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STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2130

State of Minnesota,
Respondent,

vs.

Elton Perez Vance,
Appellant

Filed April 8, 2008
Affirmed
Collins, Judge[*]

Dakota County District Court
File No. K3-03-408

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

James C. Backstrom, Dakota County Attorney, Helen R. Brosnahan, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

John M. Stuart, State Public Defender, Rochelle R. Winn, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Collins, Judge.

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

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

COLLINS, Judge

Following this court's remand for resentencing in light of *Blakely*, a sentencing jury returned a special verdict finding that appellant committed the offense with particular cruelty, that he committed multiple forms of sexual penetration, and that the offense was committed within the "sight or sound" of children. Appellant was subsequently sentenced to a double-upward departure of 288 months for first-degree criminal sexual conduct. On appeal, appellant argues that (1) he was denied the right to a fair sentencing trial when the district court permitted a paramedic who responded to the scene to describe the call as "horrific"; (2) the evidence was insufficient to prove that he committed the offenses within the presence of children or that the presence of children rendered the victim particularly vulnerable; (3) he is entitled to a new trial because the district court's instructions were vague and materially misstated the law; and (4) his sentence should be reduced to the presumptive duration because convening the second jury violated his double-jeopardy rights. We affirm.

FACTS

Appellant Elton Perez Vance and A.S.T. began an on-and-off relationship in 1996; appellant is the father of A.S.T.'s children. At about 3:00 p.m. on February 2, 2003, A.S.T. called 911 and reported that appellant had been beating her all day at her apartment. Crying and upset, A.S.T. told the dispatcher that she had recently escaped to a neighbor's apartment with one of her children, that appellant was still in her apartment either sleeping or passed out from alcohol, and that another of her children was still there.

Three Eagan police officers responded to the 911 call and observed that A.S.T. was crying and very upset. To the officers, A.S.T. appeared to have been severely beaten around the face. Her injuries included swollen lips; black-and-blue eyes; facial swelling; and marks, bruises, and abrasions around her neck. She also had several cigarette burns on her body, and her shirt and body were wet with urine. A.S.T. told the treating paramedic that appellant had repeatedly forced her to have oral and vaginal sex with him, burned her with a cigarette, cut her hair, choked and strangled her, punched and kicked her, and urinated on her. A.S.T. also stated that she resisted the first few times that appellant had sexually assaulted her, but she stopped resisting when appellant beat her even more severely.

With her permission, the officers entered A.S.T.'s apartment where they discovered appellant asleep on a mattress with a child lying near him. Appellant was arrested and subsequently charged. A jury found appellant guilty of all charges and the district court sentenced him to 288 months, a double-upward departure, for a first-degree criminal-sexual-conduct conviction and a concurrent 21-month sentence for a second-degree assault conviction.

In his direct appeal, appellant challenged, among other things, the district court's imposition of an upward-durational departure. This court affirmed appellant's conviction, but remanded the sentencing departure issue to the district court for consideration of *Blakely v. Washington*.[1] *State v. Vance*, 685 N.W.2d 713, 721 (Minn.

[1] 542 U.S. 296, 124 S. Ct. 2531 (2004).

App. 2004), *review denied* (Minn. Nov. 23, 2004). Following a hearing, the district court granted the state's motion to impanel a sentencing jury.

At the sentencing trial, the district court initially instructed the jury that they "must determine whether the following aggravating factors exist: (1) Was the victim treated with particular cruelty by [appellant]; (2) Did [appellant] commit multiple forms of sexual penetration during the course of the offense; (3) Did [appellant] commit his offense within the sight or sound of children." The state then presented testimony from the police officers and paramedics responding to the scene, as well as the nurse who treated the victim.

One of the police officers testified that when he arrived at the scene at about 3:00 p.m., A.S.T. was crying hysterically, her eyes, cheek, and lip were swollen, and she had scratch marks on her neck. A.S.T. told the officer that appellant had kept her in the apartment against her will since 5:00 a.m. and during that time appellant had sex with her repeatedly against her will. A.S.T. also told the officer that appellant had cut off clumps of her hair with a knife and burned her with a cigarette.

A responding paramedic testified that she was told by A.S.T. that appellant urinated on her and sexually assaulted her both vaginally and orally, and the paramedic counted at least six cigarette burns on A.S.T.'s body. Over defense counsel's objection, the district court permitted the state to introduce the paramedic's testimony describing the magnitude of this call as very "horrific." The court admitted the testimony to assist the jury in determining whether A.S.T. was treated with particular cruelty.

