STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0326

State of Minnesota,
Respondent,

vs.

Raine Cee Neiss,
Appellant.

Filed April 21, 2009
Affirmed in part, reversed in part, and remanded
Johnson, Judge

Hennepin County District Court
File No. 27-CR-07-023388

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

Mike Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

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Considered and decided by Halbrooks, Presiding Judge; Johnson, Judge; and Poritsky, 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.

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

JOHNSON, Judge

Trevor R. Marsh was murdered at an outdoor party on the banks of the Mississippi River in south Minneapolis. A Hennepin County jury convicted Raine Cee Neiss of second-degree murder and committing a crime for the benefit of a gang. The district court imposed two consecutive sentences totaling 399 months of imprisonment. Appellant challenges both his conviction and his sentence, arguing that (1) the district court erroneously admitted hearsay evidence, (2) the district court erroneously admitted expert testimony concerning criminal gangs, (3) the evidence was insufficient to support the conviction of committing a crime for the benefit of a gang, (4) the district court erred by departing upward from the presumptive sentencing range, and (5) the district court erred by imposing two separate sentences for his two convictions. We affirm the convictions but reverse and remand for resentencing.

FACTS

Marsh, appellant, and numerous minors and young adults attended a party in the afternoon and evening of October 25, 2006. They gathered around a campfire in a wooded area along the banks of the Mississippi River in south Minneapolis near East Lake Street, where they drank alcoholic beverages and smoked marijuana. A number of people came and went prior to approximately 9:00 p.m., at which time the only remaining persons were Marsh; appellant; appellant's brother, George Neiss; M.C.; and T.W., a minor.

According to the state's evidence, trouble began when George Neiss asked Marsh for permission to look at Marsh's handgun. When Marsh handed it over, George Neiss removed the bullets and returned the handgun and the bullets to Marsh. George Neiss and Marsh then began to argue about Marsh's claim that he was affiliated with the Gangster Disciples. Marsh claimed that he was a member of the Gangster Disciples, but George Neiss claimed that Marsh was not. George Neiss punched Marsh in the head, which caused Marsh to fall to the ground. As Marsh lay on the ground, appellant, George Neiss, and T.W. repeatedly kicked him and yelled at him for lying. T.W. removed Marsh's shoes and threw them in the fire and then stomped on Marsh's bare feet. Appellant stood over Marsh with Marsh's gun and hit Marsh on the head several times with the gun. Marsh asked appellant not to kill him. Appellant put one bullet in the gun and asked Marsh if he wanted to play Russian roulette. Appellant pointed the gun at Marsh's head and pulled the trigger, and the gun fired the bullet into Marsh's head.

Appellant, George Neiss, T.W., and M.C. then fled. George Neiss called his girlfriend, T.D., and asked her to pick them up, and she did so. T.D. and M.C. testified that, as the group was riding in T.D.'s car, George Neiss told T.D. that they had killed Marsh and that appellant was "a gangster now." T.D. also testified that appellant repeated George Neiss's statement by saying, "I'm a gangster now."

The next day, George Neiss again asked T.D. for a ride. She drove appellant and George Neiss to the river, where George Neiss got out of the car and returned several minutes later, saying that he had crushed beer cans and thrown a knife into the river.

George Neiss also said that Marsh's body was in the same place where they had left him and that he was dead. Marsh's body was found by a passerby on October 26, 2006.

On April 11, 2007, the state charged appellant with one count of second-degree intentional murder in violation of Minn. Stat. § 609.19, subd. 1(1) (2006), one count of second-degree felony murder in violation of Minn. Stat. § 609.19, subd. 2(1) (2006), and two counts of felony crime committed for the benefit of a gang in violation of Minn. Stat. § 609.22a, subd. 2 (2006). The felony-murder charge and the accompanying charge of committing a crime for the benefit of a gang were later dismissed.

The case was tried on 10 days in October 2007. The jury found appellant guilty of second-degree intentional murder and of one count of a felony crime committed for the benefit of a gang. The jury also found, by way of a special verdict form, two aggravating factors justifying an upward departure from the presumptive guidelines sentence: that Marsh was particularly vulnerable and that appellant committed the crime as part of a group of three or more persons. In November 2007, the district court sentenced appellant to 375 months of imprisonment on the conviction of second-degree intentional murder and 24 months on the conviction of crime committed for the benefit of a gang, to be served consecutively. The 375-month sentence is an upward durational departure from the presumptive guidelines range of 261 to 367 months, which has a presumptive midpoint of 306 months. Minn. Sent. Guidelines IV. Appellant appeals from both his convictions and his sentences.

