STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0028

State of Minnesota,
Respondent,

vs.

Dena L. Hankerson,
Appellant.

Filed April 7, 2009
Affirmed
Johnson, Judge

Goodhue County District Court
File No. K3-02-1092

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Stephen Betcher, Goodhue County Attorney, Goodhue County Justice Center, 454 West Sixth Street, Red Wing, MN 55066 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, 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

JOHNSON, Judge

A Goodhue County jury found Dena L. Hankerson guilty of seven offenses relating to the sexual assault of a 12-year-old girl. For the conviction of first-degree criminal sexual conduct, the district court imposed a sentence of 264 months of imprisonment, an upward departure of 120 months from the presumptive guidelines sentence of 144 months, based on a sentencing jury's findings of four aggravating factors. On appeal, Hankerson argues that the district court erred in instructing the sentencing jury and erred by relying on aggravating factors that are impermissible in this case. We conclude that the district court did not err in instructing the sentencing jury. We also conclude that two of the aggravating factors on which the district court relied when departing from the presumptive guidelines sentence are impermissible in this case. We nonetheless conclude that the upward departure is justified by the two permissible aggravating factors. Therefore, we affirm.

FACTS

On June 28, 2002, Hankerson forced her way into a home where a 12-year-old girl was babysitting two younger children. After leading the girl to a bedroom and closing the door, Hankerson asked the girl to remove her shirt. When the girl refused, Hankerson punched her in the face and told her that she had a gun that she would use to kill the girl and the two younger children if she did not comply. Hankerson then forced the girl onto a bed and choked her before sexually assaulting her. During the sexual assault, Hankerson kissed the girl on the mouth, licked and sucked the girl's genital area, forced

the girl to perform cunnilingus on her, penetrated the girl's vagina with her finger, and sucked on the girl's breasts. Upon leaving the home, Hankerson instructed the girl to not tell anyone what had happened. After Hankerson left, the girl called her mother, who called the police. Later that evening, the police stopped Hankerson when she was seen driving slowly past the residence. Hankerson was arrested when the girl identified her as the perpetrator.

In July 2002, the state charged Hankerson with eight offenses: (1) first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2000); (2) second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a) (2000); (3) first-degree burglary in violation of Minn. Stat. § 609.582, subd. 1(c) (2000); (4) first-degree burglary in violation of Minn. Stat. § 609.582, subd. 1(a) (2000); (5) terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2000); (6) fifth-degree criminal sexual conduct in violation of Minn. Stat. § 609.3451, subd. 1 (2000); (7) fifth-degree assault in violation of Minn. Stat. § 609.224, subd. 1(2) (2000); and (8) driving after revocation in violation in Minn. Stat. § 171.24, subd. 2 (2000). Hankerson pleaded guilty to the driving-after-revocation charge. After a four-day trial in September 2002, a jury found her guilty of each of the remaining seven counts.

The district court has sentenced Hankerson on two occasions. In December 2002, the district court initially sentenced her to 58 months for the burglary conviction, 18 months for the terroristic-threats conviction, and 264 months for the conviction of first-degree criminal sexual conduct, to be served concurrently. The district court did not impose sentences on the remaining convictions because they were part of the same

behavioral incident. *See* Minn. Stat. § 609.035, subd. 1 (2000). On direct appeal, this court affirmed the conviction but reversed the sentence for terroristic threats, holding that it too arose from the same behavioral incident as the sexual assault. *State v. Hankerson*, No. A03-131, 2004 WL 771304, at *2-3 (Minn. App. Apr. 13, 2004), *review denied* (Minn. June 15, 2004).

In June 2004, the United States Supreme Court issued its opinion in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). In August 2005, Hankerson filed a petition for postconviction relief in which she challenged, based on *Blakely*, the upward departure on the sentence for first-degree criminal sexual conduct. In January 2006, the postconviction court denied Hankerson's request to vacate the sentence but granted relief in the form of a sentencing jury trial. The supreme court granted accelerated review and, in October 2006, held that the district court was authorized to empanel a sentencing jury and to use the sentencing jury's findings when imposing a new sentence. *State v. Hankerson*, 723 N.W.2d 232, 236 (Minn. 2006), *cert. denied*, 128 S. Ct. 42 (2007).

