

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0486**

State of Minnesota,
Respondent,

vs.

Valjean Popowski Jr.,
Appellant.

**Filed June 23, 2009
Affirmed
Johnson, Judge**

Hennepin County District Court
File No. 27-CR-06-078127

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Crippen, Judge.*

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

UNPUBLISHED OPINION

JOHNSON, Judge

Valjean Popowski, Jr. severely beat his former girlfriend. According to eyewitnesses, Popowski punched the woman in the face seven or eight times, picked her up and slammed her headfirst onto a paved surface, and stomped on her head and back several times. The woman was comatose for several weeks before regaining consciousness, and she continues to suffer from her injuries. Popowski pleaded guilty to first-degree assault. After finding that the state had proved three aggravating factors, the district court imposed a sentence of 150 months of imprisonment, an upward departure from the presumptive guidelines sentence. We affirm.

FACTS

On the evening of November 8, 2006, Popowski and J.H., a 37-year-old woman whom Popowski had dated during the previous year, met at a bar in downtown Minneapolis. J.H. met Popowski, at his request, to talk about an incident that had occurred approximately six weeks earlier, which resulted in J.H. asking police officers to remove Popowski from her apartment. On November 8, J.H. intended to tell Popowski that their relationship was over.

Popowski and J.H. left the bar at the same time, at approximately midnight. J.H. remembers nothing of the events that followed, but two men, T.C. and B.B., were in a nearby parking lot. They heard J.H.'s screams and her car alarm. They ran toward the noises and saw Popowski struggling with J.H., who was sitting behind the steering wheel of her car. J.H. told the two men that she had a restraining order against Popowski, at

which point T.C. and B.B. told Popowski to leave or they would call the police. As B.B. left to call the police, Popowski and J.H. continued to struggle over her car keys.

According to T.C., the struggle became more violent when Popowski used both fists to punch J.H. in the face seven or eight times. J.H. made no attempt to defend herself and at some point fell to the ground. T.C. approached Popowski and scuffled with him until Popowski caused him to fall. As T.C. got back up on his feet, he saw Popowski lift J.H., who appeared to be unconscious, and throw her onto the pavement headfirst, “like a ragdoll.” Popowski then stomped on J.H.’s head and back several times. T.C. testified, “I have never seen such violence in all my life.” The record reflects that Popowski was 6 feet, 5 inches tall and weighed 250 pounds, while J.H. was 5 feet, 7 inches and weighed 130 pounds.

Popowski then fled. T.C. stayed near J.H. until Minneapolis Police Officer Thomas Schmid arrived. Officer Schmid, who had seen hundreds of assault cases during his eight years at the downtown Minneapolis precinct, testified that he had never seen an assault victim with such significant injuries. J.H. was taken by ambulance to the Hennepin County Medical Center. A forensic scientist for the Minneapolis Police Department who took photographs of J.H. the following day testified that he had not previously seen an assault victim who survived such severe and extensive injuries.

J.H. was diagnosed with multiple injuries that may be summarized as a closed-head, traumatic brain injury. She was in a coma for several weeks. In early December 2006, she was transferred to the Mayo Clinic’s Inpatient Rehabilitation Unit, where she underwent speech therapy, physical therapy, and occupational therapy. In late December

2006, she moved to her parents' home and continued to receive out-patient therapy until mid February 2007. J.H. returned to her job as a licensed securities trader in early March 2007, but she did not remain in that job for long and has since experienced unemployment. She has both long-term and short-term memory problems. She needed to re-learn basic skills and basic cognitive functions, such as simple writing and mathematics. She has dizzy spells and has difficulty with her balance. She also has scars on her face and head. She testified at the sentencing hearing that she wishes she had not survived the attack.

