next thing victim remembered,² she was in the rear passenger seat of a car with four unknown men speaking a language she did not understand. The men threatened victim with injury or death. They also told her they had a gun.

The four men drove victim to a park where victim observed wood chips on the ground. Victim tried to tell the men that her friends knew where she was and were coming to find her. The men responded by threatening to kill her and telling her to “shut the f-ck up . . . b-tch.” The men forced victim onto a slide, at which point one of the men overpowered victim, tore her jeans and underwear off, and vaginally penetrated her with his penis.

The next thing victim remembered, she was back in the car with the four men. One of the men told victim she had to perform oral sex on another man or they would kill her. Victim recalled seeing the flash from a camera phone while she performed oral sex on this man, and that her head was forced down. The next thing victim remembered was being out of the car and running, wearing only one shoe, and trying to get somewhere safe. After no one answered at a familiar house, victim ran to the house next door, where she told two strangers what happened. Victim’s friends arrived soon thereafter. One friend called 911, and victim described the evening’s events to the dispatcher. After that, an officer arrived on scene, took victim’s statement, and drove her to the hospital where medical providers completed a sexual-assault examination.

² Victim attributed the gaps in her memory to trauma rather than intoxication.

DNA tests were conducted on vaginal and oral swabs taken during the sexual-assault examination. DNA testing of vaginal swabs revealed a mixture of DNA from two or three men, none of whom was appellant. But DNA testing revealed that appellant was the primary contributor to the DNA found on victim's oral swabs. Testing also identified appellant's semen on the rear center seat of the vehicle. Additionally, a search of appellant's phone after his arrest produced photos of the in-car assault that appellant had attempted to delete. These photos clearly depict a person matching victim's appearance³ performing oral sex on appellant, and in one photo appellant's hand is on victim's head. At trial, appellant did not dispute that victim performed oral sex on him in the vehicle.

Respondent State of Minnesota charged appellant with three counts of first-degree criminal sexual conduct and one count of aiding and abetting kidnapping. The district court held a four-day jury trial. During voir dire, the district court asked the members of the jury panel (panelists): "Have any of you ever served on a jury before? I hate to ask because I know this is week two of your trials." Five panelists, including jurors "A," "B," and "C," noted they had served on juries either the previous week or earlier that week. The five panelists informed the district court that they were willing to serve on the jury and could be fair and impartial. Appellant's counsel did not object to including the five panelists on the basis that they had recently served on another jury. A, B, and C were selected to serve on the jury.⁴

³ Victim's face is not visible in the photos. On appeal, no one disputes that victim and appellant are depicted in the photos.

⁴ Appellant only challenges jurors A and B. But as the state observes, C also served on a jury the previous week.

During trial, victim testified regarding the events that occurred on October 17, 2020. The state corroborated victim's testimony with the DNA evidence, photographs from appellant's phone, security-camera footage, testimony from one of the strangers who assisted victim, victim's 911 phone call, police testimony regarding victim's statement, evidence found at the park and in the vehicle, and photographs documenting cuts on victim's wrist and bruising around her wrist and ankle.

The jury returned guilty verdicts on all four counts. A sentencing trial regarding the presence of aggravating facts was held immediately after the jury returned the guilty verdicts. The jury found two aggravating facts for the aiding-and-abetting-kidnapping count and three aggravating facts for the three first-degree criminal-sexual-conduct counts.⁵ Relying on the facts found by the jury, the district court convicted appellant of one first-degree criminal-sexual-conduct count⁶ and imposed an upward durational departure, sentencing appellant to the statutory maximum sentence of 360 months in prison. The district court's sentence constituted a greater-than-double upward durational departure from the 144- to 172-month presumptive sentencing guideline range.

This appeal follows.

⁵ The aggravating facts the jury found were multiple forms of penetration, three or more people actively participating in the assault, and the victim was subject to death threats.

⁶ The district court convicted appellant of one-count first-degree criminal sexual conduct—accomplice uses force under Minn. Stat. § 609.342, subd. 1(f)(i) (2020), which carries a statutory maximum sentence of “not more than 30 years” in prison.

DECISION

Appellant challenges his conviction on the grounds that (1) he was deprived of his constitutional right to 12 qualified jurors and (2) the trial prosecutors committed prosecutorial misconduct. Appellant also argues that, if his convictions are not reversed, the district court abused its discretion when it imposed a 360-month statutory maximum sentence. We address appellant’s arguments in turn below.

I.

Appellant first argues that he is entitled to a new trial because Minn. R. Gen. Prac. 808(b)(7) prevents a juror from serving on more than one jury during a term of jury-duty service.⁷ In particular, appellant argues that because A and B served as jurors on different cases within their two-week term of service in which appellant’s trial occurred, the rule disqualified them from serving on appellant’s jury. We disagree.

