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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1062**

Maurice Laverne Graham, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 4, 2009
Affirmed
Johnson, Judge**

Hennepin County District Court
File No. 27-CR-98-074631

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Considered and decided by Connolly, Presiding Judge; Peterson, Judge; and
Johnson, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

In 1999, a Hennepin County jury convicted Maurice Laverne Graham of six
offenses relating to the five-day-long kidnapping of a 16-year-old girl, which ended with

attempted murder. The district court initially imposed a sentence of 392 months of imprisonment on the kidnapping conviction, which the district court intended to be a quadruple upward durational departure from the presumptive guidelines sentence, and a consecutive sentence of 184 months on the conviction of attempted first-degree murder. Graham did not pursue a direct appeal from his conviction and sentence.

In 2007, Graham petitioned for postconviction relief. The district court corrected an error in the presumptive guidelines sentence arising from an error in the offense-severity level and resentenced him to 232 months on the kidnapping conviction, a quadruple upward durational departure from the corrected presumptive sentence. The postconviction court denied relief in all other respects. Graham appeals. We affirm.

FACTS

The events underlying this case occurred on five days in July 1998. The postconviction court described the conduct of Graham and others in detail in a well-written, 21-page order. We merely summarize the relevant facts in this opinion.

A 16-year-old girl was held against her will in a north Minneapolis house by Graham and six co-conspirators from July 18 to 22, 1998. The girl willingly went to the house on a Friday afternoon, and, after attending a concert that evening, returned to the house, where a party was ongoing. Graham did not permit her to leave that night, telling her that he and others were holding her for ransom.

The next morning, Saturday, July 18, Graham put the girl in a car, and he and four of his co-defendants drove to a field near the city of Albertville. While Graham held the girl's arms, three other persons repeatedly punched and kicked her. The group then

moved the girl to another wooded area, where Graham put a knife to her throat and told her that he was going to kill her. The girl convinced them to keep her alive by promising that her father would pay the ransom they sought. When the group returned to the house in Minneapolis, two co-defendants beat the girl with a belt and a wet towel. They repeatedly beat her with fists, cords, and wet towels. They cut off her long hair. One member of the group ordered the girl to remove her underwear and then poured liquid onto the girl's thighs and genitals, burning her.

The next day, Sunday, July 19, Graham told another man that the girl would perform oral sex on the man, which the girl then was forced to do on two occasions. She was also penetrated vaginally. The girl again was beaten with a television cord. Graham and two co-defendants told the girl that if she survived and told the police what had happened to her, they would kill her and her family. Police searched the house later that day. Members of the group put the girl in the attic while Graham held her at gunpoint and told her to keep quiet. Graham also bound her mouth, ankles, and hands with duct tape.

On Monday, July 20, word spread that the girl's father suspected that members of the group knew the girl's whereabouts. The group did not give the girl any food or drink that day. Graham aided a co-defendant who forced the girl to perform oral sex on him.

On Tuesday, July 21, Graham told the girl that he had spoken with her father and planned to exchange her for money but that if things did not go as planned, he would shoot her and her father. That evening, Graham and others in the group handcuffed the girl while she was naked, put a sock in her mouth, and wrapped tape around the girl's

head so that she could not see. Graham wrapped a cord around the girl's neck and body and put a shirt over her head. Graham and others put her in a car. When she cried, they hit her on the head with a hammer multiple times to the point that she was semi-conscious. In the middle of the night, the group dumped the girl in a hole at a construction site.

The following morning, Wednesday, July 22, the girl managed to escape from the hole. At approximately 6:00 a.m., a passerby saw the girl walking naked on a city street and called law enforcement for assistance.

Graham and six co-defendants faced a variety of charges. Graham's two main co-defendants pleaded guilty. Graham's case proceeded to trial. After a 13-day trial in January 1999, the jury found Graham guilty of attempted first-degree murder, kidnapping, two counts of criminal sexual conduct, second-degree assault, and terroristic threats. The jury found Graham not guilty of a second count of second-degree assault.