A.S.T. testified on behalf of the defense. She stated that on February 2, 2003, she and appellant "briefly" got into a fight. According to A.S.T., appellant was drinking and under the influence of a substance that substantially altered his mood. A.S.T. testified that she could not recall many of the details from the incident, but acknowledged that she told police that appellant had inflicted her injuries. A.S.T. also testified that she believed the children did not see or hear anything because, as the events unfolded, she put them in their bedrooms.

On rebuttal, the state was allowed to impeach A.S.T. with her interview with a police detective. The detective testified that when he talked to A.S.T. the day after the incident, she detailed how appellant sexually assaulted her, beat her, burned her with cigarettes, urinated on her, and cut off a clump of her hair. A.S.T. also described how she managed to keep the children occupied in separate rooms depending on where appellant had her in the apartment: if she and appellant were in the bedroom, she moved the children to the living room; if appellant had her in the living room, she put the children in their bedrooms.

After the state and defense rested, appellant moved for a judgment of acquittal on the "presence of children" aggravating factor. Appellant argued that there was no evidence that the children witnessed or heard any of the offense. The district court denied the motion. The jury returned special verdicts finding that the offense was committed with particular cruelty, that appellant committed multiple forms of sexual penetration, and that the offense was committed within the "sight or sound" of children. The district court sentenced appellant to 288 months for first-degree criminal sexual

conduct, a double-upward departure, and a 21-month concurrent sentence for second-degree assault. This appeal followed.

D E C I S I O N

I.

Appellant argues that he was denied the right to a fair sentencing trial when the district court permitted a paramedic who responded to the scene to testify that the magnitude of the call was very "horrific." Evidentiary rulings are committed to the district court's discretion and will not be reversed on appeal absent a clear abuse of discretion. *State v. Bjork*, 610 N.W.2d 632, 636 (Minn. 2000). Appellant has the burden of showing error and resulting prejudice. *State v. Lynch*, 590 N.W.2d 75, 80 (Minn. 1999).

The district court ruled that in light of the *Blakely* decision, the paramedic's testimony describing the call as "horrific" was admissible to assist the jury in determining whether the victim was treated with particular cruelty. Appellant contends that the district court abused its discretion in admitting the testimony because it (1) lacked foundation; (2) was irrelevant; and (3) was not helpful to the jury.

We disagree. The testimony did not lack foundation because the paramedic testified that she has been on many assault calls and some sexual-assault calls, which provided her with ample experiences to compare with this case. The testimony was relevant because the jury was charged to determine whether the victim was treated with particular cruelty. An experienced paramedic's testimony comparing this particular incident call to other assault and sexual-assault calls to which she had responded would

be helpful in assisting the jury in deciding whether appellant's treatment of A.S.T. was "particularly cruel." *See* Minn. R. Evid. 701 (stating that if a witness is not testifying as an expert, "the witness' testimony in the form of opinion or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue"). Therefore, the district court did not abuse its discretion in admitting the paramedic's testimony describing the call as "horrific."

We note that even if the district court abused its discretion in admitting this testimony, appellant is unable to show prejudice. *See State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994) (stating that upon a showing of error, this court must determine whether there "is a reasonable possibility that the verdict might have been more favorable to the defendant if the evidence had not been admitted"). Appellant is challenging the admissibility of the word "horrific" in the context of the paramedic's description of the magnitude of the call. But the paramedic went on to provide a detailed account of what she observed. The jury heard the paramedic's testimony, along with the testimony of a number of other witnesses, that appellant repeatedly assaulted A.S.T. both physically and sexually, and that appellant urinated on her, cut off her hair, and burned her with cigarettes. We conclude that had the word "horrific" not been admitted, there is no reasonable possibility that the verdict might have been more favorable to appellant. *See id.*

II.

In considering a claim of insufficient evidence, this court reviews the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to allow the jurors to reach the verdict that they reached. *State v. Brown*, 732 N.W.2d 625, 628 (Minn. 2007). The reviewing court "must assume the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002).

