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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1993**

State of Minnesota,
Respondent,

vs.

Mark Krueger,
Appellant.

**Filed November 10, 2008
Affirmed
Schellhas, Judge**

Ramsey County District Court
File No. K4-03-1313

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

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

R. Gordon Nesvig, Box 255, Cottage Grove, MN 55016 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, 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.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his 288-month executed sentence for first-degree criminal sexual conduct and the district court's imposition of a consecutive sentence for use of a minor in a sexual performance. Because the district court properly based its upward sentencing departure on a jury finding that appellant engaged in multiple forms of sexual penetration and because the consecutive sentencing was permissive, we affirm.

FACTS

This case is before us after remand to the district court for resentencing under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). *State v. Krueger*, No. A04-122, 2004 WL 1878998 (Minn. App. Aug. 24, 2004). In 2003, appellant pleaded guilty to three offenses pertaining to his sexual relationship with a 13-year-old female: count one, first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(g) (2002); count two, use of a minor in a sexual performance in violation of Minn. Stat. § 617.246, subd. 2 (2002)¹; and count three, possession of child pornography in violation of Minn. Stat. § 617.247, subd. 4(a) (2002). On count one, the district court sentenced appellant to 288-months' imprisonment, a double-duration upward departure. On count two, the district court assigned a severity level of 8 and imposed a 48-month sentence consecutive to appellant's sentence on count one. On count three, the district court sentenced appellant to one year and one day concurrent with his sentences on counts one and two.

¹ Appellant videotaped his sexual conduct with his 13-year-old victim.

The district court found that several aggravating factors justified appellant's upward-durational departure and consecutive sentences: (1) the victim was vulnerable because she was 13 years old and of reduced physical capacity; (2) the victim's zone of privacy was invaded because she was abused in her own home; (3) the abuse occurred over an extended period of time with multiple penetrations; (4) appellant videotaped his abuse of the victim without the victim's knowledge; and (5) appellant showed no remorse and failed to take responsibility for his actions.

In his first appeal, appellant argued that the district court abused its discretion in sentencing him to a double-durational upward departure on count one and a consecutive sentence on count two, arguing as to his consecutive sentence that the conduct underlying his conviction on count two stemmed from the same course of conduct as count one. *Krueger*, 2004 WL 1878998, at *4, *6. While the first appeal was pending, the United States Supreme Court issued its decision in *Blakely*, holding that facts used to enhance a sentence beyond the statutory maximum must be found by a jury or admitted by the defendant. We considered appellant's argument that a double-durational upward departure on count one was inappropriate and remanded appellant's sentence to the district court for "a consideration of the application, if any, of *Blakely* to appellant's sentence." *Krueger*, 2004 WL 1878998, at *4. On remand, the district court reaffirmed its decision to depart because the facts on which it relied were admitted by the defendant. Appellant again challenged his sentences, and we again remanded appellant's sentence because appellant's factual admissions were not accompanied by a waiver of his right to a

jury trial on those facts. *State v. Krueger*, No. A05-363 (Minn. App. Aug. 2, 2005) (order op.).

On the second remand, the district court empanelled a sentencing jury to determine whether aggravating factors existed to support an upward departure. The sole aggravating factor submitted to the jury was appellant's alleged use of multiple forms of sexual penetration. The jury heard testimony and viewed a videotape made by appellant of his sexual conduct with the victim. Appellant's counsel argued to the district court that the consecutive sentence on count two constituted a sentencing departure, and that because the jury was not asked to find aggravating factors pertaining to count two, that sentence must be concurrent. The district court stated its belief that the consecutive sentence was permissive. Appellant's counsel also argued that this court had remanded all of appellant's sentences to the district court, and the district court rejected this argument, indicating that it was the court's intention to deal only with the sentence on count one. The sentencing jury found that appellant had subjected the victim to multiple forms of penetration. The district court again imposed a 288-month sentence on count one and refused to modify the consecutive sentence on count two. Appellant again challenges his sentences.

DECISION

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). A district court may not deviate from a presumptive sentence without specifying "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 serious than typically involved in the commission of the offense.” *State v. Best*, 449 N.W.2d 426, 427 (Minn. 1989). The role of a reviewing court is to determine whether the reasons given by the district court in support of its departure are justified under the law. *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985).

