STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1990

State of Minnesota,
Respondent,

vs.

Daniel L. Conley,
Appellant.

Filed February 3, 2009
Affirmed
Connolly, Judge

Ramsey County District Court
File No. K8-03-1055

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

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

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

CONNOLLY, Judge

Appellant argues that the district court erred multiple times during his *Blakely* trial and later at sentencing. We hold that the district court correctly applied the aggravating factor dealing with the commission of a crime in the presence of children and did not direct a verdict for the state through its instructions. Because the district court also did not inappropriately inject matters of punishment into the jury's deliberations and the consecutive sentences it imposed were permissive under the sentencing guidelines, we affirm.

FACTS

In 2003, after a jury trial, appellant was convicted of first-degree criminal sexual conduct, third-degree criminal sexual conduct, second-degree assault, and solicitation to practice prostitution. Appellant was sentenced to 300 months in prison on the first-degree criminal sexual conduct conviction, which was an upward durational departure.[1] He was further sentenced to a consecutive 18-month prison sentence on the solicitation to practice prostitution conviction, and a consecutive 36-month prison sentence on the second-degree assault conviction. Appellant appealed his convictions to this court challenging probable cause, the failure to suppress evidence, and the length of his first-degree criminal sexual conduct sentence. This court affirmed the conviction, but remanded for sentencing in accordance with *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). *State v. Conley*, No. A03-1669 (Minn. App. Oct. 12, 2004).

[1] The presumptive guidelines sentence was 158 months in prison.

On remand, the district court impaneled a sentencing jury to determine the presence of aggravating factors. Four aggravating factors were presented to the jury including whether (1) appellant committed multiple acts of sexual penetration against the victim; (2) appellant used multiple forms of sexual penetration against the victim; (3) the victim was treated with particular cruelty during the sexual assault; and (4) the victim's children were present in the home during the sexual assault. The jury concluded that the only aggravating factor was the presence of the victim's children in the home during the sexual assault. Based on the jury's finding, the district court again sentenced appellant to 300 months in prison. This appeal follows.

D E C I S I O N

I. The jury's finding that children were present in the home during the sexual assault was a valid ground for an upward durational departure under the sentencing guidelines.

Appellant argues that the mere presence of children in the home is not a valid departure ground under the sentencing guidelines. Rather, according to appellant, the presence of children is only an aggravating factor if the offense is committed in the actual physical presence of the children or if the presence of children makes the victim more vulnerable. The district court's "interpretation of the sentencing guidelines is reviewed de novo." *State v. Jones*, 587 N.W.2d 854, 855 (Minn. App. 1999), *review denied* (Minn. Mar. 16, 1999).

The jury was asked: "Were [the victim's] children present in the home during the sexual assault?" Appellant did not object to this question.[2] "It is well established that a failure to object to a special verdict form prior to its submission to the jury constitutes a waiver of a party's right to object on appeal." *Kath v. Burlington N. R.R. Co.*, 441 N.W.2d 569, 572 (Minn. App. 1989), *review denied* (Minn. July 27, 1989). "However, an appellate court may review . . . the composition of special verdict questions to determine whether there is an error of fundamental law or controlling principle . . . ." *Estate of Hartz v. Nelson*, 437 N.W.2d 749, 752 (Minn. App. 1989), *review denied* (Minn. July 12, 1989).

In *State v. Hart*, a man broke into a woman's house and raped her while her children were sleeping in another room. 477 N.W.2d 732, 734-35 (Minn. App. 1991), *review denied* (Minn. Jan. 16, 1992). This court stated:

> Appellant downplayed the impact of the children's presence since they were sleeping, did not awaken, and the assault took place outside of their bedrooms. However, a crime does not have to take place in front of a child for this to be an aggravating factor. The presence of a child in another room is analogous to a reduced physical capacity. *State v. Dalsen*, 444 N.W.2d 582, 584 (Minn. App. 1989), *pet. for rev. denied* (Minn. Oct. 13, 1989).

Id. at 740.

