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**STATE OF MINNESOTA
IN COURT OF APPEALS
A06-0192, A07-0705**

State of Minnesota,
Respondent,

vs.

Juan Carlos Kennedy,
Appellant

and

Juan Carlos Kennedy, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed July 8, 2008
Affirmed
Ross, Judge**

Anoka County District Court
File No. K7-05-1360

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Considered and decided by Ross, Presiding Judge; Minge, Judge; and Connolly, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Juan Kennedy appeals from his conviction of and sentence for one count of first-degree criminal sexual conduct and two counts of kidnapping for sexually assaulting his girlfriend and holding her against her will in the hotel room where they were living. Kennedy contends that the evidence supports neither the conviction for kidnapping nor the enhanced sentence the district court imposed. He also argues that the prosecutor committed misconduct and that he received ineffective assistance of counsel. We conclude that Kennedy has waived any challenge to the sufficiency of the evidence regarding his conviction of kidnapping because he stipulated to facts and agreed to present his case in a *Lothenbach* proceeding. We hold that the facts also support the district court's determination that aggravating factors warrant an upward departure, that the prosecutor did not commit misconduct, and that Kennedy was not denied his right to effective counsel. We therefore affirm.

FACTS

This case arises from Juan Kennedy's conduct toward S.K.M. over a weekend during which the couple remained in their one-room apartment in a hotel where they had been living with their ten-month-old son. Kennedy stipulated to the facts as described in S.K.M.'s statements to police.

According to those statements, Kennedy and S.K.M. were romantically and sexually involved. But their relationship was volatile; Kennedy had a history of physically abusing S.K.M., and the couple had occasionally separated and reconciled. And the statements describe multiple sexual assaults throughout a tense weekend in February 2005.

The weekend ordeal began on Saturday, February 5, one week after S.K.M. suffered a miscarriage and spent several days in the hospital. The epicenter of the conflict was hostility from Kennedy's belief that S.K.M. recently had been promiscuous with other men. Kennedy accused S.K.M. of prostituting herself. Although S.K.M. denied it, Kennedy became angry. He pushed S.K.M. onto the bed and forced her to perform oral sex for half an hour, threatening to strike her. He told her that she was going to be his "ho." Kennedy then forced S.K.M. onto her stomach and penetrated her anally for approximately 45 minutes. During that part of the assault, S.K.M. cried out in pain and asked Kennedy to stop. He did not. He called S.K.M. derogatory names, told her to shut up, and punched her in the head. Their son was nearby on the floor. Kennedy unplugged the phone to prevent S.K.M. from making outgoing calls. S.K.M. told police that Kennedy repeated the accusation that she prostituted herself three or four times and that each time he followed the degrading accusation by sexually assaulting her in similar fashion. Later that night, S.K.M. told Kennedy that she wanted to leave him. He responded by picking up a knife, and, holding it to her stomach and neck, he told her that he would stab her if she did not shut up. S.K.M. was frightened and believed that

Kennedy would carry out his threat. Eventually, S.K.M., Kennedy, and their son fell asleep.

S.K.M.'s police statements indicated that Kennedy continued the same treatment throughout the next day. From the time S.K.M. awoke on Sunday, Kennedy harassed her and accused her of allowing other men into their home. Kennedy repeated his accusations that S.K.M. was prostituting herself, and he sexually assaulted her in the context of making the accusations. Kennedy had forced sex with S.K.M. three or four times on Sunday, and S.K.M. used the term "vaginal" on at least one occasion when she described the nature of the assault. Kennedy performed oral sex on S.K.M. against her will. At around 6:00 that evening, S.K.M. asked Kennedy if she could leave the bed to feed herself. He allowed her to do so, but only if she remained naked. Eventually, while Kennedy prepared something for himself to eat, S.K.M. finally put clothing on. Later that night, Kennedy again threatened S.K.M. with a knife. He ordered her to go and prostitute herself to earn money for food. S.K.M. began crying and begged Kennedy not to force her to do so. Kennedy made S.K.M. kiss his feet repeatedly to apologize for everything she had done in order to promise she would not do it again, or it would be the end of her.