Minnesota courts have recognized the presence of children as an aggravating factor supporting a decision to impose an upward departure. *State v. Hanson*, 572 N.W.2d 307, 309 (Minn. 1997); *State v. Profit*, 323 N.W.2d 34, 36-37 (Minn. 1982). An upward departure is justified in such cases because "committing the offense in front of . . . children [is] a particularly outrageous act," and while the children may not technically be victims of the crime, "they [are] victims in another sense." *Profit*, 323 N.W.2d at 36. And this court has affirmed upward departures even when the offense was not committed in the immediate physical presence of the child. *See State v. Hart*, 477 N.W.2d 732, 740 (Minn. App. 1991) (presence of victim's children in home during attack increases victim's vulnerability and compromises victim's ability to flee, even when children are asleep in another room), *review denied* (Minn. Jan. 16, 1992); *see also State v. Dalsen*, 444 N.W.2d 582, 584 (Minn. App. 1989) (presence of child in adjoining room during violent crime "is analogous to a reduced physical capacity"), *review denied* (Minn. Oct. 13, 1989).

Appellant asserts that such cases fall into two classes: (1) when the victim is particularly vulnerable due to the presence of children or (2) when a defendant commits the offense within the actual presence of the children. Here, appellant contends that there is no evidence that the children directly witnessed any of the assaultive behavior, nor is there any evidence that A.S.T. suffered a reduced physical capacity as a result of the children's presence in the apartment. Appellant thus argues that the presence of children cannot be a valid aggravating factor supporting the upward departure here, and his sentence should be vacated and remanded to the sentencing court to determine whether the court would impose the same sentence in the absence of this departure ground. We disagree.

Granted, while testifying as a defense witness at the sentencing trial, A.S.T. did say she did not believe that the children saw or heard anything related to the events. But the jury is not bound to adopt A.S.T.'s conclusion. *See State v. Clark*, 739 N.W.2d 412, 418 (Minn. 2007) ("[T]he jury is in the best position to weigh the credibility of evidence and thus determines which witnesses to believe and how much weight to give to their testimony." (quotation omitted)). It is undisputed that A.S.T.'s ordeal extended from 5:00 a.m. until she fled from the apartment at about 3:00 that afternoon. The record shows that the children were in the apartment and that A.S.T. moved them around from time to time depending on where appellant had her throughout the day. A.S.T. displayed bruises, burns, and scrapes all over her body, including her face. Even if they did not directly witness the physical and sexual assaults as they occurred, the children had occasions to observe their mother's physical and emotional state while she moved them

from room to room. Also, the record reflects that A.S.T. screamed during the ordeal and that appellant "trashed" the apartment. Therefore, contrary to A.S.T.'s stated belief, it is a reasonable inference drawn from the evidence that the children were exposed to the sounds and consequences, if not the sight, of appellant's offending conduct. Accordingly, the record was sufficient to support the jury's finding that appellant committed the offense in the presence of children.

III.

District courts are allowed "considerable latitude" in the selection of language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). This court reviews jury instructions "in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). "An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001).

Appellant argues that he is entitled to a new trial because the district court's jury instructions were vague and erroneous. Specifically, appellant contends that (1) the court's instruction on the presence of children misstated the law and (2) the court's instruction on particular cruelty was so vague that it failed to give adequate guidance to the jury.

A. Presence of children

The district court instructed the jury as follows:

> I have already defined for you the various terms that apply to this with regard to the issue of whether [appellant] committed his offenses within the sight or sound of children, which is

> one of the questions you'll be asked. The State need not prove that the child or children actually observed or heard the offense or offenses, so long as they could have, from where they were located. Furthermore, a child in an adjoining room could be considered to be within sight or sound of the offense if [appellant] knew the child was there, and the victim was less inclined to flee because she did not want to abandon the child.

Appellant argues that the court's instruction is erroneous because it fails to segregate the two situations when the "presence of children" can be an aggravating factor. We disagree.

As noted hereto, Minnesota courts have recognized the presence of children as an aggravating factor when (1) the offense is committed in the actual presence of children and (2) the victim is particularly vulnerable due to the presence of children. *Profit*, 323 N.W.2d at 36 (offense committed in front of children is an aggravating factor); *Dalsen*, 444 N.W.2d at 584 (presence of a child in adjoining room during a violent crime is an aggravating factor because it "is analogous to a reduced physical capacity"). Here, the district court's instruction sets out the two situations when the presence of children can be an aggravating factor. Although the instruction may not have been crafted exactly to appellant's preference, the instruction was legally sufficient because it provided the jury with the proper elements to consider. *See Kuhnau*, 622 N.W.2d at 556 (stating than a jury instruction is erroneous only "if it materially misstates the law"). Because the instruction did not materially misstate the law, we conclude that the district court did not abuse its discretion in providing the "presence of children" instruction.