At sentencing, the district court calculated the presumptive guidelines sentence on the kidnapping charge to be 98 months of imprisonment. After finding that severe aggravating factors existed, the district court imposed a sentence of 392 months, a quadruple departure from what the district court understood the presumptive guidelines sentence to be. The district court also sentenced Graham to 184 months of imprisonment on the conviction of attempted first-degree murder. The district court ordered the two sentences to be served consecutively. Graham timely filed a direct appeal but voluntarily dismissed it soon afterward.

In early August 2007, Graham filed a postconviction petition. He alleged that the aggregate sentence of 576 months is excessive. He also argued that the presumptive guidelines sentence for his kidnapping conviction was erroneously calculated in the sentencing worksheet. The state conceded that the district court was misinformed about the presumptive sentence. In April 2008, the postconviction court, with a different district court judge presiding, issued an order in which it granted the petition in part and resentenced Graham to 232 months of imprisonment on the kidnapping conviction, which again reflects a quadruple departure from the correct presumptive guidelines sentence of 58 months, and to 184 months on the attempted-murder conviction, to be served consecutively. The district court denied relief on the remainder of Graham's petition. Graham appeals.

D E C I S I O N

Graham makes three arguments concerning his sentences. First, he argues that the quadruple upward durational departure on the sentence for the kidnapping conviction constitutes "excessive and disproportionate" punishment and is not supported by severe aggravating circumstances. Second, he argues that the district court erred by making his two sentences consecutive rather than concurrent. Third, he argues that his sentence is excessive and disproportionate in comparison to the sentences imposed on his co-defendants. "When reviewing the decision of a postconviction court, we review questions of law *de novo*, but our review of questions of fact is limited to whether there is sufficient evidence in the record to support the findings of the postconviction court." *Sanchez-Diaz v. State*, 758 N.W.2d 843, 846 (Minn. 2008).

I. Quadruple Departure

Graham first argues that the quadruple upward durational departure on his kidnapping sentence is not supported by the record. Graham concedes that an upward departure of some extent is supported by substantial and compelling circumstances, but he argues that there are no *severe* aggravating circumstances that would warrant a more-than-double departure. The state, in response, argues that the postconviction court's sentence is not erroneous because "the torture and brutality, the degradation, the multiple penetrations of criminal sexual conduct, extended for five days."

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 sentencing guidelines provide a nonexclusive list of aggravating factors that may be reasons for a departure.

At the original sentencing hearing, the district court found multiple severe aggravating factors, including particular cruelty, multiple forms of penetration, and particular vulnerability due to the girl's age. On resentencing, the postconviction court considered the same aggravating factors that the district court had relied on at sentencing. Like the district court, the postconviction court also applied the factors considered in *State v. Strommen*, 411 N.W.2d 540 (Minn. App. 1987), *review denied* (Minn. Oct. 28,

1987), by examining Graham’s state of mind, the length of time of the kidnapping, multiple defendants, multiple forms of penetration by multiple men, assault of the girl, the girl’s state of mind, and the injuries the girl suffered. After correcting an error in the calculation of his presumptive sentence, the postconviction court reaffirmed the intent of the original sentencing judge by imposing a quadruple upward departure.

Our review of pre-*Blakely* departures is guided by the following rules:

1. If no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed.
2. If reasons supporting the departure are stated, this court will examine the record to determine if the reasons given justify the departure.
3. If the reasons given justify the departure, the departure will be allowed.
4. If the reasons given are improper or inadequate, but there is sufficient evidence in the record to justify the departure, the departure will be affirmed.
5. If the reasons given are improper or inadequate and there is insufficient evidence of record to justify the departure, the departure will be reversed.

State v. McIntosh, 641 N.W.2d 3, 8 (Minn. 2002) (quoting *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985)); *State v. Adell*, 755 N.W.2d 767, 771 (Minn. App. 2008). A district court’s decision to depart from the presumptive guideline sentence is reviewed for an abuse of discretion. *Taylor v. State*, 670 N.W.2d 584, 588 (Minn. 2003).