The next morning, Monday, S.K.M. awoke and finally left the room. She telephoned Kennedy's sister-in-law, who in turn called police and reported that Kennedy was holding S.K.M. against her will. The police soon arrived. They took statements from S.K.M., Kennedy, and Kennedy's sister-in-law. They took S.K.M. to a hospital,

where a nurse conducted a sexual-assault examination. S.K.M. told police that she consented to none of the instances of sexual contact with Kennedy over the weekend.

The state charged Kennedy in February 2005 with two counts of first-degree criminal sexual conduct and two counts of kidnapping. S.K.M. moved to California shortly after the incident. Officers believed she would voluntarily return to Minnesota to testify against Kennedy. But in May 2005, the state had difficulty contacting her and began the process of obtaining an out-of-state subpoena to secure her presence at trial. When S.K.M. missed a related court appearance in California because she went to the wrong courthouse, a warrant was issued for her arrest. Two days later, California authorities took S.K.M. into custody. Minnesota officers traveled to California and returned her to Minnesota for Kennedy's trial.

Trial began on June 6, 2005, as scheduled. On that day, Kennedy asked for a continuance to retain private counsel in exchange for waiving his right to a speedy trial. The prosecutor advised the court that Kennedy had been placing phone calls from prison, trying to "get to" S.K.M. and prevent her from testifying. The district court denied his request.

On the third day of trial, Kennedy again sought to discharge his public defender to retain private counsel. The district court offered to allow Kennedy to substitute attorneys if his new attorney was prepared to assume the case that day. The attorney whom Kennedy intended to hire was present in the courtroom, but he explained that he would accept representation only if the court granted a continuance. The state opposed the continuance request, explaining that it had gone to great lengths to return S.K.M. to

Minnesota to testify. To balance the state's and Kennedy's competing interests, the court declared that it would grant a continuance only if the parties agreed that S.K.M. could have her trial testimony taken under oath by deposition under rules of confrontation with the defendant present. The court opined that this compromise would allow the state to obtain S.K.M.'s sworn testimony and Kennedy to switch counsel. But Kennedy rejected the offer and indicated that he preferred to proceed unrepresented.

On the fourth day, Kennedy waived his right to a jury trial and agreed to a *Lothenbach* proceeding on stipulated facts. He also agreed to waive his *Blakely* rights, allowing the court to find whether there are aggravating factors that warrant an upward sentencing departure. The matter was then submitted to the court for a determination of guilt and aggravating factors based on the police reports, S.K.M.'s statements, and the results of the sexual-assault examination.

The district court found Kennedy guilty of one of the two counts of first-degree criminal sexual conduct and both counts of kidnapping. The court also found that the different types and many occurrences of sexual assault, and particular cruelty, were aggravating factors that justify an upward departure from the presumptive sentence. The court sentenced Kennedy to 225 months' imprisonment for criminal sexual conduct and 27 months for kidnapping, to be served concurrently.

Kennedy appealed his conviction and sentence in January 2006. This court granted Kennedy's motion to stay his appeal pending completion of parallel postconviction proceedings in the district court. The district court denied Kennedy's

petition for postconviction relief, and he filed an appeal from that decision. This court consolidated Kennedy's two appeals.

DECISION

I

Kennedy argues that neither his conviction of two counts of kidnapping nor the upward sentencing departure based on aggravating factors are supported by facts in the record. The arguments do not persuade us.

