

*This opinion is nonprecedential except as provided by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
A22-0714**

State of Minnesota,
Respondent,

vs.

Shawn Alan Shaney,
Appellant.

**Filed September 11, 2023
Affirmed
Wheelock, Judge**

Sherburne County District Court
File No. 71-CR-20-66

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

Kathleen A. Heaney, Sherburne County Attorney, George R. Kennedy, Assistant County Attorney, Elk River, Minnesota (for respondent)

Charles A. Ramsay, Daniel J. Koewler, Ramsay Law Firm, P.L.L.C., Roseville, Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Cochran, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

Appellant contends that the district court abused its discretion by granting the state's motion for an upward dispositional departure and imposing an executed 36-month sentence

for his conviction for third-degree criminal sexual conduct. We affirm appellant's sentence.

FACTS

Respondent State of Minnesota charged appellant Shawn Alan Shaney with four counts of third-degree criminal sexual conduct, one count of fourth-degree criminal sexual conduct, and one count of soliciting a child to engage in sexual conduct. Shaney agreed to plead guilty to one count of third-degree criminal sexual conduct with a minor between the ages of 13 and 16 in exchange for the state dismissing the remaining charges. The agreement allowed the state to seek an executed sentence of 36 months, an upward dispositional departure.¹ Shaney also waived his right to have a jury find the existence of aggravating factors justifying an upward departure.

Shaney testified to the following facts to support the factual basis for his plea. In October 2019, Shaney, then aged 52, met the victim K.S., then aged 14, outside of a gas station when she asked him if he smoked and if he would buy her cigarettes. While they were talking, K.S. disclosed to Shaney that she was in a foster home, her foster mom was mistreating her, and she was thinking about running away from the home. The encounter ended with Shaney giving K.S. a ride home. Shaney also gave K.S. his phone number.

In November, K.S. called Shaney and told him that she had run away from her foster home and did not intend to return home, despite that it was cold outside. Shaney picked

¹ Based on Shaney's criminal-history score of zero and the severity level of the offense, the Minnesota Sentencing Guidelines recommend a presumptive stayed sentence of 36 months' imprisonment. Minn. Sent'g Guidelines 4.B (Supp. 2019).

K.S. up and brought her to his home. K.S. began telling Shaney about her past and indicated that her foster placement was a locked facility. Shaney then had vaginal intercourse with K.S.

At sentencing, the state argued that the district court should impose an upward departure based on K.S.'s particular vulnerability at the time of the offense. The state highlighted how Shaney took advantage of K.S. by exploiting K.S.'s status as an abused child living in a foster home with no access to resources. It also highlighted the voluminous contacts Shaney had with K.S. via text messaging and phone calls over the brief period that they knew each other—thousands of contacts in a 33-day period—and his pattern of providing K.S. with incentives that included money, alcohol, cigarettes, a phone, and rides. Shaney opposed an upward departure to an executed sentence, contending that his offense was not more serious than the typical offense.

The district court granted the state's motion for an upward dispositional departure and imposed an executed sentence of 36 months' imprisonment. It found that K.S. was particularly vulnerable at the time of the offense based upon her history, Shaney's age, K.S.'s age, Shaney's knowledge of K.S.'s foster-care situation and that K.S. was a "messed-up kid," and the extensive contacts Shaney had with K.S. over a short period of time.

Shaney appeals.

DECISION

Shaney argues that the reasons the district court gave to support its conclusion that K.S. was particularly vulnerable were not legally sufficient or supported by the record and

that his case is not an atypical third-degree criminal-sexual-conduct case justifying an upward departure. The district court has discretion to impose an upward sentencing departure when aggravating circumstances are present, and we review the district court's decision for an abuse of that discretion. *State v. Meyers*, 853 N.W.2d 819, 822 (Minn. App. 2014), *aff'd*, 869 N.W.2d 893 (Minn. 2015). An upward dispositional departure may be based on offense-related aggravating factors. *State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995). “When determining whether to depart, the district court must consider whether the defendant’s conduct was significantly more or less serious than that typically involved in such crimes.” *State v. Mohamed*, 779 N.W.2d 93, 97 (Minn. App. 2010), *rev. denied* (Minn. May 18, 2010). The presence of a single aggravating factor supports a departure from the presumptive sentence. *Dillon v. State*, 781 N.W.2d 588, 599 (Minn. App. 2010), *rev. denied* (Minn. July 20, 2010). We will reverse if the district court’s reasons for an upward departure are improper or inadequate and the evidence in the record is insufficient to justify the departure. *State v. Jackson*, 749 N.W.2d 353, 357 (Minn. 2008).