Popowski was arrested at his brother's home the day after the incident. The state initially charged him with two counts of attempted first-degree murder pursuant to Minn. Stat. §§ 609.185(a)(6), (c), .17 (2006) (attempted murder with a past history of domestic abuse) and Minn. Stat. §§ 609.185(a)(1), .17 (2006) (attempted murder with premeditation). The state later amended its complaint to add one count of first-degree assault under Minn. Stat. § 609.221, subd. 1 (2006). Popowski moved to dismiss the charge of attempted first-degree murder with a past history of domestic abuse, and the district court granted the motion. Popowski eventually pleaded guilty to first-degree assault in exchange for the state's dismissal of the other attempted first-degree murder charge.

Popowski waived his right to a sentencing jury. At the conclusion of a sentencing hearing in December 2007, the district court stated, "This is the most violent assault, not involving a weapon, that I have seen in 16 years in the criminal justice system." The

district court continued by making findings on the state's allegations of aggravating factors:

There are upward departure grounds in this case. The bases argued by the State, for an upward departure, all go to the particular cruelty inflicted in the course of this assault, and the fact that this assault was more serious than what was normally contemplated by the guidelines for Assault in the First Degree.

Ms. [H.] was beaten, Mr. Popowski punched her repeatedly in the face. The eyewitness demonstrated upper cuts to her face. This would put Mr. Popowski in a position to put a substantial amount of his body weight behind these punches. This alone, and the injuries resulting, would constitute Assault in the First Degree. Ms. [H.] was subsequently picked up from the pavement, according to the eyewitness, by the Defendant and then hurled to the ground while she was limp. While we do not know for a fact whether she was unconscious, the description by the eyewitnesses seems to indicate that. In either case, she was completely defenseless. This act alone could constitute Assault in the First Degree. The Defendant, Mr. Popowski, then stomped on the head of the victim, again, bringing his body weight to bear. Again, this act alone and the damage from it would constitute Assault in the First Degree.

The medical records substantiate numerous injuries, many of which would support a charge of Assault in the First Degree. Ms. [H.] suffered a traumatic brain injury and has ongoing cognitive impairment. She has permanent scars to her face as a result of the assault, and also as a result of medical intervention required by the assault. She has long-term impairment of brain function. This constellation of attacks and injuries makes this crime significantly more serious than the typical First Degree Assault. Therefore, an upward departure from the guidelines is warranted.

The district court concluded the hearing by imposing an executed sentence of 150 months of imprisonment, an upward departure from the presumptive sentencing range of 74 to 103 months. Popowski appeals.

D E C I S I O N

Popowski argues that the district court erred by departing upward and imposing a sentence of 150 months of imprisonment. He requests that we modify his sentence by reducing it to 103 months, the upper end of the presumptive sentencing range, on the ground that the district court's reasons for the upward departure are invalid, inadequate, and unsupported by the record.

A district court must order the presumptive sentence provided by the sentencing guidelines unless there are "substantial and compelling circumstances" to warrant an upward 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). In determining whether "substantial and compelling circumstances" justify an upward sentencing departure in a first-degree assault case, the district court must determine whether aggravating factors exist. *Id.* The guidelines provide a nonexclusive list of aggravating factors that may be reasons for departure. 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 is subject to a *de novo* standard of review. *State v. Jackson*, 749 N.W.2d 353, 357 (Minn. 2008). 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).

In this case, the aggravating factors on which the district court relied, which are best described by Popowski's sentencing memorandum in the district court, are (1) particular cruelty, (2) multiple acts, and (3) the serious and permanent nature of the victim's injuries. On appeal, Popowski focuses primarily on the second factor and touches on the third factor.

A. Multiple Acts

Popowski argues that the district court erred by identifying and relying on three discrete acts that independently could have constituted first-degree assault: his punching J.H. in the face, his throwing her down on the street headfirst, and his stomping on her head and back. He contends that this mode of analysis contradicts *Jackson*, where the supreme court held that a district court may not impose an upward departure based on an aggravating factor that is based on evidence of uncharged conduct. 749 N.W.2d at 357-58.

