STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1692

State of Minnesota,
Respondent,

vs.

Michael J. Buckanaga,
Appellant.

Filed January 29, 2008
Affirmed
Klaphake, Judge

Becker County District Court
File No. K0-04-307

Lori Swanson, Attorney General, Francis C. Ling, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Joseph A. Evans, Becker County Attorney, P.O. Box 476, Detroit Lakes, MN 56502 (for respondent)

John M. Stuart, State Public Defender, Jessica Benson Merz Godes, Assistant State Public Defender, 2221 University Avenue Southeast, Suite 425, Minneapolis, MN 55414 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Klaphake, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

KLAPHAKE, Judge

In June 2004, appellant Michael J. Buckanaga pleaded guilty to second-degree assault for his involvement in the beating of a halfway house counselor in November 2003, and was sentenced to 108 months, an upward departure from the presumptive 57-month sentence. *See* Minn. Stat. § 609.222, subd. 2 (2002) (assault involving substantial bodily harm). In October 2004, appellant filed a petition for postconviction relief, claiming that his sentence violated *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), which was decided in June 2004. The district court thereafter granted appellant's petition, in part, and remanded for resentencing under Minn. Stat. § 244.10 (2004 & Supp. 2005).

A sentencing jury was impaneled, and the state filed a notice of intent to seek an aggravated sentence based on the following four factors: (1) the victim was particularly vulnerable due to reduced physical capacity; (2) the victim was treated with particular cruelty; (3) the defendant committed the crime as part of a group of three or more who actively participated in the crime; and (4) the current conviction is for an offense in which the victim was injured, and the defendant has previously been convicted of an offense in which the victim was injured. Minn. Sent. Guidelines II.D.2.b.(1), (2), (3), (10). The jury returned verdicts finding that the state had proved all four factors beyond a reasonable doubt; the district court thereafter adopted the jury's findings and resentenced appellant to 108 months.

Because the instructions given to the sentencing jury were either correct or not plainly erroneous, because the evidence overwhelmingly supports all the jury's findings on all of the aggravating factors submitted to it, and because the jury's findings amply support the district court's decision to impose a sentence of 108 months, we affirm.

D E C I S I O N

I.

A reviewing court may consider a challenge to unobjected-to jury instructions only if the instruction amounts to plain error affecting substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Even when the plain error standard is met, we may "correct the error only if it seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005) (quotation omitted).

A district court is given "considerable latitude" when drafting jury instructions, and an instruction is erroneous only if it "materially misstates the law." *State v. Goodloe*, 718 N.W.2d 413, 421 (Minn. 2006). Jury instructions are "viewed in their entirety to determine whether they fairly and adequately explain the law of the case." *State v. Peterson*, 673 N.W.2d 482, 486 (Minn. 2004).

A. Presumption of Innocence

Appellant first argues that the district court erred when it failed to instruct the sentencing jury on the presumption of innocence. "The presumption of innocence is a fundamental component of a fair trial under our criminal justice system." *Id.*

But the presumption of innocence may no longer apply once a defendant is afforded a fair trial and is convicted of the offense for which he was charged. *See Delo v. Lashley*, 507 U.S. 272, 278, 113 S. Ct. 1222, 1226 (1993) (holding that once defendant has been convicted fairly in guilt phase of capital trial, presumption of innocence disappears; "presumption [of innocence] operates at the guilt phase of a trial to remind the jury that the State has the burden of establishing every element of the offense beyond a reasonable doubt"). The two cases cited by appellant, *Peterson*, 673 N.W.2d at 486-87, and *In re Winship*, 397 U.S. 358, 363, 90 S. Ct. 1068, 1072 (1970), both involved jury instructions during the guilt determination stage, not the sentencing phase, and both involved the district court's failure to instruct on the presumption of innocence *and* reasonable doubt.

Here, the district court instructed the jury several times on the requirement that it must find the existence of the aggravating factors beyond a reasonable doubt. The jurors were also cautioned that they

> must not be prejudiced against the defendant because he has been arrested or because criminal charges have been filed against him or because he has pled guilty to the charge. None of those circumstances is evidence of the existence of aggravating factors [and the] verdicts resulting from your deliberations must be based solely on the evidence produced in court during the trial and the law stated in these instructions.