Appellant argues that the recent unpublished cases from this court only allow the children's presence to be an aggravating factor if (1) the offense is committed in the

[2] Appellant did voice his displeasure with the question, arguing that he did not "believe that this mere presence of children necessarily constitutes an aggravating factor in every circumstance." This, however, does not appear to be sufficient for a formal objection.

actual physical presence of the children; or (2) the presence of the children makes the victim more vulnerable.[3] Separate and apart from whether the presence of the children makes the victim more vulnerable, we do not believe the crime has to occur in the physical presence of the children for the aggravating factor to apply as long as it is possible that they could hear or see it based on their location. Nor do we believe that the jury had to determine that the children actually heard or saw the attack in this case particularly since appellant knew the children were present.[4] *See State v. Profit*, 323 N.W.2d 34, 36 (Minn. 1982) ("[C]ommitting the offense in front of the children was a particularly outrageous act and [] while the children maybe were not technically victims of the crime, they were victims in another sense."). In *Profit*, the child did not actually see the sexual assault. The child only saw the defendant walking the victim out of the daycare center while holding a knife to her throat after the victim had been assaulted. The assault had occurred in the bathroom when the defendant got on top of the victim and tried to kiss her. *Id.* at 35.

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[3] *See State v. Vance*, No. A06-2130, 2008 WL 942553, at *5 (Minn. App. Apr. 8, 2008) ("The State need not prove that the child or children actually observed or heard the offense or offenses, so long as they could have, from where they were located"), *review granted* (Minn. June 25, 2008); *Krejce v. State*, No. A05-2406, 2006 WL 3490579, at *2-5 (Minn. App. Dec. 5, 2006) (However, even in *Krejce* this court held that the district court did not abuse its discretion when it found this aggravating factor present even though appellant argued that the children were oblivious to the attack because the children were still in the basement when the attack occurred); *State v. Duncan*, No. CX-01-1400 (Minn. App. Mar. 12, 2002).

[4] Moreover, how would this be proved? Would a three-year old be required to testify that he or she actually saw or heard her mother being raped?

In any event, the children were physically present for a portion of the events surrounding the crime. The victim was partially undressed in front of the children, and appellant yelled at her to continue undressing while the children were present. At that time, appellant informed the children that they would hear their mother cry out, but that she would be alright. Therefore, the district court did not err in the way it phrased the question on the special verdict form. The jury's affirmative answer was a sufficient finding of this aggravating factor to permit the district court to depart from the sentencing guidelines even if the children were not physically present for the entire period of the attack or did not hear and see the actual sexual assault.

II. The district court's instructions regarding this aggravating factor did not direct a verdict for the state.

Appellant argues that because the district court instructed the jury that appellant was guilty of sexual assault, and because the presence of the children in the home was undisputed, the court's instructions had the effect of directing a verdict in favor of the state on this aggravating factor. We disagree.

The jury was told that appellant had been convicted of sexual assault. And although the presence of the children in the home was uncontested, the jury still had to decide if that fact had been proven beyond a reasonable doubt. The jury was never instructed that they must find that there were children in the home.

III. The district court did not improperly inject matters of punishment into the jury's deliberations.

Appellant asserts that the district court erred by informing the jury that its answers on the special verdict form would assist the court in determining appellant's sentence.

District courts are allowed "considerable latitude" in the selection of language for the jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explain[] the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). "An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001) (citations omitted).

"It has long been the rule in Minnesota that sentencing is not a proper consideration for the jury." *State v. Chambers*, 589 N.W.2d 466, 474 (Minn. 1999). After *Blakely*, however, the jury was drawn into the sentencing realm. In this case, the jury was told four times that its answers on the special verdict form would assist the court in determining appellant's sentence. But the jury was not told the extent of the potential sentence or how its findings would affect the ultimate sentence. The instruction was merely given to help the jury understand its function. In fact, the wording of this instruction was taken directly from the Criminal Jury Instruction Guides. *See* 10 *Minnesota Practice*, CRIMJIG 8.01 (2006) ("Your answers will assist the Court in determining defendant's sentence."). Error is never presumed on appeal, and appellant's argument is unavailing.

IV. The district court did not abuse its discretion by imposing an upward durational departure and consecutive sentences.