In August 2007, the state requested a sentencing jury trial pursuant to Minn. Stat. § 244.10, subd. 5 (Supp. 2005). The state alleged four aggravating factors: (1) multiple acts of penetration; (2) particular cruelty; (3) use of force, threats, and coercion; and (4) particular vulnerability. At the conclusion of a sentencing trial held on three days in August 2007, the jury returned a special verdict form in which it found all four factors alleged by the state. At a hearing in October 2007, the district court expressly relied on all four aggravating factors and again sentenced Hankerson to 264 months on the first-degree criminal sexual conduct conviction, which is an upward durational departure of

120 months from the presumptive guidelines sentence of 144 months. The district court also imposed a concurrent 58-month prison sentence on the burglary conviction. Hankerson appeals.

D E C I S I O N

Hankerson makes two types of arguments attacking her 264-month sentence for the conviction of first-degree criminal sexual conduct. First, she asserts various challenges to the instructions that were given to the sentencing jury. Second, she challenges the district court's consideration of the four aggravating factors that were found by the sentencing jury.

I. Sentencing Jury Instructions

Hankerson first argues that the district court erred in five different ways when instructing the sentencing jury. We review jury instructions "in their entirety to determine whether they fairly and adequately explain the law of the case." *State v. Peterson*, 673 N.W.2d 482, 486 (Minn. 2004). "A jury instruction is erroneous if it materially misstates the law." *State v. Goodloe*, 718 N.W.2d 413, 421 (Minn. 2006). 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). This court reviews jury instructions for an abuse of discretion. *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005).

A. Elements of Offenses of Convictions

Hankerson argues that the district court erred by not instructing the jury on the elements of each of the offenses of which she was convicted. The district court informed

the jury only of the elements of first-degree criminal sexual conduct but not the other seven offenses.

At trial, Hankerson did not request an instruction concerning the elements of each of the charged offenses. In general, the failure to object to jury instructions or to propose an alternative instruction constitutes forfeiture of the issue. *State v. White*, 684 N.W.2d 500, 508 (Minn. 2004). Under the plain error doctrine, however, we may consider such an issue if there is an error, the error is plain, and the error affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it is clear or obvious under current law, *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002), and an error is clear or obvious if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the first three requirements of the plain error test are satisfied, we "correct the error only if it seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005) (quotation omitted).

Hankerson contends that the absence of instructions concerning the elements of the other seven offenses was erroneous because it allowed the sentencing departure to be "based upon facts underlying elements of [the other] offenses." Hankerson relies on *State v. Jones*, 745 N.W.2d 845 (Minn. 2008), to support her argument. In *Jones*, the supreme court held that a sentencing departure could not be based on facts underlying other convictions. *Id*. at 851. The *Jones* opinion does not require jury instructions to ensure that a departure is not based on facts that supported convictions of other offenses. *See id*. at 849-51. The caselaw suggests that it is the duty of the district court -- not the

jury -- to determine whether a particular aggravating factor is based on facts that support convictions of other offenses or is otherwise impermissible in a particular case. *See, e.g.*, *State v. Jackson*, 749 N.W.2d 353, 357 (Minn. 2008). Hankerson has cited no caselaw requiring jury instructions on the elements of each offense of which a defendant has been convicted. Thus, the district court did not err by not instructing the sentencing jury on the elements of each of the offenses of which Hankerson was convicted.

B. Definition of Particular Cruelty

Hankerson argues that the district court erred by giving the sentencing jury an incorrect definition of particular cruelty. The district court instructed the jury that "particular cruelty is cruelty of a kind not usually associated with the commission of the offense in question." Hankerson requested that the district court define particular cruelty as "conduct that is significantly more cruel than usually associated with the offense" for which Hankerson was convicted.

Hankerson relies on *State v. Weaver*, 733 N.W.2d 793 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007), in which this court stated that a district court "needs to precisely define 'particular cruelty'" and further stated that, generally, "a defendant's conduct must be significantly more cruel than that usually associated with the offense of which he was convicted." *Id*. at 803. But we "decline[d] to provide an exact definition of the phrase 'particular cruelty'" and, instead, decided to "leave the matter to the district court." *Id*.

In this case, the district court's definition of particular cruelty appears to be taken from *State v. Schantzen*, 308 N.W.2d 484 (Minn. 1981), in which the supreme court

affirmed a sentencing departure based on particular cruelty, stating that "[t]he cruelty was of a kind not usually associated with the commission of the offense in question." *Id.* at 487. Because the district court's definition closely tracks the language of *Schantzen*, the instruction does not materially misstate the law. Thus, the district court did not abuse its discretion in defining "particular cruelty."

