STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0718

State of Minnesota,
Respondent,

vs.

Gary Leroy Reynolds,
Appellant.

Filed June 17, 2008
Affirmed
Toussaint, Chief Judge
Concurring specially, Shumaker, Judge

Douglas County District Court
File No. K5-05-778

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

Christopher D. Karpan, Douglas County Attorney, 305 Eighth Avenue West, Alexandria, MN 56308 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, James R. Peterson, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Toussaint, Chief Judge; Willis, Judge; and Shumaker, Judge.

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

TOUSSAINT, Chief Judge

Appellant Gary Leroy Reynolds challenges his 360-month executed sentence for first-degree criminal sexual conduct, arguing that the district court abused its discretion in departing from the guidelines' presumptive sentence. Because severe aggravating circumstances were proved beyond a reasonable doubt, we affirm.

FACTS

In June 2005, Douglas County sheriff's deputies received information that a seven-year-old boy had been sexually abused at appellant's home. Deputies spoke with appellant, the seven-year-old boy, and a 19-year-old woman who stated that she had participated in sexual acts with the boy and appellant at his home.[1] Pursuant to a search warrant, deputies seized numerous pornographic videotapes, magazines, and sexual paraphernalia.

One homemade videotape contained 33 minutes of video during which appellant, the 19-year-old woman, the 7-year-old boy, and a dog engaged in numerous sexual acts. The video of this sexual encounter was followed by several shorter video clips during which appellant and the child appeared nude, but no sexual contact was recorded.

[1] Based on its review of the videotape, the district court found that the woman "is very likely a vulnerable adult." Additionally, an investigating deputy stated in his search-warrant affidavit: "The female is very slow and has an I.Q. of 62. The mother of the female stated the female cannot adequately care for herself, that she has been sexually assaulted before and, due to her low intelligence level, simply cannot protect herself where an average person could. Out of necessity, the 19-year-old lives with her mother who cares for her."

Based on the videotape, appellant was arrested and charged with three counts of first-degree criminal sexual conduct and one count of possession of pornography involving a minor. In November 2006, appellant pleaded guilty to one count of first-degree criminal sexual conduct for having sexual contact with a victim under 13 years of age and more than 36 months younger than appellant, in violation of Minn. Stat. § 609.342, subd. 1(a) (2004). Pursuant to a plea agreement, the state dismissed the remaining charges against appellant.[2]

The state filed a motion for an upward departure from the sentencing guidelines. The state's motion listed as grounds the particular cruelty with which the crime was committed, the age of the child, the exacerbation of the crime by videotaping the sexual abuse, the involvement of a developmentally disabled adult in the abuse, and the position of trust that appellant held in relation to the child. Appellant waived his right to a jury trial on the sentencing-departure motion.

The district court watched the videotape and heard testimony and oral argument on the sentencing-departure motion. The district court made oral findings of fact and conclusions of law, finding that the state proved severe aggravating factors beyond a reasonable doubt and sentencing appellant to 360 months' imprisonment and 10 years' supervised release, the maximum term of imprisonment allowed by statute, which is two-

[2] The state dismissed two first-degree criminal-sexual-conduct charges of (1) engaging in sexual penetration with a victim under 16 years of age while having a significant relationship to the victim, and (2) engaging in sexual penetration with a victim under 16 years of age involving multiple acts committed over an extended period of time while having a significant relationship to the victim. *See* Minn. Stat. § 609.342, subds. 1(g), (h)(iii) (2004).

and-one-half times the presumptive guidelines sentence of 144 months. *See* Minn. Stat. § 609.342, subd. 2(a), (b) (Supp. 2005).

D E C I S I O N

The decision to depart from the sentencing guidelines rests within the district court's discretion and will not be reversed absent a clear abuse of that discretion. *State v. Givens*, 544 N.W.2d 774, 776 (Minn. 1996). When a district court makes such a departure, it must specify "the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence." Minn. Sent. Guidelines II.D. Generally, in determining whether to depart durationally, the district court must determine "whether the defendant's conduct was significantly more or less serious than that typically involved in the commission of the crime in question." *Holmes v. State*, 437 N.W.2d 58, 59 (Minn. 1989) (quotation omitted). "If the record supports findings that substantial and compelling circumstances exist, this court will not modify the departure unless it has a strong feeling that the sentence is disproportional to the offense." *State v. Anderson*, 356 N.W.2d 453, 454 (Minn. App. 1984) (quotation omitted).

