STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1708

State of Minnesota,
Respondent,

vs.

Terra K. Waters,
Appellant.

Filed January 15, 2008
Affirmed
Kalitowski, Judge

Stearns County District Court
File No. K2-05-2151

Lori Swanson, Attorney General, Mary R. McKinley, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Janelle Prokopec Kendall, Stearns County Attorney, Stearns County Administration Center, Room 448, 705 Courthouse Square, St. Cloud, MN 56303 (for respondent)

John M. Stuart, State Public Defender, Michael F. Cromett, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Randall, Presiding Judge; Kalitowski, Judge; and Hudson, Judge.

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

KALITOWSKI, Judge

Appellant Terra K. Waters challenges her second-degree-murder conviction, arguing that the district court (1) did not make adequate findings to support its decision;

(2) erred by applying incorrect legal standards for self-defense and heat-of-passion manslaughter; and (3) abused its discretion by not granting a greater downward durational departure. We affirm.

D E C I S I O N

I.

Appellant contends that the district court's findings of fact do not satisfy the written findings requirement of Minn. R. Crim. P. 26.01. We disagree.

Rule 26.01 mandates that in a case tried without a jury, the district court shall "specifically find the essential facts in writing on the record." Minn. R. Crim. P. 26.01, subd. 2. "If the court omits a finding on any issue of fact essential to sustain the general finding, it shall be deemed to have made a finding consistent with the general finding." *Id.* The purpose of written findings is to aid the appellate court in its review of a conviction resulting from a nonjury trial. Findings are sufficient if they "afford a basis for intelligent appellate review." *State v. Scarver*, 458 N.W.2d 167, 168 (Minn. App. 1990) (quotation omitted).

Here, the district court found that the state proved each of the elements of second-degree murder, and that appellant "did not act in self-defense." Although the district court did not discuss each element of self-defense, pursuant to rule 26.01 it is deemed to have made findings consistent with its general finding that appellant did not act in self-defense. Minn. R. Crim. P. 26.01, subd. 2. Because the district court's findings allow this court a basis for intelligent review, appellant's claim that the court's findings were insufficient is without merit.

II.

Appellant argues that the district court used incorrect legal standards for self-defense and manslaughter. Appellant maintains that had the district court applied the proper standards, it would have found that she had acted in self-defense or, in the alternative, in the heat of passion consistent with the offense of manslaughter and not murder. Appellant's claims involve mixed questions of fact and law. An appellate court reviews the district court's factual findings under the clearly erroneous standard, but independently reviews the district court's legal determinations. *State v. Wiernasz*, 584 N.W.2d 1, 3 (Minn. 1998).

1. Self-Defense.

Appellant claims that the district court cited an incorrect legal standard for self-defense. We disagree.

> The elements of self-defense are (1) the absence of aggression or provocation on the part of the defendant; (2) the defendant's actual and honest belief that he or she was in imminent danger of death or great bodily harm; (3) the existence of reasonable grounds for that belief; and (4) the absence of a reasonable possibility of retreat to avoid the danger.

State v. Basting, 572 N.W.2d 281, 285 (Minn. 1997). Although a defendant must raise this defense, once raised the state has the burden of disproving at least one of the self-defense elements beyond a reasonable doubt. *State v. Spaulding*, 296 N.W.2d 870, 875 (Minn. 1980).

Appellant interprets the district court's statement that "[t]he evidence at trial indicated that there was no immediate or imminent threat of great bodily harm or death

made by [the victim] towards [sic] [appellant] on the night he was killed" as indicating that the district court mistakenly required an *actual* threat of great harm or death to establish self-defense. But this reading is too narrow – the court could have meant that there were no reasonable grounds for appellant's belief that there was a threat. Moreover, the memorandum filed with the court's verdict does not address self-defense; rather, all of the court's statements explain why it found appellant guilty of murder and not manslaughter. The only statement that discusses appellant's claim of self-defense is in the court's findings: "Further, the Court finds that [appellant] did not act in self-defense." As discussed above, rule 26.01 establishes that the court is deemed to have made findings consistent with the court's rejection of appellant's self-defense claim. Minn. R. Crim. P. 26.01, subd. 2. And this court will not disturb the verdict if the evidence, viewed in the "light most favorable to the conviction," was sufficient. *State v. Harris*, 589 N.W.2d 782, 791 (Minn. 1999) (quotation omitted).

Here, the record supports the district court's finding that appellant did not act in self-defense. There is ample evidence that appellant did not have reasonable grounds for her apprehension of imminent danger and had a reasonable possibility of retreat. The victim, Lawrence Blais, was in bed when appellant shot him. Blais did not threaten or attack appellant that evening. Appellant could have used her car to get out of the situation, and in fact, thought about doing so, as she had done in the past. Accordingly, the state disproved two of the elements of self-defense beyond a reasonable doubt.

Citing *State v. Hennum*, appellant contends that the court should have considered whether appellant was a battered woman in evaluating the reasonableness of her belief

that she was in imminent danger. 441 N.W.2d 793, 798 (Minn. 1989). We disagree. *Hennum* discussed the admissibility of battered-woman-syndrome evidence. *Id*. at 797-99. Here, the record indicates that the defense did not present any evidence that appellant suffered from battered-woman syndrome. And even if the court found appellant's testimony that Blais abused her to be credible, the court was not required to find that her apprehension the night she killed him was reasonable. We conclude that the district court's rejection of appellant's self-defense claim was supported by the evidence.

