

*This opinion is nonprecedential except as provided by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
A22-0989**

State of Minnesota,
Respondent,

vs.

Mohammed Jalal Hussein,
Appellant.

**Filed June 26, 2023
Reversed and remanded
Reyes, Judge**

Anoka County District Court
File Nos. 02-CR-21-139;
02-CR-21-589; 02-CR-21-1741

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

Bradley R. Johnson, Anoka County Attorney, Robert I. Yount, Assistant County Attorney,
Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Erik I. Withall, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larson, Presiding Judge; Reilly, Judge; and Reyes,
Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

Appellant argues that the district court erred (1) by entering multiple convictions of
both the greater offense of stalking and its predicate offenses of domestic assault and a

domestic assault no-contact order (DANCO); (2) by imposing multiple sentences for these convictions; and (3) by relying sua sponte on a second aggravating factor of particular cruelty when it violated appellant's right to trial on that aggravating factor and was not admitted as part of the parties' global plea agreement. We reverse and remand.

FACTS

Appellant Mohammed Jalal Hussein and respondent State of Minnesota entered into a "global plea agreement" to resolve four different criminal cases involving a felony domestic assault, two felony DANCO violations, and felony stalking charges. At the plea hearing, the state informed the district court that, as part of their agreement, appellant would admit to the aggravating factor of violating the victim's zone of privacy for the felony domestic assault and felony stalking convictions. Appellant orally agreed to a *Blakely* waiver on that aggravating factor. *See Blakely v. Washington*, 542 U.S. 296, 301 (2004) (explaining that every fact that supports an enhanced sentence must be found by jury or admitted by defendant). Following the *Blakely* waiver, appellant entered his guilty pleas.

Appellant first pleaded guilty to an enhanced felony domestic assault that occurred on January 9, 2021, in violation of Minn. Stat. § 609.2242, subd. 4 (2020). He admitted to slapping his girlfriend, T.K.F., during an argument in her home. Appellant also admitted to a previous assault conviction in July 2019 and a conviction of a DANCO violation in October 2019. These two convictions were used to enhance the 2021 domestic assault to a felony. They also enhanced the charges discussed below to felonies. The parties agreed to an upward durational departure with an executed term of 24 months on this charge.

Second, appellant pleaded guilty to a DANCO violation that occurred on February 3, 2021, in violation of Minn. Stat. § 629.75, subd. 2 (d)(1) (2020). Appellant testified that he went to T.K.F.'s residence on that day and had contact with her despite knowing that a DANCO prohibited him from having any contact with T.K.F. Appellant also pleaded guilty to stalking that occurred on the same day in violation of Minn. Stat. § 609.749, subd. 5(a) (2020). Appellant admitted that he knew or should have known that both the felony domestic assault and DANCO violation would have caused T.K.F. to fear him or fear some bodily harm. The parties agreed to an upward durational departure with a concurrent sentencing term for the felony DANCO violation. Additionally, the parties agreed to an upward durational departure for the felony stalking with a consecutive, executed sentence of 34 months.

Third, appellant pleaded guilty to another DANCO violation that occurred on March 29, 2021. Minn. Stat. § 629.75, subd. 2 (d)(1). He admitted to violating the DANCO by going to T.K.F.'s residence again and having contact with her. The parties agreed to an upward durational departure with a consecutive sentencing term of 12 months and one day.¹ Altogether, the parties agreed to a total sentence of 70 months and one day.

At the sentencing hearing, the district court reviewed appellant's admission to the single aggravating factor of violating the victim's zone of privacy. It then identified an additional aggravating factor of particular cruelty, which was not admitted to as part of the global plea agreement, and made sua sponte findings to support the upward departure based

¹ As part of the global plea agreement, the state dismissed a felony DANCO-violation charge and two kidnapping charges.

on this factor. The district court sentenced appellant to 70 months and one day in jail. This appeal follows.

DECISION

I. The district court erred by entering multiple convictions for both the greater offense of stalking and its predicate offenses of felony domestic assault and a DANCO violation.