We are unconvinced by Kennedy's challenge to his conviction of the two kidnapping counts because he failed to preserve the challenge for appeal. A defendant waives a claim that the state failed to prove all of the elements of the crime charged when he submits to a *Lothenbach* proceeding. *State v. Busse*, 644 N.W.2d 79, 88–89 (Minn. 2002); *see also State v. Riley*, 667 N.W.2d 153, 157–58 (Minn. App. 2003) (holding that a *Lothenbach* defendant may not seek appellate review of a sufficiency-of-the-evidence claim), *review denied* (Minn. Oct. 21, 2003). Kennedy waived his right to challenge his conviction for the two kidnapping counts on grounds of sufficiency of the evidence when he agreed to the *Lothenbach* proceeding.¹ *See State v. Knoll*, 739 N.W.2d 919, 921 (Minn. App. 2007) (“[T]he defendant in a *Lothenbach* trial cannot challenge the sufficiency of the evidence.”).

¹ We add that even if we were to consider the challenge on the merits, the result would be the same. The stipulated facts establish a basis for the kidnapping conviction in that Kennedy unplugged the phone to prevent S.K.M. from calling for help, required her to remain nude for substantial periods, and brandished a knife when she mentioned leaving. Considered in the light most favorable to the conviction, these facts support the implicit finding that Kennedy confined S.K.M. in the room without her consent. Minn. Stat. § 609.25, subd. 1(2), (3) (2004).

We turn to Kennedy's factual challenge to the district court's findings in support of the enhanced sentence. This court reviews a district court's decision to depart from the sentencing guidelines for an abuse of discretion. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003); *see* Minn. Sent. Guidelines II.D (stating that a district court may depart from the presumptive sentence range). Reversal of the departure is warranted only if the reasons for the departure are improper or inadequate or there is insufficient evidence to justify the enhanced sentence. *Taylor v. State*, 670 N.W.2d 584, 588 (Minn. 2003). Here, the evidence is more than sufficient to support the findings of aggravating factors.

That the victim was treated with particular cruelty is an aggravating factor that justifies departure. Minn. Sent. Guidelines II.D.2.b(2). A finding of particular cruelty may be appropriate when a defendant's conduct is significantly more cruel than conduct usually associated with the offense of conviction. *State v. Weaver*, 733 N.W.2d 793, 803 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007); *see also State v. Anderson*, 370 N.W.2d 703, 705, 706–07 (Minn. App. 1985) (finding the defendant had acted with particular cruelty when he committed first-degree assault because he beat the victim for over an hour, in front of her children), *review denied* (Minn. Sept. 19, 1985). And a finding of multiple types and occurrences of sexual penetration is an aggravating factor that also supports an upward departure. *See State v. Morales-Mulato*, 744 N.W.2d 679, 692 (Minn. App. 2008) (noting that vaginal penetration and anal penetration supported an upward departure for the crime of first-degree criminal sexual conduct), *review denied* (Minn. Apr. 29, 2008).

The stipulated facts in the record and the legitimate inferences discernible from those facts support the district court's determination of aggravating factors here. Kennedy refused to allow S.K.M. to leave their hotel room for more than two days and raped her repeatedly during that time while degrading her mockingly as a supposed prostitute and accusing her of having acted as one. He forcibly penetrated her anally at least six times throughout the weekend, forced her to perform oral sex, forcibly performed oral sex on her, punched her in the head, threatened her with a knife to her stomach and neck, and made her grovel—requiring her to literally kiss his feet. The nurse's report noted that S.K.M.'s anus was tender and had lacerations and tears. Kennedy's random attacks occurred in the presence of a ten-month old boy, who was a child of both the assailant and the victim. There is abundant evidence to support the district court's determination that Kennedy assaulted S.K.M. with particular cruelty.