D E C I S I O N

I. Out-of-Court Statements

Appellant first argues that the district court erred by admitting the testimony of two witnesses concerning out-of-court statements made by his brother, George Neiss. The district court overruled appellant's objections to the testimony of M.C. and T.D., who testified to statements George Neiss made about appellant's role in Marsh's death. The district court admitted the statements on the grounds that they are statements by a co-conspirator and adoptive admissions by appellant. "Evidentiary rulings rest within the sound discretion of the trial court," and "the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

A. Co-Conspirator Statement

Appellant argues that the out-of-court statements are inadmissible hearsay because they were not made in furtherance of a conspiracy. The applicable rule of evidence provides that a statement is not hearsay if it is offered against a party and is a statement made by a co-conspirator of the party:

> In order to have a coconspirator's declaration admitted, there must be a showing, by a preponderance of the evidence, (i) that there was a conspiracy involving both the declarant and the party against whom the statement is offered, and (ii) that the statement was made in the course of and in furtherance of the conspiracy.

Minn. R. Evid. 801(d)(2)(E).

Appellant contends that the statements were not made in furtherance of a conspiracy because they are "simple narrative statements of what happened." Although statements made by a co-conspirator after the termination of the conspiracy generally are inadmissible, statements made "during the concealment phase of a conspiracy may be admissible under the co-conspirator exemption." *State v. Willis*, 559 N.W.2d 693, 699 (Minn. 1997). To determine whether a conspiracy existed at the time the out-of-court statements were made, a reviewing court should "analyze the facts of the case to determine if . . . there was an agreement to conceal, to determine the closeness in time of the concealment to the commission of the principal crime, and to determine the reliability of these statements." *State v. Davis*, 301 N.W.2d 556, 559 (Minn. 1981).

In *State v. Flores*, 595 N.W.2d 860 (Minn. 1999), a case with facts that are similar to the facts of this case, the supreme court affirmed the admission of out-of-court statements of a co-conspirator. After killing the victim, Flores and his cousin staged the victim's house to make it appear as if the murder involved a dispute over drugs. *Id*. at 864. Over the next couple of days, they disposed of evidence of the crime and items they had taken from the victim's house. *Id*. at 864-65. During that period, the cousin's girlfriend drove Flores and his cousin to the victim's house so that they could "keep track of the crime scene and dispose of incriminating evidence." *Id*. at 866. In concluding that the co-conspirator exception applied, the supreme court noted that the statements were made within two days of the murder and before the crime had been discovered. *Id*.

Similarly, T.D. picked up the four conspirators -- M.C., T.W., appellant, and George Neiss -- from the location of the crime shortly afterward. While in the car,

George Neiss and M.C. arranged to tell the police that M.C. was not at the party that night and that George Neiss left before Marsh was shot. In addition, George Neiss told T.D. that he was going to call her by telephone the next day and that she should answer the call so as to assure George Neiss that she had not "snitched." The day after the murder, T.D. drove appellant and George Neiss back to the river because George Neiss said that he had forgotten something. After returning to the car, George Neiss told T.D. that Marsh's body was still lying on the ground near a tree and that he had taken care of the crime scene so that "as long as [T.D.] and [M.C.] didn't say anything, [they would] be fine." This evidence indicates that, on the night of the murder and the following day, before Marsh's body was discovered, appellant, George Neiss, M.C., and T.D. were in the process of concealing the crime. Thus, the district court did not err by reasoning that a conspiracy then existed and, accordingly, admitting T.D.'s and M.C.'s testimony about George Neiss's out-of-court statements as statements of co-conspirators. *See Flores*, 595 N.W.2d at 864-66.

B. Adoptive Admission

The district court also reasoned that George Neiss's out-of-court statements were appellant's adoptive admissions. "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement of which the party has manifested an adoption or belief in its truth . . . ." Minn. R. Evid. 801(d)(2)(B).

> To be admissible as a statement "adopted" by the defendant as an admission of guilt, and therefore a statement that is by definition *not* hearsay, the [district] court must first determine that the defendant exhibited conduct or made statements that were unequivocal, positive and definite in nature clearly

> indicating that the defendant adopted the hearsay statements as his own.

