STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2164

State of Minnesota,
Respondent,

vs.

Donald J. Fields,
Appellant.

Filed April 14, 2009
Affirmed
Toussaint, Chief Judge

Kandiyohi County District Court
File No. CR-07-602

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

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Lawrence Hammerling, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Toussaint, Chief Judge; Peterson, Judge; and Randall, Judge.*

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

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

TOUSSAINT, Chief Judge

Appellant Donald J. Fields challenges his domestic-assault sentence, a double durational departure, arguing that the grounds used for the departure were invalid, inapplicable, and unsupported by sufficient evidence. Because we see no abuse of discretion in appellant's sentence, we affirm.

D E C I S I O N

This court reviews departures from the sentencing guidelines for an abuse of discretion; substantial and compelling circumstances must justify a departure. *Rairdon v. State*, 557 N.W.2d 318, 326 (Minn. 1996).

A jury found appellant guilty of domestic assault by strangulation, domestic assault, fifth-degree assault, terroristic threats, theft, fourth-degree criminal damage to property, and driving after revocation. He waived his right to a jury trial on aggravating factors, and the district court found: (1) multiple assaults against the same victim; (2) vulnerability of the victim; (3) violation of the victim's zone of privacy; and (4) assault committed in the presence of a young child. Appellant was sentenced to concurrent 60-month terms, a double durational departure, on his domestic assault and terroristic threats convictions.[1] He challenges the factors used as the basis for the departure.

[1] Appellant was also sentenced to a concurrent prison term of 27 months for the theft and to 90 days in jail for criminal damage to property and driving after revocation. These sentences are not challenged.

1. Multiple Assaults Against the Same Victim

The state sought an upward departure on the grounds of "[c]ontinuing criminal behavior against same victim" and "[c]urrent injury and injury in prior conviction offense." It submitted evidence of appellant's three prior convictions for crimes against this victim: domestic assault on July 31, 1999; second-degree assault on June 29, 2001; and felony domestic assault on February 27, 2003. In the 2001 assault, the victim received second-degree burns from a cigarette lighter that appellant held to her face. The district court concluded that appellant's convictions for domestic assault by strangulation, domestic assault, and terroristic threats were "part of a continuing course of conduct, specifically multiple assaults against the same victim."

A prior conviction for an offense in which a victim was injured may, of itself, justify a double durational departure. *State v. O'Brien*, 369 N.W.2d 525, 527 (Minn. 1985) ("The [double durational] departure was permissible because defendant was convicted of an offense in which the victim was injured and he has a prior felony conviction for an offense in which the victim was injured."). Moreover,

> Minnesota Sentencing Guidelines II.D.2.b.(3) states that if the defendant's conviction is for an offense in which the victim was otherwise injured, and there is a prior felony conviction for . . . an offense in which the victim was injured, this prior conviction is an aggravating factor supporting upward departure. In addition, this court has held that an appellant's prior conviction for a crime involving injury to a victim alone may be sufficient to justify an upward durational departure. This is so because repeated crimes against persons pose a greater threat to society than repeated property crimes.

State v. Petschl, 692 N.W.2d 463, 472-73 (Minn. App. 2004) (quotations and citations omitted), *review denied* (Minn. Jan. 20, 2003). Thus, appellant's prior conviction for an

assault in which this victim was injured itself justifies the double durational departure.[2] However, in the interests of completeness, we will consider the other aggravating factors found by the district court.

2. Victim's Vulnerability

Appellant and the victim are the parents of a five-year-old son, who lives with the victim. He was in the apartment while the assault occurred and remained there during a brief period when the victim ran to a neighbor's to get help, but appellant followed her and dragged her back to the apartment. The district court found that the "victim was particularly vulnerable because the victim was responsible for the care of a young child: she was unable to flee for her own safety because she needed to ensure the safety of the child." The presence of a child may be an aggravating factor because it is analogous to reduced physical capacity of the victim, who cannot leave the scene because of the child. *State v. Johnson*, 450 N.W.2d 134, 135 (Minn. 1990) (where assailant was acquaintance of mothers of infants whom victim was babysitting and "particular vulnerability of the victim [was] due [in part] to the fact that she was not free to try to flee because she had a responsibility to the infants"); *State v. Hart*, 477 N.W.2d 732, 740 (Minn. App. 1991) (where victim was afraid to scream or struggle because her sons might awaken and be injured . . . [and] afraid of leaving [assailant] alone in the home with the children"), *review denied* (Minn. Jan. 16 1992); *State v. Dalsen*, 444 N.W.2d 582, 584 (Minn. App.