C. Definition of Particular Vulnerability

Hankerson argues that the district court erred by giving the sentencing jury an erroneous definition of particular vulnerability. The district court's instructions stated, "Any vulnerability attributable solely to [the girl's] age is not an aggravating factor. But age in conjunction with other facts may constitute particular vulnerability."

Hankerson contends that the district court should have instructed the jury that it was not permitted to consider Hankerson's abuse of a position of trust or authority over the girl. Hankerson relies on *Taylor v. State*, 670 N.W.2d 584 (Minn. 2003), where the supreme court held that the victim's age and the defendant's position of authority or trust over the victim were inappropriate bases for departure because the legislature already had considered those factors when determining the elements of first-degree criminal sexual conduct. *Id.* at 589.

At the sentencing trial, Hankerson did not request an instruction concerning abuse of position of authority or trust. Rather, Hankerson requested only that the district court modify its definition of particular vulnerability to say that the jury may not consider whether the girl was particularly vulnerable due to "age, infirmity, reduced physical

capacity and reduced mental capacity." *See* Minn. Sent. Guidelines II.D.2(b)(1). Thus, we consider this argument under a plain error standard. *See Griller*, 583 N.W.2d at 740.

The state contends that Hankerson's argument is inapplicable because the state did not argue at the sentencing trial that the girl's vulnerability was based on an abuse-of-trust or abuse-of-authority theory. The state is correct. The prosecutor's argument to the sentencing jury on particular vulnerability focused on the girl's position as a caretaker for younger children. The prosecutor summarized her closing argument on the particular vulnerability factor by stating:

> So when you look at the facts, look at the fact that [the girl] was being courageous, courageous in the face of her own life being threatened, courageous in the face that she was punched and choked and threatened and sexually assault[ed], she was raped by Ms. Hankerson that day, and she did that to protect someone, two little people. And doesn't that make her particularly more vulnerable when you look at it and why she was doing that?

Thus, the district court did not err by giving instructions to the sentencing jury that omitted the issue of abuse of a position of authority or trust.

D. Issue of Punishment

Hankerson argues that the district court erred by instructing the jury that its answers to questions on the special verdict form "will assist this Court in determining the Defendant's sentence." Hankerson contends that this portion of the instructions improperly interjects "matters of punishment into the jury's deliberations." Because Hankerson did not object to the statement at the sentencing trial, we review for plain error. *See Griller*, 583 N.W.2d at 740.

Hankerson cites several cases in support of her argument that sentencing is not a proper consideration for the jury. *See, e.g.*, *State v. Chambers*, 589 N.W.2d 466, 474 (Minn. 1999); *State v. Finley*, 214 Minn. 228, 231-32, 8 N.W.2d 217, 218 (1943). The cases Hankerson cites, however, concern instructions to a jury at the guilt phase of trial, not the sentencing phase. The essential purpose of a sentencing jury is to assist the district court with sentencing by determining whether aggravating factors exist. *See Blakely*, 542 U.S. at 303, 124 S. Ct. at 2537; *Hankerson*, 723 N.W.2d at 234. In fact, the model sentencing jury instructions adopted in response to *Blakely* include a comparable instruction. *See* 10 *Minnesota Practice* CRIMJIG 8.01 (2006). Furthermore, the supreme court has implicitly approved a similar instruction, which provided as follows:

> A separate jury determination is required when a defendant has been found guilty of a crime and the state seeks an increase in the defendant's sentence above the presumptive sentence provided by law. In making that determination the trial jury shall consider those factors relevant to the question of the increased sentence. If you unanimously find beyond a reasonable doubt that one of the following relevant factors exists then the judge may increase the defendant's sentence above the presumptive sentence provided by law. Final determination whether to increase the defendant's sentence remains with the judge.

State v. Chauvin, 723 N.W.2d 20, 23 (Minn. 2006). Although this instruction was not directly challenged in *Chauvin*, the supreme court approved of the general approach. *Id.* at 29. Thus, the district court did not err by informing the sentencing jury that its verdict would assist the district court in determining Hankerson's sentence.

E. Multiple Acts of Penetration

Hankerson argues that the district court erred in its instruction concerning multiple acts of penetration. Hankerson's argument concerning the instruction is intertwined with her argument that multiple acts of penetration is not a valid departure factor. Both issues are discussed below in part II.D.

II. District Court's Reliance on Jury's Findings

Hankerson also argues that the district court, when it departed upward from the guidelines range, relied on factors that are impermissible in light of the facts of this case.