Flores, 595 N.W.2d at 867. For example, a defendant may adopt the statement of another person by nodding his head when a co-conspirator says, "I didn't do it, [the defendant] did," *State v. Shoop*, 441 N.W.2d 475, 482 (Minn. 1989), or by making a gesture "like a gun to the head" after being asked to confirm that he had shot someone, *State v. Roan*, 532 N.W.2d 563, 573 (Minn. 1995).

In this case, George Neiss stated in T.D.'s car, "We killed Trevor," and identified appellant as the person who had shot Marsh. Appellant then pulled out the murder weapon and said, "It is [my] gun now." In addition, when George Neiss stated that appellant "was a gangster now," appellant repeated the statement by saying, "I'm a gangster now. I'm a gangster." This evidence supports the district court's ruling that appellant adopted his brother's statements. Thus, the district court did not abuse its discretion by admitting the statements as adoptive admissions.

II. Admission of Expert Testimony

Appellant next argues that the district court erred by admitting expert testimony regarding gangs. He challenges the expert testimony of Inspector Michael Martin of the Minneapolis Police Department, who testified generally about the characteristics of the Gangster Disciples, including their means of self-identification and their typical activities. Inspector Martin also testified about how a member of the gang might react to someone who falsely claims to be a Gangster Disciple. Appellant contends that the testimony was "unhelpful, irrelevant, and prejudicial." He contends that the testimony

was prejudicial because it painted him as a "violent person by virtue of his gang membership." He also contends that Inspector Martin "improperly testified that murder is a common way for the Gangster Disciples to handle 'posers,' thus offering his opinion on the motive for the murder." The admissibility of expert testimony is a matter committed to the broad discretion of the district court. *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999).

The supreme court has considered the admissibility of gang expert testimony in several recent cases. *See State v. Martinez*, 725 N.W.2d 733, 738-39 (Minn. 2007); *State v. Jackson*, 714 N.W.2d 681, 691-92 (Minn. 2006); *State v. Blanche*, 696 N.W.2d 351, 372-74 (Minn. 2005); *State v. Deshay*, 669 N.W.2d 878, 884 (Minn. 2003); *State v. Lopez-Rios*, 669 N.W.2d 603, 613 (Minn. 2003). The supreme court has expressed concern with expert testimony concerning gangs but never has held the admission of such testimony to be reversible error. In most of the cases in this line, the supreme court concluded that admission of the evidence was harmless error. *See Blanche*, 696 N.W.2d at 374; *Deshay*, 669 N.W.2d at 888; *Lopez-Rios*, 669 N.W.2d at 614. In one of the more recent cases, the supreme court concluded that admission of the evidence was not erroneous because the evidence was more probative than prejudicial such that exclusion "would frustrate the legislature's purpose in enacting section 609.229 by rendering convictions under it nearly impossible to obtain." *Jackson*, 714 N.W.2d at 692. In the most recent case, the supreme court declined to determine whether admission of the evidence was error because it concluded that "any possible error did not affect [the appellant's] substantial rights." *Martinez*, 725 N.W.2d at 739.

This case is practically indistinguishable from the more recent cases described above. As in *Jackson*, Inspector Martin's testimony was relevant, and thus helpful, to the issues whether the Gangster Disciples met the statutory criteria of a criminal gang and whether appellant committed a crime for the benefit of a gang. 714 N.W.2d at 692; *see also State v. Carillo*, 623 N.W.2d 922, 928 (Minn. App. 2001) (explaining that expert "is able to offer a factual perspective" concerning gang's activities "that is both helpful and not otherwise available to a lay juror"), *review denied* (Minn. June 19, 2001). As in any case, the evidence tended to portray appellant in a negative light because it attached to him the stigma of being a gang member. But that is essentially what the state was trying to prove. More importantly, there was "ample independent evidence linking [appellant] to the gang and supporting a conclusion of guilt as the crime charged." *Martinez*, 725 N.W.2d at 739. To be specific, appellant's brother said, shortly after the crime, that appellant was "a gangster now," and appellant repeated the words with reference to himself. In addition, "the expert corroborated the testimony of numerous witnesses and likely was no more influential than much of the other evidence presented linking [appellant] to the crime." *Id.* To be specific, Inspector Martin's testimony was corroborated by M.C., C.S., and T.D., who testified about the argument that arose by the river, the reasons why Marsh was beaten and shot, and the statements made by appellant and his brother in T.D.'s car after the murder. Thus, consistent with *Jackson* and *Martinez*, we conclude that the admission of the gang expert testimony either was not error or is harmless error.