[2] Appellant argues that this factor may not be used because the prior conviction was also used in the calculation of his criminal history score. But a criminal history score is always based on prior convictions. Minn. Sent. Guidelines II.D.2.b.(3) would be meaningless if it excluded prior convictions that were used to calculate the criminal history score.

1989) (where victim "was not free to extricate herself and run because the child would be left with her assailant," who was husband of victim's friend), *review denied* (Minn. Oct. 13, 1989).

Appellant opposes this factor on two grounds. He argues that it should apply only when the assailant is not known to the victim: here, because the victim and he knew each other and the child was their son, the victim would not have feared to leave the son with him. *But see Johnson*, 450 N.W.2d at 135 (assailant was acquaintance of mothers of children whom victim was babysitting); *Dalsen* 444 N.W.2d at 584 (where assailant was known to victim as her friend's husband). The fact that appellant was not unknown to the victim does not mean that she would have felt safe leaving a child with him, particularly when appellant had been assaulting her.

Appellant also argues that the victim did not remain in the apartment or return to it because she was concerned about her son but because appellant prevented her from leaving and dragged her back. But the victim, whose trial testimony was chiefly an attempt to exonerate appellant, testified that "I did want him [her son] to go outside of the house . . . [s]o that we could leave." The district court's finding that the victim's son made her more vulnerable to appellant's assault was not an abuse of discretion.

3. Violation of Zone of Privacy

Appellant does not dispute that the assault took place in the victim's apartment but argues that the zone-of-privacy aggravating factor is defeated by the fact that the victim initially invited him into the apartment. But during the course of the assault, the victim attempted to lock appellant out of her apartment, and appellant broke the door to prevent

this. Clearly, he was not an invited guest in her home then or thereafter. Moreover, when an individual who is invited into a home as a guest commits an assault while in the home, an alternate aggravating factor, exploitation of trust, may apply. *See State v. Volk*, 421 N.W.2d 360, 366 (Minn. App. 1988) (holding that, when victim had invited murderer into his home, this was not invasion of privacy but "could be considered an exploitation of trust . . . [which] may be an aggravating factor"), *review denied* (Minn. May 18, 1988). Arguably, appellant exploited the victim's trust in him. The district court did not abuse its discretion in finding that appellant's violation of the victim's zone of privacy was an aggravating factor.

4. Presence of a Child

The district court found that appellant "committed the assault in the presence of a young child, exposing the child to the display of violence inflicted upon one parent by the other parent." Appellant argues that there is not sufficient evidence showing that the child actually saw the assault, which took place in the bedroom, because the child was in the living room. But evidence indicates that the child did see the assault.

An officer testified that the wall against which appellant hit the victim's head was near the entry to the apartment, which is in or near the living room. The victim told the officer who interviewed her shortly after the assault that "[appellant] just started banging my head on the wall and . . . my son was watchin'." She also said, "And I just kept telling my son like three or four times to go upstairs and knock on the door and tell them to call the police and [appellant] . . . kept stoppin' my son and make him sit down." She answered the question "[W]as your son in here [where the assault began]?" with "Yes,"

and said, "[Appellant] kept telling my son to leave the room." She also told the officer that "[Appellant] grabbed my son and he's putting his hands on my son I'm telling my son to call the police," and that she told appellant, "[Y]ou're beating me up in front of my son." The district court's finding that the presence of a child was an aggravating factor did not constitute an abuse of discretion.

Affirmed.