A district court must impose a sentence within the applicable sentencing guidelines range unless there are "substantial and compelling circumstances" to warrant a departure. Minn. Sent. Guidelines II.D. Substantial and compelling circumstances are present when "the defendant's conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question." *State v. Misquadace*, 644 N.W.2d 65, 69 (Minn. 2002). The guidelines provide a nonexclusive list of aggravating factors that may be used as reasons for departure. The list includes, among other factors, a victim's particular vulnerability known to the offender and particularly cruel treatment of the victim. Minn. Sent. Guidelines II.D.2.b. The issue whether a particular reason for an upward departure is permissible is a question of law, which we review de novo. *Jackson*, 749 N.W.2d at 357. A district court's decision to depart from the sentencing guidelines based on permissible grounds is reviewed for an abuse of discretion. *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001).

As stated above, the jury found four aggravating factors: particular vulnerability; particular cruelty; use of force, threats, and coercion; and multiple acts of penetration. Hankerson challenges each of the four factors.

A. Particular Vulnerability

Hankerson argues that the district court erred by relying on the sentencing jury's finding that the girl was particularly vulnerable. At sentencing, the district court stated:

> Age. Age is an element of the offense, but in this case not only was [the girl] 12 years old, she was baby-sitting in somebody else's home. And although I didn't find invasion of a zone of privacy for a reason for upward departure in 2002, it certainly goes to particular vulnerability.

Hankerson contends that, by making reference to "zone of privacy," the district court "transformed the jury's finding into one that was not made."

The district court applied the jury's finding of particular vulnerability without considering the aggravating factor of invasion of zone of privacy, which was not submitted to the sentencing jury. The district court expressly stated that it previously had *not* relied on the zone-of-privacy factor and then noted merely that zone of privacy bears similarities to particular vulnerability. The district court's reliance on particular vulnerability is permissible because particular vulnerability is specifically recognized by the sentencing guidelines and because the particular vulnerability factor has been applied in similar circumstances. *See* Minn. Sent. Guidelines II.D.2.b.(1); *see also State v. Hart*, 477 N.W.2d 732, 740 (Minn. App. 1991) (presence of children during home invasion and sexual assault of children's mother), *review denied* (Minn. Jan. 16, 1992); *State v. Dalsen*, 444 N.W.2d 582, 584 (Minn. App. 1989) (presence of child in home "increased

the parent's vulnerability" because she "was not free to extricate herself and run"), *review denied* (Minn. Oct. 13, 1989). As discussed above in part I.C., the state argued to the jury that the girl was particularly vulnerable because she was babysitting for younger children. Thus, the district court did not err in considering the jury's finding of particular vulnerability when sentencing Hankerson.

B. Particular Cruelty

Hankerson argues that the district court erred by relying on the sentencing jury's finding that Hankerson engaged in particular cruelty. More specifically, Hankerson argues that the facts underlying the finding of particular cruelty -- that Hankerson punched and choked the girl and threatened the girl and the other children -- are elements of other crimes of which she was convicted and, thus, cannot support an enhanced sentence.

In *Jones*, the supreme court reiterated the "boundaries" of a "proper departure" by identifying four types of improper departure grounds. 745 N.W.2d at 849. First, "'[t]he reasons used for departure must not themselves be elements of the underlying crime.'" *Id*. (alteration in original) (quoting *State v. Blanche*, 696 N.W.2d 351, 378-79 (Minn. 2005)). Second, "[d]epartures cannot be based on uncharged or dismissed offenses." *Id*. Third, "[d]epartures cannot be based on conduct underlying an offense of which the defendant was acquitted." *Id*. Fourth, "conduct underlying one conviction cannot be relied on 'to support departure on a sentence for a separate conviction.'" *Id*. (quoting *State v. Williams*, 608 N.W.2d 837, 840 (Minn. 2000)).

In her closing argument, the prosecutor stated:

> She punched [the girl] twice on either side of her face. When that didn't work she slowly advanced her towards, cornered her so she could not get away, she could not run, she could not fight, she could not overpower her attacker, the Defendant in this case, and she pushed her down on the bed to make sure that she could not fight back and choked her.
>
> And to make sure that she could not fight back, she could not refuse to submit, she threatened her life, she threatened the life of everyone in that household, and then she forced her to submit to sexual acts.