Count 3 of the amended complaint is not limited to only one act or one aspect of Popowski's assaultive conduct. In its entirety, count 3 alleges: "That on or about November 9, 2006, in Hennepin County, Valjean Joseph Popowski assaulted J.H. and inflicted great bodily harm." The three discrete acts that comprised Popowski's assault, which occurred within approximately 90 seconds, are ways in which Popowski's commission of the offense is "more or less serious than that typically involved in the commission of the crime in question." *Misquadace*, 644 N.W.2d at 69.

The district court's analysis is different from that of the district court in *Jackson*, where the appellant was being sentenced for robbery, which does not require the infliction of bodily harm, but was given an enhanced sentence in part because of the injuries he inflicted on the victim. 749 N.W.2d at 356. The supreme court reasoned that the infliction of those injuries could have been, but was not, charged as third-degree assault, which meant that the appellant effectively was punished for uncharged conduct. *Id.* at 357. Here, in contrast, the district court based its finding of multiple acts on conduct by Popowski that is wholly within the charge of which he was convicted. Accordingly, the district court did not sentence Popowski in violation of *Jackson*.

Thus, the district court did not err in finding the existence of the aggravating factor of multiple acts.

B. Nature of Injuries

Popowski appears to also argue that the district court erred by finding that the serious and permanent nature of J.H.'s injuries is an aggravating factor. *See State v. Van Gorden*, 326 N.W.2d 633, 634 (Minn. 1982) (approving aggravating factor based on infliction of injuries of a "serious and permanent nature"). The issue is addressed in a part of Popowski's brief in which he argues that "but for the brain injury, and possibly the facial scars, [J.H.]'s injuries do not rise to the level of great bodily harm." We disagree with that statement for reasons that are apparent from the recitation of facts stated above.

The relevant question is whether J.H.'s injuries are more serious "than [those] typically involved in the commission of the crime in question." *Misquadace*, 644

N.W.2d at 69. Popowski argues that this case is no more serious than *State v. Felix*, 410 N.W.2d 398 (Minn. App. 1987), *review denied* (Minn. Sept. 29, 1987), and *State v. Copeland*, 656 N.W.2d 599 (Minn. App. 2003), *review denied* (Minn. Apr. 29, 2003), two cases that are similar in the sense that they also involved a male-on-female beating arising from a failed relationship. We disagree. The victim in *Felix* arrived at the hospital in a conscious state, and she did not suffer long-term injuries that are as severe as those suffered by J.H. *See* 410 N.W.2d at 400. The injuries suffered by the victim in *Copeland* are not explained in detail. *See* 656 N.W.2d at 600. Regardless, the district court in *Copeland* did not depart on the ground of the nature of the victim’s injuries, so that case is inapplicable. *See id.* at 603.

We conclude that the district court did not abuse its discretion by finding that the serious and permanent nature of the victim’s injuries was an aggravating factor.

C. Summary

We note that Popowski does not challenge the district court’s finding concerning the first aggravating factor, the particular cruelty of Popowski’s assault.

An appellate court may review a sentencing departure to determine whether, in light of the district court’s findings of fact, the departure is “unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted.” Minn. Stat. § 244.11, subd. 2(b). Generally, if the facts justify a departure, the extent of departure is a matter for the district court’s discretion, unless the resulting sentence is more than twice the length of the presumptive sentence, which is not the case here. *See State v. Shattuck*, 704 N.W.2d 131, 140 (Minn. 2005); *State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981).

We conclude that the district court did not abuse its discretion by finding “substantial and compelling circumstances” warranting an upward departure. Minn. Sent. Guidelines II.D. The three aggravating factors found by the district court collectively justify the decision to impose an upward departure. Popowski’s “conduct in the offense of conviction was significantly more . . . serious than that typically involved in the commission of the crime in question.” *Misquadace*, 644 N.W.2d at 69.

In sum, we conclude that the district court did not err by sentencing Popowski to 150 months, an upward durational departure from the presumptive sentence of 86 months.

Affirmed.