III. Sufficiency of the Evidence

Appellant next argues that the evidence is insufficient to support the conviction of committing a crime for the benefit of a gang. In considering an argument of insufficient evidence, this court determines whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they reached. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

The statute that sets forth the offense of conviction provides, "A person who commits a crime for the benefit of, at the direction of, in association with, or motivated by involvement with a criminal gang, with the intent to promote, further, or assist in criminal conduct by gang members is guilty of a crime . . . ." Minn. Stat. § 609.229, subd. 2. Appellant argues that the state failed to prove two essential elements: (1) that the Gangster Disciples is a criminal gang and (2) that he committed the crime for the benefit of the Gangster Disciples.

With respect to the first issue, whether the Gangster Disciples is a criminal gang, we begin by referring to the statute that defines the term as:

> any ongoing organization, association, or group of three or more persons, whether formal or informal, that:
>
> (1) has, as one of its primary activities, the commission of one or more of the offenses listed in section 609.11, subdivision 9 [including murder, assault, burglary, kidnapping, false imprisonment, manslaughter, robbery, witness tampering, arson, drive-by shooting];

> (2) has a common name or common identifying sign or symbol; and
>
> (3) includes members who individually or collectively engage in or have engaged in a pattern of criminal activity.

Minn. Stat. § 609.229, subd. 1 (2006). Appellant argues that the state failed to prove the first requirement of the definition, that the Gangster Disciples has, as one of its primary activities, the commission of the offenses identified, and failed to prove the third requirement, that the members of the Gangster Disciples engage in or have engaged in a pattern of criminal activity.

Appellant does not challenge the evidence on the ground that the evidence is lacking in weight or that the state overlooked an issue when presenting its case. Rather, appellant challenges the evidence on the ground that it consists of broad statements by Inspector Martin that address the statutory requirements in a sweeping manner. It is undisputed that Inspector Martin's testimony addressed the statutory requirements. But appellant argues that this type of evidence -- opinion testimony stating generalized facts -- is insufficient because the state must prove each fact required by the statute with particular evidence based on first-hand knowledge, focusing on specific persons and specific actions at specific places and times. In essence, appellant argues that to prove "a pattern of criminal activity," *id.*, the state must prove a crime within a crime, or several crimes within the crime.

No caselaw appears to speak directly to the issue of the nature of the evidence required to prove the existence of a criminal gang pursuant to section 609.229,

subdivision 1. Likewise, there appears to be no guidance in the caselaw interpreting other criminal statutes that require proof of a "pattern" of a specified activity. *See, e.g.*, Minn. Stat. § 609.749, subd. 5 (2008) (criminalizing pattern of harassing conduct); Minn. Stat. § 609.902, subd. 6 (2008) (criminalizing racketeering, which requires proof of "enterprise" and "pattern of criminal activity"). Appellant's argument finds some support in *State v. Auchampach*, 540 N.W.2d 808 (Minn. 1995), which concerned the domestic murder statute, which required proof of a "past pattern of domestic abuse," Minn. Stat. § 609.185(6) (1992). The supreme court commented in a footnote that "it is important that the evidence presented at trial to demonstrate a past pattern of domestic abuse must meet appropriate admissibility requirements including . . . the rules with respect to hearsay." *Id.* at 819 n.10; *see also State v. Cross*, 577 N.W.2d 721, 724-25 (Minn. 1998) (holding that rule 404(b) and *Spreigl* do not exclude "proof of prior incidents of domestic abuse" because such evidence is necessary to prove element of crime).

The most applicable guidance is found in that part of *Jackson* in which the supreme court analyzed the admissibility of expert testimony about gangs in a prosecution for the offense of a crime committed for the benefit of a gang. 714 N.W.2d at 690-93. The supreme court reasoned that the expert's testimony "was admissible because it assisted the jury in deciding whether the commission of crimes is one of the primary activities of the Bloods gang, a prerequisite for proving that the Bloods gang meets the statutory definition of a 'criminal gang.' *This testimony was necessary to establish that [the] murder was 'for the benefit of a gang.'" Id.* at 692 (statutory citations omitted; emphasis added). The supreme court did no more than "*recommend[]* that

firsthand knowledge-testimony be used to prove the 'for the benefit of a gang' element when feasible." *Id.* at 691 (emphasis added). These statements imply that expert testimony of the type given in this case by Inspector Martin is an acceptable form of evidence to prove that the Gangster Disciples has engaged in "a pattern of criminal activity," Minn. Stat. § 609.229, subd. 1, even if there is no specific evidence about the crimes that constitute that pattern.