Hankerson contends that the facts recited by the prosecutor in closing argument satisfy elements of the offenses of (1) first-degree burglary, (2) fifth-degree assault, and (3) terroristic threats, three offenses of which she was convicted. An analysis of the elements of those offenses, as required by *Jones*, supports Hankerson's argument. First, the offense of first-degree burglary requires evidence that a defendant "enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building" and "the building is a dwelling and another person, not an accomplice, is present in it when the burglar enters or at any time while the burglar is in the building" or "the burglar assaults a person within the building or on the building's appurtenant property." Minn. Stat. § 609.582, subd. 1(a), (c). Second, the offense of fifth-degree assault requires evidence that a defendant "intentionally inflicts or attempts to inflict bodily harm upon another." Minn. Stat. § 609.224, subd. 1(2). Third, the offense of terroristic threats requires evidence that a defendant "threatens . . . to commit any crime of violence with purpose to terrorize another." Minn. Stat. § 609.713, subd. 1.

Hankerson's punching and choking of the girl would satisfy certain elements of both first-degree burglary and fifth-degree assault. Hankerson's threatening of the girl and the other children would satisfy elements of terroristic threats. The supreme court has held that "conduct underlying one conviction cannot be relied on 'to support departure on a sentence for a separate conviction.'" *Jones*, 745 N.W.2d at 849 (quoting *Williams*, 608 N.W.2d at 840). As a consequence, Hankerson's acts of assaulting and threatening the girl are impermissible bases for departure. Thus, in light of supreme court caselaw, the district court erred by considering the jury's finding of particular cruelty as a ground for the upward departure. *Id.*; *see also Jackson*, 749 N.W.2d at 357-58.

C. Use of Force, Threats, and Coercion

Hankerson argues that the district court erred by relying on the sentencing jury's finding that Hankerson used force, threats, and coercion during her commission of first-degree criminal sexual conduct. More specifically, Hankerson argues that the facts underlying the finding of use of force, threats, and coercion -- that Hankerson used physical force to restrain and coerce the girl into compliance with her demands and threatened harm to both the girl and the other children -- are elements of other crimes of which she was convicted, namely, first-degree burglary, fifth-degree assault, and terroristic threats. This argument is essentially the same argument that Hankerson made concerning the particular cruelty factor, and the facts underlying each factor are essentially the same. *See supra* part II.B.

In her closing argument, the prosecutor set forth the evidence supporting this factor:

> If you look at the threats that were made, they are significant. [The girl] was in fear of her life. *I have a gun, I'm going to shoot you, and I'm going to shoot the girls in the next room*. This is one of the most significant threats . . . that can be leveled against a child.
>
> Does it matter that she didn't see a gun? No, because everything that Dena Hankerson had threatened to do she had carried out that far. One of her requests, *I'll give you money to do what I want. Do you want to get high? This will be fun.* When that didn't work, what did she do? *I'm going to hit you.* When that didn't work she hit her. *Stop crying. Shut up. If you don't shut up I'm going to hit you again*. And she did. *If you don't do what I want you to do, I'm going to make you do it.* By this time, if you recall, she had already been hit twice, she had been advanced, backed onto a bed, pushed down, choked with her airway restricted, and she leveled the ultimate threat, her life.

The facts on which the state relied in proving the aggravating factor of use of force, threats, and coercion also satisfy elements of first-degree burglary, fifth-degree assault, and terroristic threats, which are three of Hankerson's other convictions. Thus, in light of supreme court caselaw, the district court erred by considering the jury's finding of use of force, threats, and coercion as a ground for the upward departure. *See Jackson*, 749 N.W.2d at 357-58; *Jones*, 745 N.W.2d at 849.

D. Multiple Acts or Forms of Penetration

Hankerson argues that the district court erred by relying on the sentencing jury's finding that Hankerson engaged in "multiple acts of sexual penetration." The argument is based on her contention that the district court erroneously asked the jury to determine whether "multiple acts of sexual penetration," rather than "multiple forms of penetration," occurred. Although "multiple forms of penetration" in a single incident is a valid departure ground, "multiple acts of sexual penetration" would not be a valid

departure ground because it would constitute uncharged conduct. *See State v. Adell*, 755 N.W.2d 767, 773-74 (Minn. App. 2008), *review denied* (Minn. Nov. 25, 2008).

The district court instructed the jury on this issue as follows:

> Did the Defendant Dena Hankerson commit multiple acts of sexual penetration in committing the offense against [the girl]? Cunnilingus constitutes sexual penetration if there is any contact between the female opening of one person and the mouth, tongue or lips of another person. Any intrusion, however slight, of any part of one person's body into the genital opening of another person's body constitutes sexual penetration.