Thus, the jury was instructed that the state had the burden of establishing the aggravating factors beyond a reasonable doubt and that its verdict should be based solely on the

evidence presented at the sentencing trial. The district court did not err in failing to instruct the jury on the presumption of innocence in this sentencing trial.

B. "Over and Above" the Presumptive Sentence

The district court informed the jury at three different points that it was to determine whether aggravating factors exist which would justify a sentence "over and above" the presumptive sentence provided by law. Appellant asserts that given these instructions, a reasonable juror would understand that finding aggravating factors would get appellant a longer sentence and that the jury's job was to "assist" the court in imposing a longer sentence upon appellant. Citing *State v. Chambers*, 589 N.W.2d 466, 474 (Minn. 1999), appellant insists that none of this was the jury's concern and that *Blakely* does not alter the long-standing rule in Minnesota that "sentencing is not a proper consideration for the jury."

But rather than improperly delegating its sentencing function to the jury, the district court informed the jury that its role was limited to fact-finding and that sentencing was a decision for the court, not the jury. While we do not endorse the "over and above" language, when the instructions are considered as a whole, they properly inform the jury that its role was to determine whether the aggravating factors existed beyond a reasonable doubt, and that it remained the district court's role to determine whether those findings justified imposition of a longer sentence. *Cf. State v. Chauvin*, 723 N.W.2d 20, 23 (Minn. 2006) (while not an issue on appeal, district court did instruct jury that purpose of its deliberations was to determine whether aggravating factors existed for sentencing purposes).

C. Failure to Define Second-Degree Assault and Particular Cruelty

Appellant argues that the district court erred in failing to provide the jury with a definition of second-degree assault, which includes infliction of "substantial bodily harm," and that the jury was thus ignorant of what facts were already taken into account to establish a factual basis for his guilty plea to second-degree assault. *See State v. Osborne*, 715 N.W.2d 436, 446 (Minn. 2006) (stating that "elements of an offense cannot be used as aggravating factors to impose an upward sentencing departure for that same offense"). Appellant also argues that the prejudice resulting from the district court's failure to define second-degree assault was further compounded by the court's failure to define the term "particular cruelty," which generally means the kind of cruelty "not usually associated with the commission of the offense in question." *State v. Schantzen*, 308 N.W.2d 484, 487 (Minn. 1981).

This court has suggested that a district court should provide a sentencing jury with some definition of the term "particular cruelty." *State v. Weaver*, 733 N.W.2d 793, 802-03 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007). But even if the district court here committed error when it failed to define the underlying offense and to provide the jury with some definition of the term "particular cruelty," that error did not affect appellant's substantial rights: there is little chance that a properly instructed jury would have found that the state failed to prove beyond a reasonable doubt that appellant acted with particular cruelty. *See State v. Vance*, 734 N.W.2d 650, 661-62 (Minn. 2007) (stating that "third prong of plain error test is met when there is a reasonable likelihood that a properly instructed jury could have accepted the defendant's version of events").

And, even if the three prongs of the plain error test are met, reversal is only necessary to "ensure fairness and the integrity of the judicial proceedings." *Id.* at 662. A reviewing court may "refrain[] from determining whether the defendant was prejudiced by plain error and instead [hold] that, because the evidence . . . was both overwhelming and uncontroverted at trial, there was no basis on appeal to conclude that the error seriously affected the fairness or integrity of the judicial proceedings." *Id.* Here, as the state argues, the evidence against appellant was so strong that any reasonable juror likely would conclude, with or without the challenged instructions, that appellant's "savage and prolonged beating of a defenseless and sometimes unconscious victim, which left him with lasting brain injuries, was cruelty of a kind not usually associated with the commission of the offense in question."

II.

