This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).

STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0261

State of Minnesota,
Respondent,

vs.

Robert Edward Cindrich,
Appellant.

Filed July 29, 2008
Affirmed
Wright, Judge

Ramsey County District Court
File No. K9-03-1307

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Charlann E. Winking, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Klaphake, Judge; and Wright, Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

Appellant challenges the district court's reimposition of an enhanced sentence on remand for reconsideration in light of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). Appellant argues that there is insufficient evidence in the record to support the aggravating factors found by the sentencing jury and, even if the evidence supporting the aggravating factors is sufficient, the district court abused its discretion by sentencing appellant to 360 months' imprisonment. Appellant also contends that the district court erroneously instructed the jury regarding the aggravating factors. In his pro se supplemental brief, appellant raises five additional challenges to his resentencing. We affirm.

FACTS

At approximately 8:20 p.m. on March 31, 2003, appellant Robert Cindrich was driving with his sister and his friend Chawtell Nestell near the Rice Community Recreation Center in St. Paul. They were looking for a middle-school-age boy who had been in an altercation with Cindrich's girlfriend's younger brother. When they saw four boys walking down the street, Cindrich pulled over next to them. Cindrich and Nestell got out of the vehicle and ran toward the boys, who "took off running." The boys whom Cindrich was chasing escaped, but Nestell caught one boy, later identified as 15-year-old B.D.

Convinced that B.D. was the middle-school-age boy whom they sought, Cindrich and Nestell hit and knocked B.D. to the ground. As he lay on the ground, both men

repeatedly hit and kicked B.D. in the chest and head. B.D. attempted to shield himself, but because of the strength of the blows landed by Cindrich and Nestell, he was unable to do so. During the beating, one of the men picked up B.D. and held him under the arms. As B.D. was being held up, his head flopped to the side and his arms hung limp. The other man then kicked B.D. in the chest. After hitting and kicking B.D. for approximately two to three minutes, Cindrich and Nestell left B.D. in the street and departed in the vehicle. As they were leaving, Nestell told Cindrich that, during the beating, he had seen B.D.'s eyes roll back. B.D. subsequently died as a result of the injuries inflicted on him by Cindrich and Nestell.

Cindrich was charged with second-degree unintentional murder, a violation of Minn. Stat. § 609.19, subd. 2(1) (2002). Cindrich pleaded guilty, and the state sought a sentence of 360 months' imprisonment, an upward durational departure from the presumptive guidelines sentence of 210 months' imprisonment. After finding several aggravating factors, the district court sentenced Cindrich to 360 months' imprisonment.

Cindrich appealed. While Cindrich's appeal was pending, the United States Supreme Court released its opinion in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). We remanded Cindrich's sentence for reconsideration in light of the *Blakely* decision. *State v. Cindrich*, No. A03-1786 (Minn. App. Aug. 18, 2004) (order op.).

On remand, the state again sought an upward durational departure on several grounds. The district court impaneled a sentencing jury, which found that (1) B.D. was particularly vulnerable because of his age and reduced physical capacity, which Cindrich

knew or should have known; (2) B.D. was treated with particular cruelty for which Cindrich should be held responsible; (3) Cindrich exhibited a lack of remorse; (4) Cindrich failed to render aid to B.D. or to seek medical assistance; (5) the offense was planned; (6) Cindrich committed the offense as part of a group of three or more people who actively participated; (7) Cindrich intentionally selected B.D. in whole or in part because of B.D.'s actual or perceived age; (8) the offense had a serious impact on the community; and (9) the offense had a serious impact on B.D.'s family. Based on the jury's findings, the district court again sentenced Cindrich to 360 months' imprisonment. This appeal followed.

D E C I S I O N

I.

We review a district court's departure from the Minnesota Sentencing Guidelines' presumptive sentence for an abuse of discretion. *State v. Thompson*, 720 N.W.2d 820, 828 (Minn. 2006). 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).

A.