The normal limit on an upward departure is double the presumptive sentence, but an even greater departure may be warranted if the facts are "unusually compelling." *State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981). Offenses justifying a more-than-double departure from the guidelines are "extremely rare," and there is no easily applied test to determine whether a more-than-double departure is justified. *State v. Norton*, 328 N.W.2d 142, 146 (Minn. 1982). We must rely on our "collective, collegial experience

in reviewing a large number of criminal appeals." *Id*. But when a departure is supported by "severe" aggravating circumstances, the only limit on sentence duration is the statutory maximum. *State v. Mortland*, 399 N.W.2d 92, 94 n.1 (Minn. 1987).

The district court found the following severe aggravating circumstances were proved beyond a reasonable doubt: appellant's position of trust with the child and the child's vulnerability as a result of that position of trust; appellant's lack of remorse; appellant's particular cruelty and the infliction of severe emotional harm on the child; appellant's prior criminal-sexual-conduct conviction involving a 13-year-old boy; appellant's invasion of the child's zone of privacy; and the inference that appellant had engaged in numerous sexual acts with the child in the past that were not recorded on videotape.

Appellant contends that there were no legitimate severe aggravating circumstances proved by the state and that the crime was not significantly more serious than that typically involved in the commission of first-degree criminal sexual conduct. We agree that several of the severe aggravating circumstances were not legitimate bases for an upward durational departure.[3] But the particular cruelty of appellant's acts, including

[3] A defendant's position of trust with a victim is not a valid basis for an upward durational departure because the legislature has taken it into account when defining different offenses that constitute first-degree criminal sexual conduct. *Taylor v. State*, 670 N.W.2d 584, 589 (Minn. 2003). The defendant's videotaping of the abuse is not a legitimate aggravating factor because it could have been independently charged as use of a minor in a sexual performance. *See* Minn. Stat. § 617.246, subd. 2 (2004); *State v. Jackson*, ____ N.W.2d ____ 2008 WL 2229468, at *3 (Minn. May 30, 2008) ("guidelines do not contemplate enhanced sentences based on uncharged criminal conduct"). A defendant's lack of remorse is generally a basis for dispositional, but not durational, departure. *State v. Hough*, 585 N.W.2d 393, 397-98 n.5 (Minn. 1998). A defendant's

multiple forms of sexual contact and penetration during the abuse and the severe emotional harm caused to the child as a result of the abuse, is a legitimate severe aggravating circumstance that supports the district court's sentence.

The fact that the "victim was treated with particular cruelty for which the individual offender should be held responsible" can constitute a basis for an upward departure. Minn. Sent. Guidelines II.D.2.b.(2). "Particular cruelty" has been defined as cruelty "of a kind not usually associated with the commission of the offense in question." *State v. Schantzen*, 308 N.W.2d 484, 487 (Minn. 1981).

Appellant argues that there was nothing to show that he treated the child with particular cruelty. We disagree. First, appellant subjected the child to multiple types and methods of sexual contact and penetration. The sexual abuse that appellant admitted to lasted for at least 33 minutes and involved numerous criminal sexual acts between appellant, the woman, the child, and a dog. Appellant's actions in abusing the child support upward departure. *See State v. Van Gorden*, 326 N.W.2d 633, 635 (Minn. 1982) (holding multiple methods of sexual penetration of victim was aggravating factor); *State v. Sebasky*, 547 N.W.2d 93, 101 (Minn. App. 1996) (holding multiple types of sexual assault on victim was aggravating factor), *review denied* (Minn. June 19, 1996).

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invasion of the victim's zone of privacy is not an aggravating factor when, as here, the victim resides in the same home as the defendant and the offense did not take place in the victim's bedroom. *State v. Hagen*, 679 N.W.2d 739, 741 (Minn. App. 2004), *remanded on other grounds*, 690 N.W.2d 155 (Minn. App. 2004). An inference of additional criminal conduct is not a valid basis for an upward departure when the defendant was not convicted of those acts and did not admit to the commission of those acts. *State v. Cermak*, 344 N.W.2d 833, 838 (Minn. 1984).

Second, the district court found that the abuse created "extremely significant issues for [the child], for perhaps the rest of his life . . . certainly emotional injury, emotional injury that may never be repaired." We recognize that sexual abuse of a child will always be emotionally damaging. But the record indicates that the emotional damage suffered by the child here was substantially more severe than that in the typical case. The district court did not abuse its discretion in concluding that the emotional harm to the child constituted particular cruelty and supported an upward departure. *See State v. Skinner*, 450 N.W.2d 648, 654 (Minn. App. 1990) (holding that victim's need for psychological counseling was aggravating factor), *review denied* (Minn. Feb. 28, 1990); *State v. Patterson*, 511 N.W.2d 476, 478 (Minn. App. 1994) (holding victim's need for future psychological counseling as result of offense supported upward departure), *review denied* (Minn. Mar. 31, 1994).