Multiple Forms of Penetration

Appellant argues that because multiple forms of penetration are part of the charged offense, Minn. Stat. § 609.342, subd. 1(g) (2002), this cannot be used to enhance a sentence for a conviction of that offense. “The reasons used for departing must not themselves be elements of the underlying crime.” *State v. Blanche*, 696 N.W.2d 351, 378-79 (Minn. 2005). A reviewing court interprets a criminal statute “[b]ased on the plain language of the statute and our previous decisions interpreting the statute.” *State v. Reese*, 692 N.W.2d 736, 743 (Minn. 2005).

Minnesota Statutes, section 609.342, subdivision 1(g), provides that:

A person who engages in sexual penetration with another person . . . is guilty of criminal sexual conduct in the first degree if . . . the actor has a significant relationship to the complainant and the complainant was under 16 years of age at the time of the sexual penetration.

The plain language of this statute includes the term “sexual penetration” in its singular form, implying that only one act of sexual penetration is needed to violate the statute. Moreover, this court has held that multiple forms of sexual penetration is a permissible

aggravating factor to support an enhanced sentence where the defendant was convicted under Minn. Stat. § 609.342, subd. 1(g). *State v. Adell*, 755 N.W.2d 767, 774 (Minn. App. 2008), *pet. for review filed* (Minn. Oct. 14, 2008). Additionally, in *Adell*, we held that multiple forms of penetration is not an essential element of Minn. Stat. § 609.342, subd. 1(h)(iii), which is identical to subd. 1(g) except that it includes the additional requirement of multiple acts of sexual abuse over an extended period of time. *Id.* We therefore reject appellant's argument that multiple forms of penetration is included in a charged offense under Minn. Stat. § 609.342, subd. 1(g).

Citing numerous cases, appellant acknowledges that Minnesota appellate courts have held that multiple forms of penetration is a proper aggravating factor for the district court's consideration in imposing an upward departure for first-degree criminal sexual conduct, but appellant argues that these cases involved conduct more egregious than his conduct in this case. *See, e.g., Ture v. State*, 353 N.W.2d 518, 522 (Minn. 1984) (imposing a double-upward durational departure on a defendant who violently raped his victim); *State v. Morales-Mulato*, 744 N.W.2d 679, 692 (Minn. App. 2008), *review denied* (Minn. Apr. 29, 2008) (affirming an upward durational departure where the defendant brandished a pocket knife and threatened to harm the victim and her family); *State v. Butterfield*, 555 N.W.2d 526, 531-32 (Minn. App. 1996), *review denied* (Minn. Dec. 17, 1996) (affirming a triple-durational upward departure where the defendant kidnapped and sexually assaulted his victim at knifepoint). Appellant argues that his conduct was less egregious for a number of reasons: the victim was not related to him; the victim was 13 years old; appellant did not use force or threats to coerce the victim

into a sexual relationship; and there was no physical injury or pregnancy. We reject appellant's argument that his conduct was not significantly more serious than typically involved in the commission of an offense under Minn. Stat. § 609.342, subd. 1(g), merely because cases exist that arguably involved more serious conduct than appellant's conduct in this case.

The conclusion that sexual abuse is significantly worse when a defendant subjects his victim to multiple forms of sexual penetration is supported by the fact that Minnesota appellate courts have upheld double- and triple-durational departures based on multiple forms of sexual penetration, albeit in addition to other aggravating factors. *See State v. Dietz*, 344 N.W.2d 387, 389-90 (Minn. 1984) (affirming a greater-than-double-durational departure in a case lacking egregious factors like injury, pregnancy, and threatening behavior or physical force); *State v. Mesich*, 396 N.W.2d 46, 52 (Minn. App. 1986), *review denied* (Minn. Jan. 2, 1987) ("Multiple penetrations alone will generally justify a double, but not greater, upward durational departure."). We cannot conclude that the district court abused its discretion in imposing an upward double-durational departure based on a finding of multiple forms of penetration. *See Best*, 449 N.W.2d at 427 (stating that a district court has "broad discretion to depart" if aggravating factors exist).