Inspector Martin testified that, in his opinion, the Gangster Disciples meets the statutory definition of a criminal gang. He testified that, first, its primary purpose "is to make money through illegal activities"; second, it has a common identifying symbol, the six-pointed star; and, third, it is "involved in murders and shootings, narcotics trafficking, criminal sexual conduct, prostitution, witness intimidation, money laundering and a number of other crimes." In the absence of a requirement of more particular testimony from a person with first-hand knowledge of the predicate facts, this testimony is sufficient to prove that the Gangster Disciples fits the statutory definition of a criminal gang.

With respect to the second issue, whether appellant committed the crime for the benefit of the Gangster Disciples, Inspector Martin testified that gang members react to a false claim of gang membership in a number of ways, including assaulting or killing the person making the false claim. The evidence shows that appellant and his brother beat and shot Marsh because they were offended by Marsh's claims that he was a Gangster Disciple, which claim they believed to be false. M.C. testified that Marsh claimed that he was a Gangster Disciple and that George Neiss argued with Marsh about his claim. In

addition, both M.C. and T.D. testified that appellant repeatedly stated after the murder that he is "a gangster now." This evidence is sufficient to allow the jury to conclude that appellant committed the murder "for the benefit of, at the direction of, in association with, or motivated by involvement with a criminal gang." Minn. Stat. § 609.229, subd. 2.

IV. Sentencing Departure

Appellant next argues that the district court erred by departing upward from the presumptive sentencing range. At sentencing, the district court stated, "The basis for this departure is the jury's finding of a particular vulnerability. The Court agrees that this killing of a victim downed by beating and kicking, begging for his life, made him particularly vulnerable, warranting an upward departure." The sentencing guidelines provide a nonexclusive list of aggravating factors that may be used as reasons for departure, which includes, among others, a victim's particular vulnerability known to the offender. Minn. Sent. Guidelines II.D.2.b.(1). Appellant's argument has two parts: first, that the district court improperly instructed the sentencing jury and, second, that the evidence is insufficient to prove the aggravating factor of particular vulnerability.

A. Jury Instruction

Appellant first contends that the district court erred by instructing the jury that it could find Marsh to be particularly vulnerable due to his age. 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). 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). The district court has discretion to give additional instructions, to clarify or reread previous instructions, or to give no response at all to a jury's question. *See State v. Laine*, 715 N.W.2d 425, 434 (Minn. 2006).

The special verdict form given to the sentencing jury asked whether Marsh was "particularly vulnerable due to his physical injury and inability to defend himself." During its deliberations, the jury sent a written question to the district court, asking for elaboration on the phrase "particularly vulnerable." With both the jury and counsel present, the district court answered the question, in part, by saying, "A victim is particularly vulnerable due to age, infirmity, reduced physical or mental capacity." Appellant objected generally to the district court's decision to answer the question, arguing that the question "underscores my argument that . . . this is just too vague to try and delineate for them." Appellant did not object to the particular language used by the district court in answering the jury's question.

Appellant contends that the district court erred when answering the jury's question because Marsh, who was 17 years old, was "not an age where one is particularly vulnerable," because appellant did not exploit Marsh's age when committing the offense, and because age is an element of the underlying offense of a crime committed for the benefit of a gang. Because appellant did not object specifically to the reference to the word "age," the plain error standard applies. Under the plain error doctrine, we may consider a forfeited 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).

Regardless whether the district court erred or plainly erred when answering the jury's question, any such error would not affect appellant's substantial rights. The jury instructions and special verdict form focused the jury on the question whether Marsh was "particularly vulnerable due to his physical injury and inability to defend himself." That the district court later provided an explanation of the term "particularly vulnerable" that was broader than the jury instructions and special verdict form likely did not have an impact on the jury's analysis of the relevant question. Thus, the district court's answer to the jury's question does not entitle appellant to a new trial.

B. Evidence Supporting Departure

Appellant next contends that the state failed to prove that Marsh was particularly vulnerable. More specifically, appellant contends that Marsh was not particularly vulnerable because he did not have a "physical injury" or an "inability to defend himself" *before* the commencement of the attack. Appellant argues, in essence, that particular vulnerability must be a pre-existing condition rather than the result of something that happens in the course of the commission of the crime. A sentencing jury's findings are reviewed for sufficiency of the evidence. *See State v. Rodriguez*, 738 N.W.2d 422,

433 (Minn. App. 2007), *aff'd*, 754 N.W.2d 672 (Minn. 2008). A review for sufficiency of the evidence consists of "a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach their verdict." *State v. Clark*, 755 N.W.2d 241, 267 (Minn. 2008).