In her closing argument, the prosecutor stated as follows:

> Now you look at it, and the act of sexually penetrating a child could be accomplished by just one of the methods that Hankerson did to [the girl]. For example, she could have just penetrated [the girl's] vagina with her finger. That would have been enough. She could have just forced [the girl] to lick and suck her vagina one time. And that standing alone could have been enough. She could have just licked and sucked [the girl's] vagina and not required her to do anything to the body of Hankerson. That standing alone would have been enough. . . . This was an act that was brutal and vicious and multiple attacks on this child, multiple acts of penetration above and beyond what the law requires a child to endure. Multiple acts of penetration, this is what makes it significantly more serious.

Hankerson's argument focuses on the district court's use of the word "acts" instead of the word "forms." The state contends that, in this case, the term "multiple acts of penetration" was used to represent the concept of "multiple forms of penetration." The state points out that the jury was asked to determine whether Hankerson engaged in multiple types of penetration in a single incident. In fact, there was evidence of only one incident; there was no allegation that Hankerson had assaulted the girl in multiple

incidents. Although the use of the word "forms" is proper and preferable, the jury's finding is clear in light of the evidence, the instructions, and the arguments. The jury clearly was not misled into believing that it was being asked to determine whether Hankerson engaged in penetration of the girl on multiple occasions. Multiple forms of penetration in a single behavioral incident is a valid departure ground. *Adell*, 755 N.W.2d at 774-75; *see also Rairdon v. State*, 557 N.W.2d 318, 327 (Minn. 1996); *State v. Dietz*, 344 N.W.2d 386, 389 (Minn. 1984); *State v. Van Gorden*, 326 N.W.2d 633, 635 (Minn. 1982); *State v. Morales-Mulato*, 744 N.W.2d 679, 692 (Minn. App. 2008), *review denied* (Minn. Apr. 29, 2008); *State v. Sebasky*, 547 N.W.2d 93, 101 (Minn. App. 1996), *review denied* (Minn. June 19, 1996). Thus, the district court did not err in considering the jury's finding of multiple "acts" of penetration -- which, in this case, means multiple forms of penetration -- in sentencing Hankerson.

E. Appellate Remedy

In light of the foregoing analysis, the district court's upward departure was based on two permissible aggravating factors and two aggravating factors that are impermissible in this case. The question then arises whether Hankerson is entitled to a remedy. In her brief, Hankerson asks this court to reverse and remand the case to the district court for imposition of the presumptive guidelines sentence. In its responsive brief, the state contends that "even if this Court concludes that one or more of the aggravating factors were improper, the existence of just one aggravating factor is sufficient to justify a departure."

Under long-established caselaw, if a district court's reasons for a departure are stated on the record, an appellate court must determine whether the stated reasons justify the departure. *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985). If a district court has given a single reason for a departure, we determine whether that reason justifies the departure; if so, the departure will be affirmed. *See, e.g.*, *State v. Jeno*, 352 N.W.2d 82, 85 (Minn. App. 1984) (affirming upward departure based on one valid aggravating factor). If a jury has performed the necessary factfinding, we usually "restrict our review . . . to those facts that have been found by the sentencing jury" and consider whether the district court abused its discretion when determining that the factors found to exist "constitute proper aggravating factors that justify an enhanced sentence." *Adell*, 755 N.W.2d at 772. A departure is justified if the reason or reasons stated are proper and if the severity of the sentence is within the district court's broad discretion. *See State v. Shattuck*, 704 N.W.2d 131, 139-40 (Minn. 2005); *Reece*, 625 N.W.2d at 824; *State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981).

If a district court has stated more than one reason for a departure, and if each of the stated reasons is a permissible basis of departure, and if the stated reasons collectively justify the departure, the departure will be affirmed. *See Williams*, 361 N.W.2d at 844; *see also State v. Back*, 341 N.W.2d 273, 277 (Minn. 1983) (affirming upward departure based on three valid reasons); *Morales-Mulato*, 744 N.W.2d at 691-92 (affirming upward departure based on two valid reasons); *State v. Copeland*, 656 N.W.2d 599, 604 (Minn. App. 2003) (affirming upward departure based on three valid reasons), *review denied* (Minn. Apr. 29, 2003).