Appellant also argues that a jury, not a district court judge, must make the factual finding that a defendant's conduct is "significantly more serious than typically involved in the commission of" the charged offense in order to support a departure. *Id.* Appellant provides no legal support for this argument, apparently disregarding the fact that in many cases decided since *Blakely*, the Minnesota Supreme Court has affirmed upward

departures where a jury has found the existence of aggravating factors without determining that the conduct underlying the offense was significantly more serious than typically involved in its commission. *See, e.g., State v. Rodriguez*, 754 N.W.2d 672 (Minn. 2008); *State v. Chauvin*, 723 N.W.2d 20 (Minn. 2006). We reject appellant's argument.

Consecutive Sentencing

Appellant also argues that the acts he committed were part of one course of conduct and, therefore, consecutive sentencing is precluded. *See* Minn. Stat. § 609.035, subd. 1 (2002) (“[I]f a person’s conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses”). But this court has already concluded that the conduct underlying the three offenses was “clearly motivated by different criminal objectives,” *Krueger*, 2004 WL 1878998, at *6, and we will not reconsider this issue on appeal. *See State v. Al-Naseer*, 734 N.W.2d 679, 683 (Minn. 2007) (stating that where an appellate court decides a legal issue in a case and remands for further proceedings, its decision becomes the “law of the case” and may not be reconsidered in the district court or on another appeal).

Appellant also argues that the district court erred in imposing a consecutive sentence on count two, because no aggravating factor supports an upward departure on that count. “Generally, when an offender is convicted of multiple current offenses . . . concurrent sentencing is presumptive.” Minn. Sent. Guidelines II.F (2002). Unless consecutive sentencing is presumptive or permissive, consecutive sentencing “constitutes

a departure from the guidelines,” and the district court must provide written reasons justifying the departure. *Id.* But the guidelines provide that:

It is permissive for multiple current felony convictions against persons to be sentenced consecutively to each other when the presumptive disposition for these offenses is commitment to the Commissioner of Corrections as determined under the procedures outlined in Section II.C. Presumptive Sentence. Consecutive sentencing is permissive under these circumstances even when the offenses involve a single victim involving a single course of conduct.

Minn. Sent. Guidelines cmt. II.F.04 (2002). In this case, the presumptive guidelines sentence on appellant’s conviction on count one is commitment to the commissioner of corrections. Minn. Sent. Guidelines IV (2002). Likewise, the presumptive sentence on appellant’s conviction on count two is also commitment to the commissioner of corrections, based upon the district court’s assignment of a severity level of 8.² Because the presumptive sentences for both counts one and two are commitment to the commissioner of corrections, *id.*, consecutive sentencing is permissive in this case.

In *State v. Senske*, 692 N.W.2d 743, 748-49 (Minn. App. 2005), *review denied* (Minn. May 17, 2005), we held that “*Blakely* does not apply to permissive consecutive sentencing based on a finding that the offenses are ‘crimes against persons’” and that

² On count two, appellant was convicted under Minn. Stat. § 617.246, subd. 2. The Offense Severity Reference Table in the guidelines excludes this offense, and therefore it has no assigned severity level in the guidelines. Minn. Sent. Guidelines cmt. II.A.03 (2002). But the district court assigned the offense a severity level of 8, because it determined that such a ranking is “consistent with the ranking for similar behavior in this jurisdiction and reflects behavior between criminal sexual conduct in the second degree and criminal sexual conduct in the first degree.” Because the presumptive sentence for an offense with a severity level of 8 is commitment to the commissioner of corrections, Minn. Sent. Guidelines IV, consecutive sentencing by the district court was permissive in this case.

“*Blakely* does not require the jury to determine the relationship between multiple sentences any more than it would require a jury determination whether multiple sentences are permissible.” Since consecutive sentencing is permissive in this case, *Blakely* does not apply. Therefore, because we remanded this case to the district court for “a consideration of the application, if any, of *Blakely* to appellant’s sentence,” *Krueger*, 2004 WL 1878998, at *5, the district court correctly concluded that the propriety of appellant’s consecutive sentence on count two was not before it. *See State v. Roman Nose*, 667 N.W.2d 386, 394 (Minn. 2003) (“On remand, it is the duty of the district court to execute the mandate of this court strictly according to its terms”). The district court did not err in refusing to consider appellant’s consecutive sentence on count two on remand.

Affirmed.