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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-1882**

State of Minnesota,  
Respondent,

vs.

Alejandro Perez Calel,  
Appellant.

**Filed November 18, 2008  
Reversed and remanded  
Connolly, Judge**

Lyon County District Court  
File No. CR-07-15

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Considered and decided by Connolly, Presiding Judge; Minge, Judge; and Crippen, Judge.\*

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

## **UNPUBLISHED OPINION**

**CONNOLLY**, Judge

Appellant was convicted of felony kidnapping, terroristic threats, and domestic assault by strangulation. The district court sentenced him to a prison term of 63 months on the kidnapping conviction, which was both an upward dispositional departure and a triple upward durational departure. Because the district court committed plain error when it did not precisely define the term “particular cruelty” in its instructions to the jury, we reverse and remand for a new sentencing proceeding.

### **FACTS**

Appellant Alejandro Cael was charged by complaint filed in Lyon County District Court with kidnapping in violation of Minn. Stat. § 609.25, subd 1(2) (2006), terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2006), domestic assault by strangulation in violation of Minn. Stat. § 609.2247, subd. 2 (2006), first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(c) (2006), first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(e)(i) (2006), and three counts of second-degree assault in violation of Minn. Stat. § 609.222, subd. 1 (2006).

Following a jury trial, appellant was convicted of the kidnapping, terroristic threats, and domestic-assault-by-strangulation charges. He was acquitted of the remaining charges. Appellant was sentenced solely on the kidnapping conviction. Because he had a criminal-history score of zero, the presumptive guidelines sentence for the kidnapping conviction, which is a severity level VI crime, was probation with a stay

of execution of a 21-month prison sentence. Minn. Sent. Guidelines IV and V. But the district court imposed both an upward dispositional departure and a triple upward durational departure.<sup>1</sup> This resulted in appellant receiving a 63-month prison sentence. The departure was based on the aggravating factor of “particular cruelty.” In the instructions on the aggravating factor of “particular cruelty,” the district court posed the following question in the interrogatory presented to the jury: “Was [the victim] treated with particular cruelty for which the defendant should be held responsible?” The district court did not provide the jury with any guidance on the meaning of the term “particular cruelty.” Appellant contends that the district court’s failure to define “particular cruelty” was plain error that affected his substantial rights. This appeal follows.

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<sup>1</sup> Greater than double departures are reserved for the “rare cases in which the facts are so unusually compelling that an even greater degree of departure will be justified.” *State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981); *see, e.g., Perkins v. State*, 559 N.W.2d 678, 692 (Minn. 1997) (greater than triple durational departure warranted when the defendant raped the victim under severe aggravating circumstances, which included particular cruelty and knowledge that he was in the full-blown stages of AIDS); *State v. Glaraton*, 425 N.W.2d 831, 834 (Minn. 1988) (gun stuck in victim’s orifices, victim subjected to multiple penetrations, and victim permanently scarred); *State v. Mortland*, 399 N.W.2d 92, 95 (Minn. 1987) (victim subjected to multiple penetrations, permanently injured, threatened with death, and suffered psychological damage); *State v. Van Gorden*, 326 N.W.2d 633, 634-35 (Minn. 1982) (victim subjected to multiple penetrations, permanently injured, and victim’s zone of privacy invaded); *State v. Herberg*, 324 N.W.2d 346, 350 (Minn. 1982) (victim subjected to various types of penetration and “outrageously gross and vile physical abuse”); *State v. Mesich*, 396 N.W.2d 46, 52-53 (Minn. App. 1986) (victim was raped, beaten, threatened with death and disfigurement, and had a knife inserted into her vagina), *review denied* (Minn. Jan. 2, 1987).