If a district court has stated more than one reason for a departure, and if a reviewing court determines that none of the stated reasons is proper, the departure usually must be reversed. *See Jackson*, 749 N.W.2d at 358 (reversing upward departure based on two invalid reasons and remanding for imposition of presumptive sentence or empaneling of sentencing jury); *State v. Thao*, 649 N.W.2d 414, 424 (Minn. 2002) (reversing upward departure based on two invalid reasons and remanding for resentencing); *State v. McIntosh*, 641 N.W.2d 3, 8-10, 12 (Minn. 2002) (reversing upward departure based on three invalid reasons and remanding for imposition of presumptive sentence) (citing *Williams*, 361 N.W.2d at 844). In that situation, *Blakely* forecloses inquiry into whether other reasons might justify the departure, unless there exists an aggravating factor that was found by the jury but not relied upon by the district court. *State v. Rodriguez*, 754 N.W.2d 672, 685 (Minn. 2008).

The present case is different from the cases described above. The district court stated four reasons for its upward departure, and we have concluded that two of those reasons are permissible and two are impermissible. In this situation, the consistent practice of the supreme court and this court is to affirm the upward departure. *See State v. Hough*, 585 N.W.2d 393, 397 & n.4 (Minn. 1998) (affirming upward departure based on two valid reasons despite one invalid reason); *State v. Givens*, 544 N.W.2d 774, 776 & n.3 (Minn. 1996) (affirming upward departure based on one valid reason without considering one other reason); *State v. Johnson*, 327 N.W.2d 580, 583-84 & n.4 (Minn. 1982) (affirming upward departure based on one valid reason despite state's abandonment or failure to prove validity of three other reasons); *Adell*, 755 N.W.2d at

774-75 (affirming upward departure based on two valid reasons despite one invalid reason); *State v. Dominguez*, 663 N.W.2d 563, 567 (Minn. App. 2003) (affirming upward departure based on one valid reason despite two invalid reasons); *but see Rodriguez*, 754 N.W.2d at 685-86 (P. Anderson, J., concurring) (proposing remand for resentencing in light of uncertainty whether district court would reimpose same sentence); *State v. Thompson*, 720 N.W.2d 820, 832-33 (Minn. 2006) (Hanson, J., dissenting) (suggesting that appellate courts should remand to district courts for resentencing based on discretionary consideration of permissible aggravating factors).

The rule of law that should be applied in this situation is not expressly stated in the cases cited above. In *Hough*, it appears that the appellant did not argue that the district court's reasons did not justify the departure. 585 N.W.2d at 397. In *Givens*, the supreme court concluded that, "on these facts," the upward departure was justified by one of two reasons stated by the district court, and the court then declined to analyze the second reason because the first reason was "sufficient to justify the departure." 544 N.W.2d at 776 n.3. In the similar situation in which a district court relies on an aggravating factor that is comprised of two or more component factors, the supreme court has affirmed departures after concluding that the aggravating factor exists, even though the supreme court based that intermediate conclusion on different components than were relied on by the district court. *Rodriguez*, 754 N.W.2d at 685; *Thompson*, 720 N.W.2d at 831 n.4. It appears, however, that the supreme court has applied different rationale for such a result. In *Thompson*, the court stated generally that a departure should be affirmed so long as "the trial court's reason for departure" is proper and the appellate court concludes that

"the extent of the departure was 'limited to that justified by the reason for departure.'" 720 N.W.2d at 831 n.4 (quoting *Schantzen*, 308 N.W.2d at 487). In *Rodriguez*, the court relied primarily on a line of cases originating with *Williams* and concluded that the record "contains sufficient evidence to justify the departure." 754 N.W.2d at 685 (citing *State v. Losh*, 721 N.W.2d 886, 896 (Minn. 2006) (quoting *McIntosh*, 641 N.W.2d at 8 (quoting *Williams*, 361 N.W.2d at 844))).

We believe that the modes of analysis employed in *Rodriguez* and *Thompson* provide the best guidance for the situation presented by this case. We interpret the caselaw to provide that, in this situation, a reviewing court should affirm an upward departure based on the valid and permissible aggravating factors identified by the district court when pronouncing sentence if those factors justify the decision to depart and the extent of the departure, without regard for the role that impermissible aggravating factors may have played in the district court's departure. Accordingly, we essentially assume in this case that the district court considered and relied on only two aggravating factors, the two that we have deemed permissible. The district court could have obviated this assumption by expressly stating, at the time of pronouncing sentence, whether each of the aggravating factors relied upon is independently sufficient to support the upward departure or, on the other hand, whether the aggravating factors are interdependent in some way. But the district court did not make such a statement. We also interpret the caselaw to neither require nor permit an inquiry into whether a district court would have imposed the same sentence if it had considered only the permissible aggravating factors

or an inquiry into whether the district court is likely to impose the same sentence on remand.[1]