⁷ Appellant also argues that the inclusion of the two jurors deprived appellant of his constitutional right to a trial by jury. The United States and Minnesota constitutions guarantee a defendant’s right to trial “by an impartial jury.” U.S. Const. amend. VI; Minn. Const. art. I, §§ 4, 6; *see also* U.S. Const. art. III, § 2, cl. 3. “Where a criminal defendant has been denied the fundamental right to a fair trial, we will grant a new trial.” *State v. Bowles*, 530 N.W.2d 521, 529 (Minn. 1995). But the state and federal constitutions only require those elements that are “the essence of the jury itself,” which does not include the “particular qualification of jurors.” *State v. Hamm*, 423 N.W.2d 379, 384 (Minn. 1988) (quotation omitted), *superseded on other grounds by* Minn. Const. art. I, § 4 (amended 1988). Instead, “[q]ualification and composition of the jury panel itself . . . [is] subject to the control of the legislature.” *Id.*; *see also* Minn. Stat. §§ 593.31 (providing that “all qualified citizens have the opportunity in accordance with this chapter and applicable court rules to be considered for jury service in this state”), .51 (“The supreme court shall promulgate rules governing jury administration”) (2022). Thus, because appellant challenges juror “qualification,” we are not presented with a constitutional question.

Under Minn. R. Crim. P. 26.02, subd. 1, a “jury list must be composed of persons randomly selected from a fair cross-section of *qualified* county residents.” Under Minn. R. Gen. Prac. 808(b)(7), a juror is not “qualified” if they have “served as a state or federal grand or petit juror in the past four years.” But Minn. R. Gen. P. 811(a) allows that, “[i]n counties with a population of 100,000 or more,”⁸ a qualified juror can serve on more than one jury during a term of service. See Minn. R. Gen. Prac. 811(a) (providing that a “term of service must not exceed two weeks or the completion of one trial, *whichever is longer*”). Rule 811(a) is consistent with our previous decision that once a juror begins a term of service, a four-year limitation does not prohibit the juror from serving on more than one jury during the same term of service. *State v. Bobo*, 414 N.W.2d 490, 492 (Minn. App. 1987) (interpreting a four-year limitation similar to rule 808(b)(7)⁹ to mean “disqualifying service must come from a previous term”), *rev. denied* (Minn. Dec. 22, 1987).

Here, appellant challenges the qualification of two jurors who served on appellant’s jury after serving on unrelated juries during the same term of service. Appellant fails to identify a cognizable legal error; both the rules and our precedent provide that jurors can

⁸ The parties do not dispute that Stearns County has a population over 100,000 people. U.S. Census Bureau, *QuickFacts: Stearns County, Minnesota*, <https://www.census.gov/quickfacts/stearnscountyminnesota> [<https://perma.cc/JD7J-HACH>].

⁹ In *Bobo*, we addressed a statutory predecessor to rule 808(b)(7)—Minn. Stat. § 593.41, subd. 2. *Bobo* controls our analysis because the statute and rule are substantially the same. Compare Minn. R. Gen. P. 808(b)(7) (“To be qualified to serve as a juror, the prospective juror must be . . . [a] person who has not served as a state or federal grand or petit juror in the past four years”), with Minn. Stat. § 593.41, subd. 2(8) (1986) (“A prospective juror is disqualified to serve as a juror if the prospective juror . . . [h]as served as a county, municipal, district or federal court grand or petit juror within the past four years”).

serve on more than one jury during a term of service. Further, appellant has failed to demonstrate that he was prejudiced by the jurors' inclusion. *See Bobo*, 414 N.W.2d at 492; *State v. Logan*, 535 N.W.2d 320, 324 (Minn. 1995) ("If defendant had . . . peremptory challenges available and had not exercised one of them to strike [the challenged juror], then the question would be whether defendant could complain about [the challenged juror] sitting on the jury.").

For these reasons, we conclude that the inclusion of jurors A and B did not violate the Minnesota Rules of General Practice, and appellant is not entitled to a new trial on this ground.

II.

Appellant next argues that he is entitled to a new trial because prosecutors committed misconduct during his trial. Appellant asserts that the prosecution misstated evidence, suggested appellant had a duty to call a witness, and, during closing argument, injected broader social themes into the proceedings. Appellant concedes that he did not object to the alleged instances of prosecutorial misconduct at trial, therefore, we review this issue using the modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under this standard, appellant bears the burden of establishing "(1) error (2) that is plain." *Id.* But upon doing so, the burden shifts to the state to prove that there is no "reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id.* (quotation omitted). If these three prongs

are met, we assess whether we should address the error to ensure fairness and the integrity of the judicial proceedings. *Id.*