Appellant challenges the sufficiency of the evidence to support the jury's findings on three of the four aggravating factors: (1) the victim was particularly vulnerable; (2) appellant acted with particular cruelty; and (3) appellant actively participated in the crime as part of a group of three. He insists that his sentence should either be reduced to the presumptive guidelines sentence or that the matter be remanded to the district court for resentencing based solely on the only remaining aggravating factor, which is whether the current offense involved injury to the victim and appellant was previously convicted of an offense involving injury to a victim.

But a single aggravating factor may justify an upward durational departure. *See, e.g.*, *State v. O'Brien*, 369 N.W.2d 525, 527 (Minn. 1985). Reversal is warranted only if

the reasons for the departure are improper or inadequate and there is insufficient evidence to justify an aggravated sentence for the offense of which the defendant was convicted. *Taylor v. State*, 670 N.W.2d 584, 588 (Minn. 2003). Here, even though the district court specifically relied upon all four factors, any one of the aggravating factors could have justified the 108-month sentence, which is less than double the presumptive 57-month sentence.

Moreover, the evidence is more than sufficient to support the findings on all of the three factors challenged by appellant. Particular vulnerability can exist when, as here, an otherwise able-bodied person is rendered vulnerable and defenseless during the course of an offense or attack. *See State v. Bock*, 490 N.W.2d 116, 121 (Minn. App. 1992) (affirming finding of particular vulnerability when victim was struck with bat while alone in his house in the middle of the night, fell to ground dazed, and then struck again), *review denied* (Minn. Aug. 27, 1992). And the evidence supports the finding that the victim was treated with particular cruelty: he was subjected to a prolonged beating by attackers who continued to punch and kick him after he was unconscious and unable to defend himself; he sustained extensive, severe injuries; he was subjected to gratuitous threats during the assault; and he was attacked by multiple perpetrators, one of whom was appellant and all of whom actively participated in the attack. *See, e.g.*, *State v. Smith*, 541 N.W.2d 584, 590 (Minn. 1996); *State v. Cox*, 343 N.W.2d 641, 644 (Minn. 1984); *State v. Felix*, 410 N.W.2d 398, 401 (Minn. App. 1987), *review denied* (Minn. Sept. 29, 1987); *State v. Stauffacher*, 380 N.W.2d 843, 850 (Minn. App. 1986), *review denied* (Minn. Mar. 21, 1986); *State v. Anderson*, 370 N.W.2d 703, 706-07 (Minn. App. 1985),

review denied (Minn. Sept. 19, 1985). Finally, contrary to appellant's claim that he was not directly involved in the attack, the evidence shows that he was an active participant and part of a group of three. We therefore conclude that the evidence supports the findings made by the sentencing jury and that those findings fully support the district court's departure decision.

III.

Appellant has filed a pro se supplemental brief in which he challenges the district court's decision, following the Supreme Court's decision in *Blakely* and appellant's pro se petition for postconviction relief, to impanel a sentencing jury. Appellant insists that he was entitled to imposition of the presumptive sentence because he "already stood convicted and imprisoned," and because "the [state] had no rules, statutes, or laws in place to conform to *Blakely*." Appellant further claims that the district court's decision to impanel a sentencing jury under Minn. Stat. § 244.10 violated his due process rights and ex post facto clauses of the state and federal constitutions.

But similar arguments have been rejected by our supreme court. In *Hankerson v. State*, 723 N.W.2d 232, 236 (Minn. 2006), the court held that a district court has the authority to impanel a sentencing jury under the sentencing guidelines and Minn. Stat. § 244.10, even in sentencing for a crime occurring before *Blakely*. The court also rejected the defendant's *ex post facto* argument, holding that the procedural sentencing change did not implicate *ex post facto* restrictions. *Id.* at 241-42. Moreover, appellant's claim that he has been denied due process should be rejected because he was afforded a

jury trial and because the aggravating factors were found to exist beyond a reasonable doubt by a jury, not by a court.

Finally, appellant appears to complain about the passage of time between the filing of his petition for postconviction relief, the granting of that petition, and the impaneling of the sentencing jury. Any delay was well within the presumptive 57-month sentence, and appellant does not claim that the delay prejudiced him in any particular way.

Affirmed.