Appellant argues that, “because the [offenses] of domestic assault and violation of the DANCO were predicate offenses for [the] greater offense of stalking,” the district court erred by entering convictions for the predicate offenses. We agree.

“Whether an offense is an included offense is a question of law, which [appellate courts] review de novo.” *State v. Degroot*, 946 N.W.2d 354, 364 (Minn. 2020). A defendant cannot be convicted of both the offense charged and an included offense. Minn. Stat. § 609.04, subds. 1, 2 (2020). “An offense is necessarily included in a greater offense if it is impossible to commit the greater offense without committing the lesser offense.” *State v. Nyagwoka*, 894 N.W.2d 174, 177 (Minn. App. 2017) (quotation omitted). “In determining whether one offense necessarily is proved by the proof of another, the [district] court must look at the statutory definitions rather than the facts in a particular case.” *Id.* (quotation omitted).

When the actor knows or has reason to know their actions would cause the victim under the circumstances to feel terrorized or to fear bodily harm and which does cause this reaction on the part of the victim, they are guilty of stalking. Minn. Stat. § 609.749, subd. 5(a). Stalking is defined as “two or more acts within a five-year period” that violate or attempt to violate one or more of an enumerated list of 16 statutes, which includes the

domestic-assault and DANCO-violation offenses of which appellant was also convicted. *Id.* subd. 5(b)(5), (17) (2020).

Here, the record shows that, at the plea hearing, appellant admitted to committing felony domestic assault against T.K.F. and violating the DANCO protecting T.K.F. within the preceding five-year period. And without appellant admitting to the felony domestic assault and February DANCO violation, he could not be convicted of stalking.

The Minnesota Supreme Court addressed a similar issue regarding a first-degree felony murder conviction in *Spann v. State*, 740 N.W.2d 570 (Minn. 2007). In that case, the defendant was convicted of first-degree murder while committing an aggravated robbery, second-degree intentional murder, and first-degree aggravated robbery. *Id.* at 572. To be convicted of first-degree murder, a defendant must cause the death of another human while committing or attempting to commit one or more of an enumerated list of predicate offenses, which included aggravated robbery. Minn. Stat. § 609.185 (a)(3) (2006). The supreme court held that “aggravated robbery [was] an offense necessarily proved if felony murder is proved” and vacated the conviction of aggravated robbery. *Spann*, 740 N.W.2d at 574 (quotation marks omitted).

Like in *Spann*, the elements of stalking required that appellant violate or attempt to violate one or more of an enumerated list of offenses which includes domestic assault and DANCO violations. Minn. Stat. § 609.749, subd. 5(b). For that reason, the felony domestic assault and the February DANCO violation are predicate offenses to appellant’s greater offense of stalking. *See id.* subd. 5(b)(5), (17). And like in *Spann*, the district court here convicted appellant of both the predicate offenses and the greater offense. We

therefore reverse appellant's convictions for the felony domestic assault and DANCO violation, and remand to the district court to issue an amended warrant of commitment. Because we reverse appellant's conviction for these offenses, we need not address whether the district court erred in imposing multiple sentences.

II. The district court erred by relying on a second aggravating factor of particular cruelty when imposing an upward durational departure.

Appellant argues that the district court's sua sponte reliance on a second aggravating factor of particular cruelty violated appellant's *Blakely* rights and violated the plea agreement. His argument has merit.

"[T]he interpretation and enforcement of plea agreements present legal issues that [appellate courts] review de novo." *James v. State*, 699 N.W.2d 723, 728 (Minn. 2005). We review the validity of a *Blakely* waiver and admission of facts that support an aggravating factor de novo. *State v. Dettman*, 719 N.W.2d 644, 649 (Minn. 2006).