A victim’s particular vulnerability at the time an offense is committed is an aggravating factor a district court may consider when deciding to depart upward from a presumptive sentence. Minn. Sent’g Guidelines 2.D.3.b(1) (Supp. 2019). That a victim is particularly vulnerable must be known to the defendant at the time of the offense and must result from a victim’s “age, infirmity, . . . reduced physical or mental capacity,” or another compelling, relevant factor. *Id.*; *see also State v. Rabold*, 935 N.W.2d 902, 906 (Minn. App. 2019) (quoting Minn. Sent’g Guidelines 2.D.3.b(1)).

We conclude that the evidence in the record is sufficient to support the district court's finding that K.S.'s history and circumstances rendered her particularly vulnerable to a sexual assault and that Shaney was aware of this vulnerability. Shaney admitted at the plea hearing that he knew that K.S. was in foster care, her foster mom was mistreating her, and she was planning to run away. When K.S. contacted Shaney after she ran away from her foster home, Shaney learned that K.S.'s foster home was a locked facility, which indicated to Shaney that K.S. had done something wrong in her past to be placed there. Shaney knew that K.S. was a runaway, that she likely had nowhere else to go, and that it was cold outside when he transported her to his home and had sex with her. These facts all rendered K.S. particularly vulnerable to Shaney's sexual abuse.² Because Shaney was aware of these vulnerabilities and exploited them, the district court did not err by relying on K.S.'s particular vulnerability as an aggravating factor justifying an upward departure. And we conclude, based on our collegial experience, that Shaney's offense was significantly more serious than the typical offense of this nature. *See Dillon*, 781 N.W.2d at 597 (stating that appellate courts may use their "collegial experience" to determine whether a case is "atypical" and justifies a departure). We therefore discern no abuse of discretion in the district court's upward dispositional departure based on the aggravating factor of K.S.'s particular vulnerability at the time of the offense.

² We do not imply that a child's placement in foster care automatically renders them particularly vulnerable to a sexual assault; whether a child's status renders them particularly vulnerable requires an analysis of the specific facts of each individual case.

Although we affirm the district court’s sentencing decision, we wish to address three aspects of the district court’s rationale. First, the district court should not have considered the difference between Shaney’s and K.S.’s ages when making its decision about aggravating factors because the difference between the ages of the perpetrator and victim is an element of Shaney’s crime of conviction—third-degree criminal sexual conduct with a minor between the ages of 13 and 16 where the perpetrator is more than 24 months older than the victim. *See* Minn. Stat. § 609.344, subd. 1(b) (2018); *State v. Thompson*, 720 N.W.2d 820, 830 (Minn. 2006) (“[E]lements of an offense cannot be used as aggravating factors to impose an upward sentencing departure for that same offense.” (quotation omitted)). Second, the court noted the number of times Shaney contacted K.S. prior to the sexual assault, but whether a victim is particularly vulnerable is based on characteristics of the victim, not the perpetrator’s actions. *See* Minn. Sent’g Guidelines 2.D.3.b(1). And third, although the record supports a finding that K.S. was particularly vulnerable, the district court did not use clear or specific language to identify the basis for its finding. It instead made vague references to K.S.’s “history” and observed that Shaney knew that K.S. was a “messed-up kid,” all of which we construe to summarize the child’s factual circumstances as set forth in the record. The better practice would have been for the district court to cite the specific facts related to K.S.’s experiences that rendered her particularly vulnerable.

Affirmed.