Cindrich first argues that the record evidence is insufficient to support the aggravating factors found by the sentencing jury. There are no published decisions articulating the standard of review applicable to a sentencing jury's findings regarding aggravating factors when an appellant challenges the sufficiency of the evidence

supporting those findings. But a sentencing trial addressing whether aggravating factors are present is procedurally akin to a trial on the elements of the substantive offense. *See Thompson*, 720 N.W.2d at 827 (analogizing judicial fact-finding regarding sentencing, after jury-trial waiver, to bench trial on elements of offense). And the fact-finding role of the jury in each circumstance is identical. Accordingly, when reviewing a challenge to the sufficiency of the evidence supporting an aggravating factor, we conduct a painstaking analysis of the record to determine whether the jury reasonably could find the aggravating factor based on the facts in the record and the legitimate inferences that can be drawn from those facts. *Cf. State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999) (discussing sufficiency-of-the-evidence review after jury trial on substantive offense); *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988) (same). In doing so, we view the evidence in the light most favorable to the jury's findings and assume that the jury believed the evidence supporting the aggravating factors and disbelieved any contrary evidence. *Cf. Chambers*, 589 N.W.2d at 477 (stating that evidence presented at jury trial on guilt is viewed on appeal in the light most favorable to the verdict).

Cindrich challenges the sufficiency of the evidence with regard to all but one of the aggravating factors found by the jury. But only one aggravating factor is necessary to support an upward durational departure. *See, e.g.*, *State v. O'Brien*, 369 N.W.2d 525, 527 (Minn. 1985) (holding that double durational departure was permissible even if only one aggravating factor was present).

When the victim of an offense is "particularly vulnerable due to age . . . or reduced physical or mental capacity, which was known or should have been known to the

offender," that vulnerability is an aggravating factor that may support an upward durational departure from the sentencing guidelines. Minn. Sent. Guidelines II.D.2.b.(1). Particular vulnerability can exist when 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 yard in the middle of the night, fell to ground dazed, and was struck again), *review denied* (Minn. Aug. 27, 1992). A victim's vulnerability is not a factor unless it was a "substantial factor" in the defendant's accomplishment of the crime. *State v. Gardner*, 328 N.W.2d 159, 162 (Minn. 1983).

The evidence supports the jury's finding that B.D. was particularly vulnerable due to age and reduced physical capacity. B.D. was the youngest of the four boys whom Cindrich and Nestell chased. He was 15 years old, was five feet seven inches tall, and weighed 115 pounds. By contrast, B.D.'s two assailants were 23-year-old men, each approximately six feet tall. Cindrich and Nestell attacked B.D. simultaneously and cooperatively as B.D. unsuccessfully attempted to shield himself. Moreover, the record establishes that the fatal blow likely was delivered when one man held B.D.'s limp, unresponsive body upright for the other to kick.

The evidence likewise supports the jury's finding that Cindrich was or should have been aware of B.D.'s particular vulnerability. Because he admits that the impetus for the attack was his mistaken belief that B.D. was the middle-school-age boy he sought, Cindrich essentially admits that he was aware of B.D.'s youth. And the jury reasonably could infer that Cindrich was aware of B.D.'s reduced physical capacity when Cindrich

hit and kicked B.D. as he lay on the ground and subsequently either picked up and held B.D.'s limp body to be kicked or kicked B.D.'s limp body. The record amply supports the jury's finding that B.D. was particularly vulnerable due to age and reduced physical capacity, which Cindrich knew or should have known.

Because ample evidence supports the jury's finding that B.D. was particularly vulnerable, which Cindrich knew or should have known, we decline to address the other aggravating factors.

B.

Cindrich argues alternatively that, even if the evidence supports the jury's findings as to the existence of aggravating factors, the district court abused its discretion by imposing a sentence of 360 months' imprisonment. But Cindrich does not contest that a victim's particular vulnerability may be a valid reason for an upward durational departure, and he does not suggest that the district court's reliance solely on the jury's finding of particular vulnerability would constitute an abuse of discretion. We, therefore, address the narrow issue of whether the district court abused its discretion by sentencing Cindrich to 360 months' imprisonment based on the jury's finding that B.D. was particularly vulnerable.

To apply the abuse-of-discretion standard in this context, we look to the district court's rationale to determine whether, in departing from the presumptive guidelines sentence, it pronounced a sentence proportional to the severity of the offense. *State v. Richardson*, 670 N.W.2d 267, 285 (Minn. 2003). When determining whether an upward durational departure is justified, we base our decision on our "collective, collegial

experience in reviewing a large number of criminal appeals from all the judicial districts." *Holmes v. State*, 437 N.W.2d 58, 59 (Minn. 1989) (quotation omitted).