B. Particular cruelty

At the sentencing trial, the district court instructed the jury on particular cruelty as follows:

> The laws of the State of Minnesota provide that it is an aggravating factor to commit a crime with particular cruelty. Now you may be of the opinion that any sexual assault or assault with a weapon is particularly cruel. However, for purposes of this trial, you must set aside that opinion. Instead, you must determine if these offenses were committed in a manner that that [sic] was particularly cruel. Particular cruelty is the intentional infliction of pain or suffering, which is over and above what was necessary to accomplish the crimes for which [appellant] was convicted.

The district court went on to provide the definitions of the crimes of which appellant was convicted.

Appellant concedes that the district court's instruction was accurate. But appellant argues that the instruction was insufficient because "under the [district] court's definition of particular cruelty, *any* conduct that exceeded the 'typical offense,' as defined by the elements of the offense, would meet the definition of particular cruelty." (Emphasis added.)

As yet, there is no published authority guiding jury instruction on the definition of "particular cruelty" in this context.[2] Absent such guidance, here the district court took

[2] We note that this court has recently addressed this issue in unpublished opinions. *See e.g., State v. Walker*, No. A06-470, 2007 WL 2363790, at *6 (Minn. App. Aug. 21, 2007) (suggesting that the phrase "particular cruelty" should be defined as conduct "significantly more cruel than that usually associated with the offense of which he was convicted."), *review denied* (Minn. Nov. 13, 2007); *State v. Huertas*, No. A05-2359, 2007 WL 329209, at *1, 3-4 (Minn. App. Feb. 6, 2007) (holding that the district court's instruction defining particular cruelty as "conduct and harm more serious than the typical

care to (a) inform the jury of the elements of the crimes of which appellant was convicted, (b) admonish the jury to set aside any opinion that all such crimes are particularly cruel, and (c) instruct that "[p]articular cruelty is the intentional infliction of pain or suffering, which is *over and above what was necessary* to accomplish the crimes for which [appellant] was convicted." (Emphasis added.) We cannot say that this instruction materially misstates the law. Given the still-evolving state of the law, we conclude that the district court did not abuse its discretion in instructing the jury on particular cruelty.

Moreover, even if the instruction on particular cruelty was inadequate, any error was harmless. *See State v. Porter*, 674 N.W.2d 424, 429 (Minn. App. 2004) (stating that "an error [in the jury instructions] is prejudicial and a new trial is required only if it cannot be said beyond a reasonable doubt that the error had no significant impact on the verdict"). The jury had evidence that for approximately ten hours A.S.T. was restrained and repeatedly assaulted both physically and sexually; and that appellant burned A.S.T. with cigarettes, cut off her hair, and urinated on her. On this record, substituting any reasonable definition of "particular cruelty" for that given by the district court, it can be said beyond a reasonable doubt that any error had no significant impact on the verdict. *See id.*

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offense, but does not involve the elements of the offense itself" to be a sufficient instruction), *review denied* (Minn. May 15, 2007).

IV.

Appellant argues that the district court did not have authority to convene a sentencing jury to determine aggravating sentencing factors and that the district court's application of Minn. Stat. § 244.10 (2006) to him violates the ex post facto clauses of the federal and state constitutions. But our supreme court recently held that the 2005 amendments to section 244.10 could not be prohibited as ex post facto because they work to a defendant's advantage by elevating the quantum of proof required to convince a jury to proof beyond a reasonable doubt. *Hankerson v. State*, 723 N.W.2d 232, 242 (Minn. 2006), *cert. denied* 128 S. Ct. 42 (2007). The court also held that the district court had authority to impanel a sentencing jury on resentencing of a sentence that violated *Blakely*. *Id.* at 235-36. Appellant concedes that *Hankerson* is controlling authority, but asserts that he is seeking to preserve the issue for further review. Certiorari has now been denied in *Hankerson*. *Hankerson v. Minnesota*, 128 S. Ct. 42 (2007). In light of *Hankerson*, we conclude that appellant's arguments are without merit.

V.

Appellant raises a number of issues in his pro se supplemental brief. Appellant initially argues that convening the sentencing jury subjected him to double jeopardy. But this argument was rejected in *Hankerson*, and, therefore, we conclude that appellant's argument fails. 723 N.W.2d at 236-41. Appellant further argues that (1) the delay caused by the remand in his case to comply with *Blakely* violated his right to a speedy

trial and (2) he was denied the effective assistance of counsel. We have reviewed each of these claims and conclude they are without merit as well.

Affirmed.