Appellant argues that because he did not use any "gratuitous violence," there "was no evidence upon which the court could have found particular cruelty in the usual sense of that term." Contrary to appellant's argument, particular cruelty is not limited to cases in which gratuitous violence was used. Particular cruelty may take the form of severe emotional distress and psychological torment. *See Rairdon v. State*, 557 N.W.2d 318, 327 (Minn. 1996). Particular cruelty may also take the form of the treatment of the victim after the commission of the crime. *State v. Losh*, 721 N.W.2d 886, 896 (Minn. 2006) (holding that action of leaving severely injured victim in unsafe place was particularly cruel), *cert. denied*, 127 S. Ct. 2437 (U.S. May 21, 2007). Thus, the fact that appellant did not use gratuitous violence does not affect our conclusion that the district

court did not abuse its discretion in departing.

Appellant next argues that it is not clear that the district court even based its departure on the particular cruelty with which appellant committed his crime. The district court refused to label the conduct as specifically "particularly cruel," instead focusing on the particular seriousness of appellant's conduct:

> Is this particular cruelty for the purposes of departing? I guess it depends on your definition of what that means. From my perspective, I don't have to put a name on it to comply with requirements of departure. I think that involvement [of the woman] and all that clearly occurred on that videotape is a separate factor that creates from my view an extremely important reason to depart from the Guidelines.

We disagree with appellant's reading of the district court's analysis here. The record supports the district court's findings, and we conclude that the district court properly considered appellant's conduct.

Appellant finally argues that, even if particular cruelty was proved beyond a reasonable doubt, it is not a "severe" aggravating circumstance. We disagree. We are satisfied that the number and types of sexual contact and penetration that appellant subjected the child to during this incident of abuse and the severe emotional and psychological harm that appellant caused the child are unusually compelling facts that qualify as a severe aggravating circumstance and support the district court's departure.

Affirmed.

SHUMAKER, Judge (concurring specially)

I concur in the result the majority has reached on the unique facts of this case, showing especially egregious criminal conduct. But in general, I question the fairness of using a finding that the "victim was treated with particular cruelty" as an aggravating departure factor. Minn. Sent. Guidelines. II.D.2.b.(2). Because it is a ground for increasing the severity of punishment, "particular" cruelty implies cruelty that is especially severe, that is beyond the harm or injury that might ordinarily be expected to flow from an offense. As a matter of jurisprudential philosophy, it seems to follow that extraordinarily severe harm warrants enhanced punishment.

There are, however, two critical practical problems that I believe implicate fundamental fairness when this departure basis is used. First, neither the sentencing guidelines nor the caselaw provides a baseline for "cruelty" from which "particular" cruelty can be measured and assessed. Thus far, the jurisprudence on this point has been *ad hoc*, but no defining and unifying principle has been identified. Without a baseline, this is the best the courts can do, but even best efforts can sometimes result in fundamental unfairness.

The second problem is related and, if viewed broadly, is virtually insoluble as a practical matter. Even if we have a baseline, how does one prove that the baseline has been exceeded? That proof might likely entail the presentation of the facts of other cases in sufficient quantity and similarity to permit reliable conclusions to be drawn. The potential for departure trials that consume far more time than trials on the merits and that involve the litigation of countless collateral issues is a reality. Perhaps an experienced

trial judge is in a slightly better position than a jury to assess "particular" cruelty because of the judge's background in sentencing. But even then "particular cruelty" is an evidentiary proposition that a defendant is entitled to dispute by challenging the evidentiary facts from which particular cruelty is to be inferred and by offering countervailing evidence. Because the sentencing judge cannot be both a witness and the presiding judge, even the experienced judge's knowledge of cases that support a distinction between ordinary and particular cruelty cannot be used. *See* Minn. R. Evid. 605 (prohibiting the presiding judge from testifying as a trial witness). Thus, we return to the need for independent proof of particular cruelty, and I believe that will be virtually impossible to adduce.

Without a baseline—which will be very difficult to establish—and without proof that conduct has exceeded even an established baseline—which will be equally difficult if not impossible to prove—"particular cruelty" should be abandoned as an aggravating factor for sentencing departures.