Cindrich's 360-month sentence is proportional to the severity of the offense. Cindrich and Nestell jointly attacked B.D., knowing that he was younger and smaller than each of them. They repeatedly hit and kicked B.D. in the head and chest for approximately two to three minutes. Because of the force of their joint attack, B.D. was never able to protect himself. Indeed, Cindrich and Nestell not only continued to strike B.D. while he was limp and nonresponsive but also held him upright to better strike him in that nonresponsive state. After attacking B.D., Cindrich and Nestell left B.D.'s unconscious body in the street. On this record, the district court's sentencing departure was a sound exercise of its discretion.

II.

Cindrich also challenges the district court's instruction of the jury regarding the aggravating factors. Specifically, Cindrich argues that he was "denied due process by the lack of instruction given to the sentencing jury defining the aggravating factor of 'particular cruelty,' as well as the remaining factors." Although Cindrich asserts that the due-process argument applies to each of the aggravating factors, he does not identify any legal authority in support of this claim. Moreover, the crux of his argument is that terms such as "cruel" are vague, requiring definitional guidance to sentencing juries to ensure consistent application of the law. Because Cindrich fails to articulate a specific argument regarding any ground other than particular cruelty, and because the argument he advances is limited to the particular-cruelty factor, he has waived any jury-instruction challenge

with respect to other aggravating factors. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (citing *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971)) (stating that assignment of error in brief based on mere assertion and unsupported by legal authority is waived unless prejudicial error is obvious on mere inspection). Moreover, having concluded that the jury's finding of particular vulnerability was amply supported and that the district court did not abuse its discretion by departing upward durationally on that ground, we need not address Cindrich's argument regarding the particular-cruelty instruction.

III.

In his pro se supplemental brief, Cindrich argues that (1) his resentencing hearing violated the Double Jeopardy Clause of the United States Constitution; (2) the district court lacked the authority to impanel a jury for the purpose of resentencing Cindrich because the legislature's 2005 amendments to Minn. Stat. § 244.10 only prospectively authorized the district court to convene a jury to make factual findings regarding aggravating factors; (3) the district court could not, after *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), sentence him to anything but the presumptive sentence; (4) retroactive application of section 244.10 would violate the Ex Post Facto clauses of the United States and Minnesota constitutions; and (5) the resentencing jury system violates the Equal Protection Clause of the United States Constitution because of systematic underrepresentation of minority members of the population.

The Minnesota Supreme Court has rejected Cindrich's first four arguments. In *Hankerson v. State*, the supreme court held that the use of a sentencing jury to consider

aggravating factors in a resentencing hearing does not violate the Double Jeopardy Clause of the United States Constitution, provided the sentence ultimately imposed does not exceed the sentence imposed originally. 723 N.W.2d 232, 240-41 (Minn. 2006). And in *State v. Chauvin*, the supreme court held that the district court had the inherent judicial authority to impanel a sentencing jury to consider the existence of aggravating factors when, at the time of trial, the legislature had not yet enacted legislation specifically authorizing the use of juries for sentencing. 723 N.W.2d 20, 27 (Minn. 2006).

In 2005, the Minnesota Legislature amended section 244.10 to authorize the district court to impanel a sentencing jury to decide whether aggravating factors existed. 2005 Minn. Laws ch. 136, art. 16, § 4, at 1115; *see also Hankerson*, 723 N.W.2d at 234-35 (discussing amendment). And the supreme court subsequently held that, when read in conjunction with the version of the sentencing guidelines in effect when the offense was committed, the 2005 amendment authorizes the retrospective use of a sentencing jury when seeking a deviation from the sentencing guidelines on resentencing for a conviction obtained before the statute's effective date. *Hankerson*, 723 N.W.2d at 236. And the 2005 amendment authorizes a district court to impose a new enhanced sentence based on the sentencing jury's findings. *Id.* Moreover, the retrospective application of the amendment is not prohibited as an ex post facto law because the change was procedural, it inures to the benefit of a defendant by affording the defendant a new sentencing hearing requiring a higher quantum of proof, and the sentencing guidelines gave notice of

potential punishments. *Id.* at 242-43. Thus, none of Cindrich's first four arguments in his pro se supplemental brief merits relief.

Finally, Cindrich has waived his Equal Protection argument by failing to raise it before the district court and by failing to adequately support his assertions on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that appellate court will not decide constitutional questions not raised before district court unless justice requires and doing so will not unfairly surprise other party); *Modern Recycling*, 558 N.W.2d at 772 (stating that assignment of error in brief based on mere assertion is waived unless prejudicial error is obvious on mere inspection).

Affirmed.