2. Heat-of-Passion Manslaughter.

Appellant maintains that the district court's findings also indicate that it used an incorrect legal standard for heat-of-passion manslaughter, and that had it applied the proper standard, the court would have found appellant guilty of manslaughter rather than murder. Because the record supports the court's finding that appellant did not act in the heat of passion, we disagree.

A person who "intentionally causes the death of another person in the heat of passion provoked by such words or acts of another as would provoke a person of ordinary self-control under like circumstances" is guilty of first-degree manslaughter. Minn. Stat. § 609.20(1) (2002). The first element of the heat-of-passion defense, that the killing was actually committed in the heat of passion, is subjective. *State v. Buchanan,* 431 N.W.2d 542, 549 (Minn. 1988). The defendant's emotional state at the time of the killing is of primary importance in making this determination. *State v. Boyce,* 284 Minn. 242, 254-55, 170 N.W.2d 104, 112 (1969). Under the second element, the adequacy of the provocation is judged objectively from the perspective of "a person of ordinary self-

control under like circumstances . . . ." *State v. Hannon*, 703 N.W.2d 498, 510 (Minn. 2005). On appeal, this court refers to the record as a whole to determine if the district court's factual findings are clearly erroneous and independently reviews the legal determinations. *Wiernasz*, 584 N.W.2d at 3.

The district court found that appellant did not kill Blais in response to "such words or acts as would provoke a person of ordinary self-control in like circumstances." Appellant relies on the court's sentencing memorandum for her assertion that "the court's references to heat[-]of[-]passion manslaughter indicate the court used an incorrect legal standard . . . ." We reject this argument because: (1) a court's comments when justifying a downward departure do not affect its findings and verdict; (2) the court's statements do not indicate that it used an improper standard; and (3) the evidence is sufficient to support appellant's second-degree-murder conviction.

Appellant's reliance on the court's sentencing memorandum is misplaced. Because the court granted a downward departure, it was required to provide its reasons for departing in writing. Minn. Sent. Guidelines II.D. But a court may articulate mitigating factors that do not amount to a defense. *See id.* at II.D.2.a.(5) (Factors which may be used as reasons for departure include "[o]ther substantial grounds . . . which tend to excuse or mitigate the offender's culpability, although not amounting to a defense.").

Furthermore, none of the court's statements in its sentencing memorandum establishes that it used an improper standard for manslaughter. Appellant maintains that the court did not consider the importance of the phrase "under like circumstances" in rejecting appellant's claim that she acted in the heat of passion. We reject appellant's

argument that the court should have considered appellant's mental and emotional problems under the second (objective) prong of the heat-of-passion manslaughter standard. Appellant does not cite any authority for this assertion and we have found none. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (holding that an argument not supported by authority is waived unless prejudicial error is obvious on mere inspection).

Moreover, the evidence supports appellant's conviction of second-degree murder. Nothing in the record indicates that appellant was provoked by such words or acts as would provoke a person of ordinary self-control in like circumstances. Blais did not threaten or hurt appellant the night she shot him. Although Blais and a friend had quarreled earlier that evening, the friend had left and Blais was in bed when he was killed. We conclude that the district court properly found that a person of ordinary self-control would not have acted as appellant did in those circumstances.

III.

Appellant argues that the district court abused its discretion in granting a downward durational departure reducing the presumptive sentence only by one-third, and should have further reduced appellant's sentence to one-half of the presumptive sentence. Because the district court appropriately exercised its discretion in weighing the mitigating factors, we disagree.

A district court may order a downward departure from the presumptive sentence if "substantial grounds exist which tend to excuse or mitigate the offender's culpability," even if those grounds do not amount to a defense. Minn. Sent. Guidelines II.D.2.a.(5);

Hennum, 441 N.W.2d at 801 (reversing district court's presumptive sentence because, although "the jury was free to reject defendant's claim of legal self-defense," substantial grounds mitigated defendant's culpability). A reviewing court will modify a departure if it has a "strong feeling" that the sentence is inappropriate to the case. *State v. Malinski*, 353 N.W.2d 207, 209 (Minn. App. 1984) (quotation omitted), *review denied* (Minn. Oct. 16, 1984). But this court will not substitute its own judgment for that of the district court in sentencing matters. *State v. Sejnoha*, 512 N.W.2d 597, 601 (Minn. App. 1994), *review denied* (Minn. Apr. 21, 1994).

Here the district court found that appellant lacked substantial capacity for judgment when she shot Blais. The district court determined that this and other mitigating factors justified a downward durational departure. The court imposed a sentence of 204 months rather than the presumptive sentence of 306 months.

Appellant argues that the facts of this case are analogous to *Hennum*, in which the reviewing court found that a sentence of only one-half the presumptive sentence was warranted. 441 N.W.2d at 801. But the victim in *Hennum* had abused his wife throughout their ten-year marriage, and severely beat her on the night she killed him. *Id.* at 795-96. The wife fired one bullet, and made no attempt to cover up the killing. *Id*. at 796. The presentence investigation report recommended that she be sentenced to one-half of the presumptive sentence. *Id*. at 801. The Minnesota Supreme Court agreed, holding that the downward durational departure was justified by the substantial mitigating factors. *Id*.

Here, the district court adequately considered the mitigating factors in imposing appellant's sentence. Appellant had been involved with Blais for less than two months when she killed him. Blais did not threaten or attack appellant the night she shot him. Further, appellant covered up the crime and did not confess to killing Blais until two-and-a-half years later. Moreover, appellant's presentence investigation report did not recommend a particular departure. We conclude that the district court acted within its discretion in sentencing appellant to two-thirds of the presumptive duration under the sentencing guidelines.

Affirmed.