Generally, an upward durational departure is limited to a sentence that is twice the length of the presumptive sentence, unless the facts are “unusually compelling.” *State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981). The *Evans* court acknowledged that “there

may well be rare cases in which the facts are so unusually compelling that an even greater degree of departure will be justified.” *Id.* In determining whether a case is one of the rare cases described by *Evans*, this court “must rely on its ‘collective collegial experience in reviewing a large number of criminal appeals.’” *State v. Wilkinson*, 539 N.W.2d 249, 253 (Minn. App. 1995) (quoting *State v. Norton*, 328 N.W.2d 142, 146 (Minn. 1982)). Accordingly, we review Graham’s sentence by comparing it to sentences imposed in similar cases. *See Norton*, 328 N.W.2d at 146-47.¹

In *Strommen*, this court affirmed an upward departure that was 4.19 times the presumptive sentence for criminal sexual conduct. 411 N.W.2d at 545. A 16-year-old girl was kidnapped and raped by three men, including Strommen. *Id.* at 544. The girl was subjected to multiple forms of penetration by the three men, including, at one point, by two men simultaneously. *Id.* The men held a knife to the girl’s throat and choked her until she fainted. The girl’s captors held her for three hours before dumping her in a rural ditch. *Id.* The girl was terrified, and the incidents led to permanent physical and psychological trauma. *Id.* This court affirmed the district court’s decision that severe aggravating circumstances, including the girl’s particular vulnerability due to her age, supported the quadruple departure. *Id.* at 544-45.

¹The supreme court also has noted that, even if severe aggravating circumstances are present, a sentence may not exceed the statutory maximum for that offense. *State v. Mortland*, 399 N.W.2d 92, 94 n.1 (Minn. 1987). Here, the statutory maximum for the kidnapping conviction is 40 years. Minn. Stat. § 609.25, subd. 2(2) (1996). The sentence imposed for the kidnapping conviction on resentencing is 19 years, 4 months, which is less than half the statutory maximum.

In *State v. Mesich*, 396 N.W.2d 46 (Minn. App. 1986), *review denied* (Minn. Jan. 2, 1987), this court affirmed a departure that was 5.5 times the presumptive sentence for criminal sexual conduct. *Id.* at 50, 52-53. Mesich had “subjected [the victim] to vicious psychological degradation” by cutting her breasts with a knife while threatening to cut them off; by inserting a knife into her vagina and threatening to cut out her female organs; and by telling her after the attack was over that the abuse was the only thing she was made for, that “it would have been better with a dog, and that he should not have wasted his time on a piece of trash.” *Id.* at 52-53.

In *Norton*, the supreme court affirmed a triple durational departure for a kidnapping conviction. 328 N.W.2d at 144, 147. The victim in that case, a five-year-old girl, was taken to a cornfield, where she was forced to perform fellatio and was told that she would be killed if she did not cooperate. *Id.* at 143. The girl needed ongoing psychological counseling. *Id.* at 147. The supreme court noted that the girl was particularly vulnerable due to her age. *Id.* at 146. The cruelty of the attack, the court noted, was ““of a kind not usually associated with the commission of the offense in question.”” *Id.* (quoting *State v. Schantzen*, 308 N.W.2d 484, 487 (Minn. 1981)).

In this case, the victim was 16 at the time of the kidnapping. She was held against her will for five days. She was repeatedly beaten and sexually assaulted, both orally and vaginally. She was sometimes deprived of food and water, told she was being held for ransom, and repeatedly threatened with death to her and to her family. The facts of this case are, in our view, as horrific, if not more horrific, than the facts of *Strommen*, *Mesich*, and *Norton*. The victim in this case was held for a longer period of time than the girl in

Norton, who was held only several hours. 328 N.W.2d at 143. She was subjected to more forms of abuse, and for a longer period of time, than the victim in *Strommen*. The degradation and torture that she experienced for five days is similar to that of *Mesich*. Thus, the postconviction court did not err by resentencing Graham to a quadruple upward durational departure on the kidnapping conviction.

II. Consecutive Sentences

Graham next argues that the postconviction court erred by imposing the two sentences in a consecutive rather than a concurrent manner. He argues that the imposition of consecutive sentences for kidnapping and attempted murder constitutes a second departure from the guidelines that is not supported by findings of the postconviction court or by the evidentiary record.

Graham's argument appears to be based on an amendment to the sentencing guidelines that became effective after the conduct for which he was convicted. In August 1998, the guidelines were amended to provide:

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

Minn. Sent. Guidelines cmt. II.F.04 (1998).