While some of the prosecutor's comments may have approached misconduct, we disagree—with one notable exception—that the alleged misconduct constitutes plain error. The one exception is the prosecutor's statements during closing argument that victim's assault was "something from a horror movie[,] "every girl's worst nightmare[,] and "every mom and dad's worst fear." "Closing arguments should focus on the evidence and any reasonable inferences that can be drawn from the evidence." *State v. Tate*, 682 N.W.2d 169, 178 (Minn. App. 2004), *rev. denied* (Minn. Sept. 29, 2004). The prosecution must not appeal to the passions of the jury. *E.g.*, *State v. Mayhorn*, 720 N.W.2d 776, 786-87 (Minn. 2006). Nor may the prosecution inject broader social issues into the proceedings to encourage a jury "to enforce the law or teach defendants lessons or make statements to the public . . . [a jury's] role is limited to deciding dispassionately whether the state has met its burden in the case at hand." *State v. Salitros*, 499 N.W.2d 815, 819 (Minn. 1993). Here, the prosecutor's remarks were similar to other instances where we have determined a prosecutor engaged in prosecutorial misconduct. *See, e.g.*, *State v. Post*, 512 N.W.2d 99, 103 (Minn. 1994) (finding improper prosecutor's urging jury to "preserve the integrity of society and keep us from having to worry about when we're going to face the next individual with a gun in his hand and when he's going to . . . use it on us"); *State v. Casady*, 392 N.W.2d 629, 634 (Minn. App. 1986) (concluding improper prosecutor's argument

about the evils of sexual abuse of children and that it was up to the jury to stop it), *rev. denied* (Minn. Sept. 24, 1986).

Nonetheless, the state has met its burden to show there is no reasonable likelihood that the absence of the alleged prosecutorial misconduct would have had a significant effect on the jury's verdict. In evaluating the reasonable likelihood that the erroneously admitted evidence significantly affected the verdict, we must consider the persuasiveness of that evidence and the manner in which the evidence was presented. *State v. Jackson*, 764 N.W.2d 612, 620 (Minn. App. 2009), *rev. denied* (Minn. July 22, 2009). Here, the evidence supporting the jury's guilty verdict included: victim's testimony, appellant's DNA on victim's oral swab, appellant's DNA on the backseat of the vehicle, photographs from appellant's phone, security-camera footage corroborating victim's statements, testimony from one of the strangers who assisted victim, the 911 phone call, police testimony regarding victim's statement, evidence found at the park and in the vehicle, and photographs documenting cuts on victim's wrist and bruising around her wrist and ankle. On this record, we cannot conclude that there is a reasonable likelihood that, absent the prosecutors' remarks, there was a significant effect on the jury's verdict.

III.

Appellant finally argues the district court abused its discretion when it sentenced him to a greater-than-double upward durational departure. Appellant asserts that a greater-than-double durational departure is disproportionate to cases he alleges involved more

egregious conduct. *See, e.g., State v. Frank*, 416 N.W.2d 744, 746-47 (Minn. App. 1987), *rev. denied* (Minn. Feb. 8, 1988); *State v. Glaraton*, 425 N.W.2d 831, 834-35 (Minn. 1988).

We apply a *de novo* standard when reviewing whether a particular reason for an upward departure is permissible. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *rev. denied* (Minn. July 20, 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.” *Id.* A district court may impose a greater-than-double durational departure only if there are “severe aggravating factors.” *State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009).

We must determine whether the district court’s upward departure was legally and factually supported. *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). Here, appellant faced a 144-month presumptive duration and a top-of-the-box 172-month sentence. Minn. Sent’g Guidelines 4.B (2020). The district court identified three severe aggravating factors that the jury found supported an upward departure: (1) multiple forms of penetration; (2) three or more people actively participating in the assault; and (3) the victim was subject to death threats. *See State v. Adell*, 755 N.W.2d 767, 774-75 (Minn. App. 2008) (multiple forms of penetration), *rev. denied* (Minn. Nov. 25, 2008); *State v. Ayala-Leyva*, 848 N.W.2d 546, 558 (Minn. App. 2014) (three or more active participants), *rev. denied* (Minn. Minn. Aug. 11, 2015); *State v. Allen*, 482 N.W.2d 228, 233 (Minn. App. 1992) (threats to the victim), *rev. denied* (Minn. Apr. 13, 1992).

We have previously concluded that the multiple-forms-of-penetration aggravating factor alone supports a double-upward departure. *Adell*, 755 N.W.2d at 776; *State v.*

Mesich, 396 N.W.2d 46, 52 (Minn. App. 1986), *rev. denied* (Minn. Jan. 2, 1987). Had the district court imposed a double-upward departure, appellant would serve a 344-month sentence. Thus, the question becomes whether the three severe aggravating factors together support the district court adding 16 months to impose the 360-month statutory maximum. We conclude that, under the facts in this case, the district court did not abuse its discretion when it sentenced appellant to the statutory maximum sentence. *See State v. Butterfield*, 555 N.W.2d 526, 531-32 (Minn. App. 1996) (affirming a triple-upward departure on multiple forms of penetration and death threats), *rev. denied* (Minn. Dec. 17, 1996).

Affirmed.