The United States and Minnesota Constitutions guarantee criminal defendants the right to a jury trial. U.S. Const. amend. VI; Minn. Const. art 1, § 6; *see also* Minn. R. Crim. P. 26.01, subd. 1. Therefore, "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury[] and proved beyond a reasonable doubt." *Blakely*, 542 U.S. 296, 296 (quotation omitted). For a waiver on the issue of an aggravated sentence, the Minnesota Rules of Criminal Procedure provide:

Whe[n] the prosecutor seeks an aggravated sentence, the defendant, with the approval of the court, may waive a jury trial on the facts in support of an aggravated sentence *provided the defendant does so personally, in writing or on the record in*

open court, after being advised by the court of the right to a trial by jury, and after having had an opportunity to consult with counsel.

Minn. R. Crim. P. 26.01, subd. 1(2)(b) (emphasis added).

Here, appellant's presumptive sentence for consecutive stalking sentence should have been based on a criminal-history score of zero. *See* Minn. Sent'g Guidelines 2.F.104.2(b) (2020) (criminal-history score of zero applies for permissive consecutive sentences). With a criminal-history score of zero, appellant's consecutive sentence became 18 months. But instead, the district court based its consecutive stalking sentence on a score of three. This led to the district court imposing a 34-month sentence, which is an upward departure from the presumptive duration. To impose the 34-month sentence, the district court made the following findings sua sponte to support a determination of particular cruelty as an aggravating factor:

The [district] court finds that the rapid escalation of offense against the same victim in her home, violated her zone of privacy. The behaviors began on January 9[,] 2021, and were followed by more violations on February 3[,]2021, and March 29[,]2021. The violations occurred on a monthly basis for three months in a row. Each crime posed a threat to the victim. I find the violations were particularly cruel, in that, because the repeated violations and victimization in her home, left her on heightened alert.

But the district court violated appellant's *Blakey* rights by adding and relying on this second aggravating factor when appellant did not provide his own admission to facts that would support the aggravating factor of particular cruelty or waive his right to a jury trial on those facts.

The district court relied on *State v. Rourke* to support why it could make a finding regarding the aggravating factor of particular cruelty. 773 N.W.2d 913 (Minn. 2009). The district court is correct that, in *Rourke*, the supreme court held that *Blakely* did not require the district court to submit the aggravating factor of particular cruelty to the jury. *Id.* at 922. But the supreme court clarified that “*Blakely* [still] requires that the jury determine additional facts (i.e., the defendant sprayed the handcuffed victims with chemicals) which a [district court] may rely on to support [its] explanation as to why those additional facts support a substantial and compelling reason” for an upward departure. *Id.* at 922 (quotation marks omitted). In other words, *the facts* that would support a particular-cruelty aggravating factor still need to be submitted to the jury and the jury must decide whether the state has proved, beyond a reasonable doubt, a factual circumstance that would support a particular-cruelty factor. *See id.* If the jury finds that the state proved those facts beyond a reasonable doubt, the district court could then rely on those facts to determine whether they support a substantial and compelling reason to depart from the presumptive guideline sentence. But unless such facts are either found by a jury or the defendant waives his right to a jury’s determination of those facts, the district court is not permitted to find them of its own accord or aggravate the defendant’s sentence based upon them. *See State v. Dettman*, 719 N.W.2d 644, 649 (Minn. 2006) (“The district court’s imposition of an upward departure was permissible only if the facts authorizing the departure were either found by a jury beyond a reasonable doubt or admitted by [appellant]”).

Furthermore, the aggravating factor of particular cruelty was not a part of the global plea agreement. “A guilty plea cannot be induced by unfulfilled or unfulfillable promises,

including a promise of a sentence unauthorized by law.” *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000). The plea agreement here permitted an aggravated sentence based only on appellant’s admission of facts to support the zone-of-privacy aggravating factor. Therefore, when the district court made findings of its own to support the aggravating factor of particular cruelty, it violated the plea agreement, which led to an improper sentence. We do acknowledge, however, that the district court only added the second aggravating factor to follow the terms of the global plea agreement.

We therefore reverse appellant’s sentence and remand to the district court for resentencing consistent with this opinion. Nothing in this opinion precludes the parties from bringing any motions they deem appropriate.

Reversed and remanded.