But the sentencing guidelines in effect at the time of Graham's offense do not include the above-quoted language. Rather, the 1997 guidelines state that a district court

is permitted to impose consecutive sentences for “[m]ultiple current felony convictions for crimes against persons,” Minn. Sent. Guidelines II.F. (Supp. 1997), “without the requirement to cite reasons for departure,” Minn. Sent. Guidelines cmt. II.F.04 (Supp. 1997). This is true even if a district court imposes both an upward departure and consecutive sentences because the court need give reasons only for the upward departure. Minn. Sent. Guidelines cmt. II.F.04 (Supp. 1997). Graham’s second argument fails for this reason alone.

Even if we were to assume that the 1997 guidelines should be interpreted in the same manner as the 1998 guidelines, Graham’s argument would fail. Under the 1998 guidelines, additional reasons for consecutive sentencing are required only if there is “one victim and a single course of conduct.” Minn. Sent. Guidelines cmt. II.F.04 (1998). The postconviction court found that the two offenses -- the kidnapping and the attempted murder -- constituted separate incidents and, thus, were not part of a single course of conduct. Graham does not challenge this finding. He argues instead that the record would not support a finding of aggravating factors in addition to those that justify the upward departure on the kidnapping conviction. But as we have stated, additional aggravating factors are unnecessary under the 1997 guidelines and, in any event, unnecessary under the 1998 guidelines given the postconviction court’s finding that the two offenses did not arise from a single course of conduct. Thus, the postconviction court did not err by imposing consecutive sentences on resentencing.

III. Proportionality

Graham last argues that the aggregate length of his sentences is excessive and disproportionate in comparison to the sentences imposed on his co-defendants. Graham contends that the aggregate length of his sentences, 416 months, is excessive because his six co-defendants received sentences ranging from 48 months to 270 months. The postconviction court noted that only two other co-defendants were charged with crimes that were similar in severity to the charges Graham faced. According to Graham and the postconviction court, those two defendants pleaded guilty. One was sentenced to concurrent prison terms of 66 months and 240 months; the other was sentenced to two concurrent sentences of 270 months each.

The supreme court addressed a similar argument in *State v. Vazquez*, 330 N.W.2d 110 (Minn. 1983), in which the appellant was convicted of “participating with friends of his in the gang rape of an 18-year-old woman.” *Id.* at 111. A co-defendant pleaded guilty and received the presumptive sentence. *Id.* Vazquez went to trial and received a double upward departure at sentencing. *Id.* The supreme court concluded that this result was not inconsistent with the goal of uniformity in sentencing, stating that “one must bear in mind that equality and fairness in sentencing involve more than comparing the sentence the appealing defendant received with the sentence his accomplices received. It also involves comparing the sentence of the defendant with those of other offenders.” *Id.* at 112. In addition, the supreme court has held that it is “not unjustifiably disparate” for a defendant who is convicted following trial to receive a more severe sentence than co-defendants who pleaded guilty in exchange for reduced sentences. *State v. Cermak*,

365 N.W.2d 243, 248 (Minn. 1985) (quotation omitted). The supreme court has expressed similar views in examining sentences of co-defendants who pleaded guilty and went to trial. *State v. Williams*, 337 N.W.2d 387 (Minn. 1983). The supreme court pointed out that “one of the risks of a defendant’s insisting on a trial is that it gives the court an opportunity to see the victims and hear the testimony and learn the facts in more vivid, concrete detail.” *Id.* at 391. And in hearing that testimony, the defendant takes the risk “that the evidence adduced at his trial would have an impact on the sentence that the trial court imposed.” *Id.*

In this case, Graham’s co-defendants chose to plead guilty, and Graham chose to exercise his right to a jury trial. The evidence that was introduced by the state, as summarized above, leaves a strong impression. In addition, Graham admitted when interviewed by the police that he was the ringleader. He took responsibility for the crime and stated that it was his idea to put the girl in the hole at the construction site. Based on all the facts summarized in this opinion, the postconviction court did not err by imposing a sentence that was longer than sentences received by Graham’s co-defendants.

Affirmed.