Appellant relies on *State v. Volk*, 421 N.W.2d 360 (Minn. App. 1988), *review denied* (Minn. May 18, 1988), where the district court found that the victim was particularly vulnerable because he was bound and gagged prior to being murdered. *Id.* at 366. In reversing the district court's upward departure, this court reasoned that the district court "improperly took this factor," that the victim was bound and gagged, "into consideration because the court was examining the effect of being bound and gagged rather than the mental or physical capacity of the victim." *Id.* But this court later held in *State v. Bock*, 490 N.W.2d 116 (Minn. App. 1992), *review denied* (Minn. Aug. 27, 1992), that an upward departure based on particular vulnerability was proper where the defendant delivered a blow to the victim's head, which caused the victim to fall and become dazed before the defendant killed him by delivering a second blow to the head. *Id.* at 120-21.

The *Volk* and *Bock* cases are fairly similar and not easily reconciled. But it appears that the facts of this case are more similar to the facts of *Bock*, where a violent assault caused the victim to fall to the ground and become immobilized and, thus, particularly vulnerable to a fatal attack. In addition, the evidence shows that, as appellant stood above Marsh while he lay on the ground, Marsh asked appellant not to kill him, and

appellant proceeded to shoot Marsh without any resistance. Thus, the evidence is sufficient to support the jury's finding of particular vulnerability, and the district court did not err by relying on that aggravating factor in sentencing appellant to an upward departure.

V. Multiple Sentences

Appellant last argues that the district court erred by imposing sentences on both the offense of second-degree murder and the offense of committing a crime for the benefit of a gang. We review the district court's interpretation of the sentencing guidelines de novo. *State v. Maurstad*, 733 N.W.2d 141, 148 (Minn. 2007).

The sentencing proceedings in this case are governed by a statute that provides:

> If the crime committed [for the benefit of a gang] is a felony, the statutory maximum for the crime is five years longer than the statutory maximum for the underlying crime. If the crime committed [for the benefit of a gang] is a felony, and the victim of the crime is a child under the age of 18 years, the statutory maximum for the crime is ten years longer than the statutory maximum for the underlying crime.

Minn. Stat. § 609.229, subd. 3(a) (2006). The jury found that Marsh was a child under the age of 18 years. A conviction under subdivision 3(a) carries a mandatory minimum sentence of one year and one day. Minn. Stat. § 609.229, subd. 4(a) (2006). The sentencing guidelines provide:

> For persons sentenced under Minn. Stat. § 209.229, subd. 3(a) . . . the presumptive disposition is always commitment to the Commissioner of Corrections due to the mandatory minimum under Minn. Stat. § 609.229, subd. 4. The presumptive duration is determined by the duration contained in the Sentencing Guidelines Grid cell . . . plus . . . an

> additional 24 months if the victim of the crime was under the age of eighteen years.

Minn. Sent. Guidelines II.G.

Appellant's challenge is based on a statute providing that "if 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 and a conviction or acquittal of any one of them is a bar to prosecution for any other of them." Minn. Stat. § 609.035, subd. 1 (2006). Appellant contends that the district court erred by imposing a 24-month sentence for the offense of committing a crime for the benefit of a gang in addition to the 375-month sentence for second-degree murder because both offenses are based on the same conduct. The state essentially concedes that the district court erred by imposing two separate sentences. The state contends that this court should convert appellant's sentence to a single 399-month sentence by adding 24 months to 375 months. Appellant contends that the appropriate remedy is a remand to the district court for resentencing in conformity with the relevant statutes.

In this situation, the applicable sentencing statutes and guidelines permit and require a single prison sentence on the conviction of second-degree murder, with a length of imprisonment equal to the otherwise proper sentence plus an additional 24 months. Because the district court erred in its interpretation of the sentencing statutes and guidelines, we reverse appellant's sentence and remand to the district court for resentencing. On remand, the district court shall impose a single sentence, which should

reflect a sentence of not more than 375 months, plus an additional 24 months, for a total of not more than 399 months.

Affirmed in part, reversed in part, and remanded.