Kennedy argues that the district court erred by finding that Kennedy had penetrated S.K.M. vaginally, which the district court also identified as particular cruelty because the forced vaginal intercourse was so soon after S.K.M. suffered a miscarriage that required her to be hospitalized. Kennedy claims that there was no evidence that S.K.M. was penetrated vaginally. We emphasize that there is a sufficient basis to affirm the finding of particular cruelty for the reasons already addressed. But there is also support for the finding of vaginal intercourse. The investigating officer asked S.K.M., "What was he forcing you to do . . . I need to fully understand the sexual intercourse. Um, was it vaginal intercourse and so forth like that." S.K.M. replied, "Vaginal . . . [a]nd my (inaudible) in my butt." The finding of vaginal rape is supported. With or without

that finding, the record sufficiently supports the district court's determination of particular cruelty and multiple types and occurrences of penetration. We therefore see no abuse of discretion in the sentencing determination.

II

Kennedy argues that he is entitled to a new trial because the prosecutor committed misconduct by falsely representing to the court that Kennedy and members of his family threatened and attempted to intimidate S.K.M. to prevent her from testifying. Kennedy claims that the prosecutor's allegedly false assertions led to the district court's decision to deny Kennedy's motion for a continuance. Although Kennedy actively objected to the court's denial of his motion for a continuance, he did not object to the prosecutor's comments or challenge as untrue the assertion that Kennedy was threatening or intimidating S.K.M. The failure to object to error at trial generally constitutes waiver of a challenge to that error on appeal, allowing reversal only if the error is plain and affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error affects substantial rights if it was prejudicial and affected the outcome of the case. *Id.* at 741.

Kennedy does not establish the threshold element of error. The transcript of the postconviction hearing demonstrates that the prosecutor's statements that Kennedy was threatening S.K.M. and attempting to intimidate her were supported by seven recorded phone calls and other testimony. The trial prosecutor, Deidre Aanstad, testified that S.K.M. told her that she had received phone calls from Kennedy's father, brother, and sister before trial. S.K.M. told Aanstad that Kennedy's father tried to dissuade her from

testifying and that her conversation with him frightened her. He told S.K.M. that Kennedy was being raped in jail and that he was afraid that Kennedy might die. Kennedy's brother also spoke with S.K.M., attempting to discourage her from testifying. Kennedy's sister also told S.K.M. that she should not testify.

Aanstad also testified that she had listened to the phone calls that Kennedy made from prison. She began listening to the recorded calls when she first had difficulty contacting S.K.M. in May 2005. Aanstad checked the prison's telephone records and discovered that it seemed that Kennedy was not making many calls. But when Aanstad and an investigator examined jail telephone records more carefully, they determined that Kennedy was secretly making calls to S.K.M. by using other inmates' identification numbers. In substance, those telephone calls indicated that Kennedy was asking friends and family members to "get to" S.K.M. and prevent her from testifying. Aanstad testified that she did not mislead the court about S.K.M.'s willingness to testify because she was not certain whether S.K.M. would be willing to testify until S.K.M. arrived in Minnesota.

The postconviction court listened to the seven recorded calls made by Kennedy and determined that Kennedy had a trial strategy that he did not disclose to his trial attorney, which consisted of soliciting others to "get to" S.K.M. and to intimidate her not to testify against him, or to change her story at trial. Based on the evidence presented in the postconviction proceeding, Aanstad had an evidentiary basis to represent to the court that Kennedy was attempting to persuade S.K.M. not to testify. Given the supported finding that Kennedy was attempting to dissuade S.K.M. from testifying, Kennedy fails to establish any error by the prosecutor in pointing out that fact.

To the extent that Kennedy's prosecutorial misconduct challenge contests the district court's decision to deny his motion for a continuance, it also fails. This court reviews a district court's decision to grant or deny a motion to continue for an abuse of discretion. *State v. Courtney*, 696 N.W.2d 73, 81 (Minn. 2005). A defendant must show that the denial prejudiced him in order to justify reversal. *Id.* Kennedy does not make that showing. Kennedy claims that the denial of his motion for a continuance deprived him of his right to be represented by counsel of his own choosing. But a right to counsel of the defendant's own choice is not absolute. *See id.* at 81–82 (recognizing that a defendant's constitutional right to counsel includes a fair opportunity to secure counsel of the defendant's choice, but that a motion for a continuance in order to secure counsel of the defendant's choice is properly denied when the defendant has not been diligent in procuring counsel or preparing for trial). Following *Courtney*, we conclude that the district court acted within its discretion by denying Kennedy's motion for a continuance because Kennedy waited until trial before first requesting additional time to retain private counsel, and the evidence supports the district court's conclusion that he did so either to prevent S.K.M. from testifying or to delay the proceeding.