In light of the foregoing caselaw, we proceed to consider whether a departure is justified by the two permissible aggravating factors -- particular vulnerability and multiple forms of penetration. With respect to the factor of particular vulnerability, the evidence shows that Hankerson exploited the girl's position as a babysitter for two younger children by threatening to kill both the girl and the other children if the girl did not submit to Hankerson's demands. By doing so, Hankerson gained greater control over the girl, which facilitated the sexual assault. With respect to the factor of multiple forms of penetration, the evidence shows that Hankerson not only performed cunnilingus on the girl but also forced the girl to perform cunnilingus on her, kissed the girl on her mouth, and digitally penetrated the girl's vagina. By engaging in multiple forms of penetration, Hankerson inflicted more horror on the girl than she otherwise would have inflicted.

[1]In this way, the caselaw is dissimilar to the rule that applies in the federal courts. If a federal district court "relies upon an improper ground in departing from the guideline range, a reviewing court may not affirm a sentence based solely on its independent assessment that the departure is reasonable." *Williams v. United States*, 503 U.S. 193, 201, 112 S. Ct. 1112, 1120 (1992) (construing 18 U.S.C. § 3742(f)). Rather, a court of appeals may affirm the sentence only if it determines, first, that the departure was not "imposed . . . as a result of an incorrect application" of the federal sentencing guidelines and, second, that the "resulting sentence [is not] an unreasonably high or low departure from the relevant guideline range." *Id.* at 202, 112 S. Ct. at 1120. The first part of the inquiry asks whether "the sentence would have been different but for the district court's error," which requires a court of appeals to "decide whether the district court would have imposed the same sentence had it not relied upon the invalid factor or factors." *Id.* at 203, 112 S. Ct. at 1120. The first part of the inquiry is akin to a harmless error test. *Id.* at 203 (citing Fed. R. Crim. P. 52(a)). The second part of the inquiry considers "the amount and extent of the departure in light of the grounds for departing" and requires a court of appeals to determine whether the valid reasons given by the district court "are sufficient to justify the magnitude of the departure." *Id.* at 203, 204, 112 S. Ct. at 1121.

Together, the conduct supporting these two aggravating factors significantly increased the severity of the crime. Thus, we conclude that these two factors constitute "substantial and compelling circumstances" to warrant a departure, Minn. Sent. Guidelines II.D., and that Hankerson's "conduct in the offense of conviction was significantly more . . . serious than that typically involved in the commission of the crime in question." *See Misquadace*, 644 N.W.2d at 69.

Consistent with *Thompson*, we also proceed to consider the extent of the departure. This court previously has affirmed upward departures of a similar or greater degree in other first-degree criminal-sexual-conduct cases involving similar sets of aggravating factors. For example, in *Hart*, the defendant invaded the victim's home and entered a boy's bedroom before ordering the victim to her own bedroom, where he raped her. 477 N.W.2d at 734-35. The district court found the aggravating factors of multiple forms of penetration, particular vulnerability due to the presence of the victim's children, and violation of the victim's zone of privacy. *Id.* The district court imposed a double upward departure of 122 months (from 122 months to 244 months), and this court affirmed, holding that the district court did not abuse its discretion. *Id*. at 739-40. In *Morales-Mulato*, a jury found that the defendant engaged in both multiple forms of penetration and multiple acts of penetration over a period of time. The district court imposed a 50-percent upward departure of 72 months (from 144 months to 216 months), and this court affirmed the departure. 744 N.W.2d at 684, 691-92. And in *Dalsen*, the district court imposed a double upward departure of 54 months (from 54 months to 108 months) based on the aggravating factors of multiple forms of penetration, multiple acts

of penetration, and particular vulnerability due to the presence of a child. 444 N.W.2d at 583. This court affirmed the upward departure on the ground that the district court did not "impose a sentence disproportionate to the severity of the offense." *Id*. at 584.

In this case, the district court imposed an upward departure of 120 months, which is 83 percent of the presumptive sentence of 144 months, resulting in a total sentence of 264 months. In light of caselaw in which this court, in similar factual circumstances, has affirmed upward departures of as much as 122 months and as much as two times the presumptive sentence, we believe that the upward departure in this case is not disproportional to the seriousness of Hankerson's offense. Therefore, we conclude that the record "contains sufficient evidence to justify the departure," *Rodriguez*, 754 N.W.2d at 685, and that "the extent of the departure was limited to that justified by the reason[s] for departure," *Thompson*, 720 N.W.2d at 831 n.4 (quotation omitted).

Affirmed.