Appellant argues that the district court abused its discretion by imposing an upward durational departure as well as consecutive sentences because a single aggravating factor does not amount to severe, aggravating circumstances. Departures

from presumptive sentences are reviewed under an abuse of discretion standard, but there must be "substantial and compelling circumstances" in the record to justify a departure. *Rairdon v. State*, 557 N.W.2d 318, 326 (Minn. 1996). The decision of the district court to impose consecutive sentences will not be reversed absent a clear abuse of discretion. *State v. Rannow*, 703 N.W.2d 575, 577 (Minn. App. 2005).

Appellant did not challenge his sentences for assault or solicitation to practice prostitution in his first appeal. Respondent argues that by failing to raise a challenge at that time, appellant has waived his ability to challenge them now. *See State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976) ("It must be emphasized, however, that where direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief."). Furthermore, appellant did not raise these issues in the trial court, and they generally cannot be raised for the first time on appeal. *State v. Sorenson*, 441 N.W.2d 455, 459 (Minn. 1989). But Minnesota Rule of Criminal Procedure 27.03, subd. 9 provides that "[t]he court may at any time correct a sentence not authorized by law."[5]

Under the 2003 Minnesota Sentencing Guidelines, crimes against a person could be sentenced consecutive to one another even where the offenses involved a single victim and a single course of action. Minn. Sent. Guidelines II.F (2003). However, a Guidelines comment states:

> Consecutive sentencing is permissive under these circumstances even when the offenses involve a single victim

[5] It does not appear that *Knaffla* would apply, as this is not an appeal from the denial of postconviction relief.

> involving a single course of conduct. However, consecutive sentencing is not permissive under these circumstances when the court has given an upward durational departure on any of the current offenses. The Commission believes that to give both an upward durational departure and a consecutive sentence when the circumstances involve one victim and a single course of conduct can result in disproportional sentencing unless additional aggravating factors exist to justify the consecutive sentence.

Minn. Sent. Guidelines cmt. II.F.04 (2003).

Caselaw has clarified that "additional aggravating factors" requires "severe aggravating factors" to justify an upward durational departure and consecutive sentencing. *See State v. Hearn*, 647 N.W.2d 27, 33 (Minn. App. 2002); *State v. Jackson*, 596 N.W.2d 262, 267 (Minn. App. 1999), *review denied* (Minn. Aug. 25, 1999).

In this case, however, the district court determined that each crime constituted a separate behavioral incident. "The district court's decision of whether multiple offenses are part of a single behavioral incident is a fact determination and should not be reversed unless clearly erroneous." *State v. Carr*, 692 N.W.2d 98, 101 (Minn. App. 2005). "But where the facts are established, the determination is a question of law subject to de novo review." *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001). To determine whether multiple offenses arise from a single behavioral incident, we consider whether the offenses "(1) arose from a continuous and uninterrupted course of conduct, (2) occurred at substantially the same time and place, and (3) manifested an indivisible state of mind, or were motivated by a single criminal objective." *State v. Suhon*, 742 N.W.2d 16, 24 (Minn. App. 2007), *review denied* (Minn. Dec. 4, 2007).

The sexual assault occurred on Saturday. The victim was first threatened with a knife following the sexual assault.[6] She was forced to attempt to prostitute herself the following day by phone and eventually in person at the University. The offenses were certainly connected, but nonetheless they appear to have been individual acts, not motivated by a single criminal objective, and did not arise from a continuous and uninterrupted course of conduct. Because these offenses did not constitute a "single course of conduct," the comment to Minn. Sent. Guidelines II.F.04 does not apply. That being the case, consecutive sentencing was permissive under the Sentencing Guidelines without a finding of additional severe aggravating factors. The district court did not abuse its discretion by imposing an upward durational departure as well as consecutive sentences.

V. The district court did not abuse its discretion by imposing three separate consecutive sentences.

Appellant argues that because these three offenses were committed as part of a single behavioral incident, it was error to impose all three sentences consecutive to each other. The decision of the district court to impose consecutive sentences will not be reversed absent a clear abuse of discretion. *Rannow*, 703 N.W.2d at 577. We conduct a de novo review of a district court's interpretation of the Minnesota Sentencing Guidelines. *State v. Rouland*, 685 N.W.2d 706, 708 (Minn. App. 2004), *review denied* (Minn. Nov. 23, 2004).

[6] The victim noticed the knife during the sexual assault, but she was not threatened with it until later.