III

Kennedy contends also that his guilty plea must be vacated because he was denied effective assistance of counsel. To establish ineffective assistance of counsel that violated his constitutional rights, Kennedy must show that his attorney's representation fell below an objective standard of reasonableness, and that, but for the errors, the result would have been different. *Hathaway v. State*, 741 N.W.2d 875, 879 (Minn. 2007). His

allegation faces the strong presumption that his counsel's performance fell within a wide range of reasonable assistance. *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007). This court may address the two parts of the test in any order and may dispose of the claim on one without analyzing the other. *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006).

Kennedy contends that his trial counsel's representation fell below an objective standard of reasonableness because his trial attorney failed to properly assess the evidence and correctly advise Kennedy about the likelihood of success, or correctly advise Kennedy about the sentence he faced if found guilty. Neither contention is convincing.

Misjudging Weight and Significance of Evidence

Kennedy argues that he received ineffective assistance of counsel because a reasonable criminal attorney would not have concluded that the evidence against him was overwhelming or that it would take a "miracle" to win. Kennedy's trial counsel, David Powers, reviewed S.K.M.'s statements to police, Kennedy's statements to police, and all other evidence in the case, and he concluded that there was overwhelming evidence against his client. He so informed Kennedy and told him that it would be nothing short of a miracle to win the case. Powers had fourteen years of experience, mostly as a public defender. At the time of Kennedy's trial, Powers had represented over one hundred defendants accused of criminal sexual conduct. Kennedy's disappointment at his counsel's unpleasant assessment of Kennedy's prospects at trial offers no support for his claim of ineffective assistance because "attorneys have a duty to render candid advice to clients." *State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998). Additionally, Powers

testified that, regardless of his assessment, he still developed a trial strategy, ordered an investigation, and actively tried to work with Kennedy to formulate a defense.

It appears that Powers's bleak assessment of the evidence was certainly not unreasonable. The postconviction court agreed with Powers's evaluation of the case against Kennedy, based on the consistency of S.K.M.'s statements to the police, her willingness to testify, the corroborating evidence of knives found in the room, the results of the medical examination, and the statement given by Kennedy's sister-in-law. We need not address the prejudice prong of the test. Kennedy does not demonstrate that his right to effective assistance of counsel was denied when Powers advised Kennedy that his chance of prevailing at trial was slight.

Inaccurate Calculation of Likely Sentence

Kennedy also claims that his right to effective assistance of counsel was violated when Powers incorrectly described Kennedy's potential sentence. Powers testified at the postconviction hearing that he explained that Kennedy would likely face an upward durational departure from the presumptive sentence. Powers told Kennedy that the maximum sentence for a conviction of criminal sexual conduct was 30 years and that two convictions would be 60 years if the court imposed a consecutive sentence. Kennedy does not dispute that he could have been sentenced up to 30 years per conviction of criminal sexual conduct. And Powers adamantly denied telling Kennedy that he would likely serve 60 years. The postconviction court found Powers's testimony credible, expressly disbelieving Kennedy's testimony that Powers told him that he was facing life in prison. We defer to the trial court's weighing of credibility and conclude that Kennedy

has not shown that Powers incorrectly informed him of the potential liability that he faced if he went to trial. Again, we need not address the question of whether the statements prejudiced Kennedy. We hold that Kennedy has not shown ineffective assistance of counsel.

Affirmed.