## DECISION

**I. By failing to provide the jury with a definition of the term “particular cruelty,” the district court committed plain error that affected appellant’s substantial rights.**

Appellant did not object at trial to the district court’s failure to define “particular cruelty.” Generally, the right to appeal a jury instruction is forfeited when a party fails to object to the instruction at trial. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001). When a party does not object to a jury instruction at trial, an appellate court has the discretion to consider the issue on appeal if it is plain error affecting substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). There is a three-prong test for plain error. *Id.* This test requires that before an appellate court reviews an unobjected-to error, it must be established that there is (1) error; (2) that is plain; and (3) the error must affect substantial rights. *Id.* If this test is satisfied, an appellate court must then assess “whether it should address the error to ensure fairness and the integrity of the judicial proceedings.” *Id.* An error affects a party’s substantial rights, if “the error was prejudicial and affected the outcome of the case.” *Id.* at 741; *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”). A party bears a “heavy burden” of persuasion on this third prong. *Griller*, 583 N.W.2d at 741.

Here, both sides concede that the district court’s failure to provide a definition of “particular cruelty” to the jury was plain error under this court’s decision in *State v. Weaver*. 733 N.W.2d 793, 803 (Minn. App. 2007) (stating that, when a sentencing jury is

to determine whether a defendant committed a crime with “particular cruelty,” the instruction “given to the jury needs to precisely define ‘particular cruelty’”), *review denied* (Minn. Sept. 18, 2007).<sup>2</sup>

Thus, we must determine whether the failure to precisely define “particular cruelty” affects appellant’s substantial rights. We conclude that it does. The sole basis for the upward departure was the jury’s determination that appellant committed his crime with “particular cruelty.” As a result of this determination, appellant was sentenced to 63 months in prison instead of probation with a stay of execution of his 21-month prison sentence. This departure affected appellant’s substantial rights because it brought his sentence outside of the presumptive range of the guidelines sentence for his crime. While we acknowledge that appellant’s acts were sufficient to support his conviction, we cannot say beyond a reasonable doubt that the failure to precisely define “particular cruelty” had no significant impact on appellant’s sentence. As a result, we must reverse appellant’s sentence and remand for a new *Blakely* sentencing proceeding or imposition of the presumptive guidelines sentence. If there is a new *Blakely* sentencing proceeding, a new sentencing jury must be impaneled, and the district court shall define the term “particular cruelty” for the jury if it intends to use this aggravating factor as a potential basis for an upward departure.

Courts in Minnesota have yet to promulgate a precise definition of “particular cruelty.” Unfortunately, we are unable to provide the district court with a precise

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<sup>2</sup> We do note that at the time the district court was providing sentencing instructions to the jury it did not have the benefit of *Weaver*, which was released approximately two months later.

definition of “particular cruelty.”<sup>3</sup> However, we do in fact want to provide some guidance as to the term’s meaning:

In general, a defendant’s conduct must be significantly more cruel than that usually associated with the offense of which he was convicted. *See, e.g., Holmes v. State*, 437 N.W.2d 58, 59 (Minn. 1989) (departure unjustified when conduct not significantly different from that typically involved in crime); *State v. Hanson*, 405 N.W.2d 467, 469 (Minn. App. 1987) (departure not warranted when defendant did not commit manslaughter in a manner significantly more serious than a typical manslaughter). In the past, judges have imposed upward sentencing departures based on “particular cruelty” when the defendant’s conduct included threats, degradation of the victim, or the gratuitous infliction of pain. *See, e.g., Smith*, 541 N.W.2d at 590. Courts have also found “particular cruelty” to exist when a defendant leaves the victim to die alone without notifying emergency personnel, sets fire to a victim who is still alive, or attempts to conceal or destroy a victim’s body. *See, e.g., State v. Folkers*, 581 N.W.2d 321, 327 (Minn. 1998); *State v. Jones*, 328 N.W.2d 736, 738 (Minn. 1983); *State v. Gurske*, 424 N.W.2d 300, 305 (Minn. App. 1988); *State v. Dircks*, 412 N.W.2d 765, 767-68 (Minn. App. 1987), *review denied* (Minn. Nov. 24, 1987).

*Id.* at 803.

Because the district court did not define the term “particular cruelty” in its instructions to the jury, we reverse and remand for a new sentencing proceeding.

**Reversed and remanded.**

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<sup>3</sup> “Extreme Conduct” in the Federal Sentencing Guidelines manual is defined as follows: “If the defendant’s conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.” U.S. Sentencing Guidelines Manual § 5k2.8 (2007).