The district court's conclusion that these offenses constituted separate behavioral incidents is not erroneous. However, even assuming the offenses occurred as part of one behavioral incident, appellant is unable to demonstrate that these sentences were improper.

Minn. Stat. § 609.035, subd. 6 (2006) provides an exception to the general single behavioral incident rule and states that a conviction for criminal sexual conduct committed with force or violence "is not a bar to conviction or punishment for any other crime committed by the defendant as part of the same conduct." In such circumstances, moreover, the imposition of consecutive sentences is not a departure from the sentencing guidelines. *Id.* Appellant argues, therefore, that the assault sentence can be served consecutively to the criminal sexual conduct sentence, and the solicitation to practice prostitution sentence can be served consecutively to the criminal sexual conduct sentence, but the assault sentence and the solicitation to prostitution sentence must be served concurrently to each other.

The sentencing guidelines in effect at the time, however, allowed for felony "person crimes" to be sentenced consecutively even when arising from a single course of conduct. Therefore, under appellant's interpretation of Minn. Stat. § 609.035, subd. 6, the statute would conflict with the 2003 Sentencing Guidelines. According to statutory-construction principles, whenever a general provision is in direct conflict with a special provision, the special provision must prevail and shall be construed as an exception to the general provision. Minn. Stat. § 645.26, subd. 1 (2008). Stated in a different way, "[w]hen an irreconcilable conflict exists between two statutory provisions, the more

particular provision controls over the general provision." *Ford v. Emerson Elec. Co.*, 430 N.W.2d 198, 200 (Minn. App. 1988), *review denied* (Minn. Dec. 16, 1988). However, "[w]hen two statutes conflict, we must initially attempt to reconcile the statutes by construing them, if possible, so that effect may be given to both provisions." *Id.* Therefore, the statute should be read to allow for consecutive sentencing when criminal sexual conduct, committed with force or violence, is committed with other "person crimes", even in a single course of conduct. Thus, even if these crimes did arise out of one behavioral incident, consecutive sentencing was permissive per the Sentencing Guidelines and Minn. Stat. § 609.035, subd. 6.

VI. The district court did not err in concluding that the solicitation to practice prostitution conviction was a crime against a person.

Appellant argues that he was entitled to a jury trial to determine if solicitation to practice prostitution was a crime against a person and therefore consecutive sentencing on this conviction was not permissive.[7] *Blakely*'s application to permissive consecutive sentences is a question of law, which we review de novo. *State v. Senske*, 692 N.W.2d 743, 746-49 (Minn. App. 2005), *review denied* (Minn. May 17, 2005).

This court has previously held that *Blakely* does not require a jury to determine factors supporting permissive consecutive sentencing based on a judicial finding that the offenses were crimes against persons. *Senske*, 692 N.W.2d at 748-49. Therefore, there was no need for a jury to make a determination as to whether solicitation to practice prostitution was a crime against a person. Appellant readily concedes this point.

[7] The 2003 Minnesota Sentencing Guidelines allowed "person crimes" to be sentenced consecutively.

Appellant, however, wished to preserve this argument due to the United States Supreme Court's grant of certiorari on a case that may call *Senske* into question. *Oregon v. Ice*, 2008 WL 112170 (March 17, 2008). Oral arguments were heard in *Oregon v. Ice* on October 14, 2008 but an opinion has not yet been issued. Based on the status of the law at this time, no jury determination as to whether solicitation to practice prostitution was a crime against a person was necessary.[8]

VII. Appellant's pro se arguments are unavailing.

Appellant argues in a supplemental pro se brief that his original convictions should be overturned for multiple reasons, including ineffective assistance of trial counsel and conflicting verdicts. Appellant's convictions were affirmed on appeal to this court, and only remanded for compliance with *Blakely*. The jury was told that appellant was guilty of criminal sexual conduct in the first degree and that its answers to the special verdict questions would assist the district court in sentencing appellant. The jurors knew they were not determining guilt and the *Blakely* findings do not alter the status of the underlying convictions.

Affirmed.

[8] Appellant does not argue that the district court's conclusion that solicitation to practice prostitution was a crime against a person was error. He merely argues that he was entitled to have a jury make that determination.