STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1329

State of Minnesota,
Respondent,

vs.

Bruce Ray Fairbanks,
Appellant.

Filed August 4, 2009
Affirmed in part, reversed in part, and remanded
Kalitowski, Judge

Anoka County District Court
File No. 02-KX-00-007845

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

Robert M.A. Johnson, Anoka County Attorney, Marcy S. Crain, Assistant County Attorney, Anoka County Government Center, 2100 Third Avenue, Suite 720, Anoka, MN 55303-5025 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Klaphake, Judge; and Hudson, Judge.

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

KALITOWSKI, Judge

Appellant Bruce Ray Fairbanks challenges his 240-month sentence for first-degree assault on a corrections officer and his consecutive 103-month sentence for kidnapping – great bodily harm. Appellant contends that (1) severe aggravating factors were not present to justify the district court's imposition of a consecutive sentence and a double durational departure; and (2) the court erred in using a criminal-history score of one instead of zero in determining the duration of the consecutive sentence. We affirm the consecutive sentence but reverse and remand for resentencing with a zero criminal-history score.

D E C I S I O N

The charges and convictions in this case stem from appellant's July 19, 2000 assault and kidnapping of corrections officer J.O., the facts of which are detailed in *State v. Fairbanks* (*Fairbanks I*), No. C0-02-1576, 2003 WL 21911109, at *1-2 (Minn. App. Aug. 12, 2003), *review denied* (Minn. Oct. 21, 2003).

Appellant waived his right to a jury trial, and on stipulated facts was found guilty of first-degree assault of a correctional employee and kidnapping – great bodily harm. The district court sentenced appellant to concurrent terms of 240 months for the first-degree assault conviction and 480 months for the kidnapping conviction to be served consecutive to his unexpired sentence for first-degree criminal sexual conduct. *Fairbanks I*, 2003 WL 21911109, at *2.

Appellant directly appealed, and we affirmed the convictions but reversed and remanded for resentencing. *Id.* at *6. On remand, the district court resentenced appellant to 240 months for the first-degree assault conviction and 240 months for kidnapping, to be served consecutively to each other. *State v. Fairbanks* (*Fairbanks II*), 688 N.W.2d 333, 335 (Minn. App. 2004), *review denied* (Minn. Dec. 13, 2005). After the United States Supreme Court issued its decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), appellant again appealed, and we vacated the sentences and remanded for resentencing under the procedures required by *Blakely*. *Fairbanks II*, 688 N.W.2d at 337.

On remand, appellant waived his right to a *Blakely* jury, and following a sentencing trial, the district court sentenced appellant to 240 months for the first-degree assault conviction, which constitutes a double durational departure, and a 103-month sentencing for the kidnapping conviction, to be served consecutively to the assault sentence for a total sentence of 343 months. The 343-month sentence was to be served consecutive to his criminal-sexual-conduct sentence that he was serving at the time of this incident.

I.

Appellant argues that when multiple crimes are committed against the same victim in a single behavioral incident, severe aggravating circumstances are required in order to impose both a durational departure and a consecutive sentence. We agree and conclude that here, an additional and severe aggravating factor exists to justify the imposition of the durational departure and the consecutive sentence.

Departures from presumptive sentences are reviewed under an abuse of discretion standard, but there must be "substantial and compelling circumstances" in the record to justify a departure. *Rairdon v. State*, 557 N.W.2d 318, 326 (Minn. 1996). An appellate court will not interfere with a district court's discretion in sentencing unless the sentence is disproportionate to the offense or unfairly exaggerates the criminality of the defendant's conduct. *State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007). But an interpretation of the sentencing guidelines is reviewed de novo. *State v. Holmes*, 719 N.W.2d 904, 907 (Minn. 2006).

The sentencing guidelines provide that "[m]ultiple current felony convictions for crimes on the list of offenses eligible for permissive consecutive sentences . . . may be sentenced consecutively." Minn. Sent. Guidelines II.F. (2006). Here, both of appellant's convictions are eligible for permissive consecutive sentencing because they are listed in section VI of the guidelines. *See id.* at VI (providing a list of crimes eligible for permissive consecutive sentences).

But although the guidelines permit consecutive sentencing under these circumstances, the guidelines commentators caution that "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." *Id.* at cmt. II.F.04. (emphasis added).

In *State v. Halvorson*, we held that "a trial court may not depart durationally and with respect to consecutive service unless *severe* aggravating circumstances are present

that would justify imposition of a term longer than twice the presumptive sentence." 506 N.W.2d 331, 340 (Minn. App. 1993) (emphasis added). The state asserts that *Halvorson* is distinguishable because it was decided in 1993 under a different version of the sentencing guidelines. But six years after *Halvorson* and after the commentators suggested that only "additional aggravating circumstances" must be present for both an upward departure and a consecutive sentence, we affirmed *Halvorson*'s holding that a district court may not depart durationally and with respect to consecutive service unless severe aggravating circumstances are present. *See State v. Jackson*, 596 N.W.2d 262, 267 (Minn. App. 1999), *review denied* (Minn. Aug. 25, 1999). Therefore, we conclude that to both upwardly depart and impose a consecutive sentence for offenses committed during a single behavioral incident involving the same victim, such a sentence must be supported by severe aggravating factors.

Appellant argues that because the district court did not find severe aggravating circumstances, a consecutive sentence on the kidnapping conviction was not permitted and thus, this court should modify the consecutive 103-month kidnapping sentence to a concurrent 163-month sentence. We disagree.

Generally, when an upward departure is justified, "the upper limit will be double the presumptive sentence length." *State v. Williams*, 608 N.W.2d 837, 840 (Minn. 2000) (quotation omitted). But when severe aggravating factors exist, a departure of up to the statutory maximum sentence and consecutive sentences may be appropriate. *Id.*

The difference between aggravating and severe aggravating circumstances is "based on our collective, collegial experience in reviewing a large number of criminal

appeals." *State v. Norton*, 328 N.W.2d 142, 146 (Minn. 1982). There is no clear line past which some aggravating circumstances become severe, and there is "no easy-to-apply test to use in making this decision." *Id.*

The district court identified numerous aggravating factors but did not specify which factors were "severe" aggravating factors. But we conclude that in addition to the aggravating factor of appellant's "dangerous offender" status, the severe aggravating factor of particular cruelty was present to support imposition of the consecutive kidnapping sentence.

Here, the record shows that during the kidnapping, appellant held the victim hostage with a razor held near her neck. As appellant held the razor to the victim's neck, he made multiple references to her family and specifically to her infant child, and graphically described the harm that he could do to her. Appellant told the other officers who had responded to the incident to back off or he would kill her and himself. Appellant threatened to cut the victim's throat if the officers did not open the door to release him. The victim testified that, as a result of the attack, she has suffered long-term psychological harm. The victim has been diagnosed with posttraumatic stress disorder, anxiety, has suffered panic attacks, and has "live[d] in fear and panic."

We conclude that the manner in which appellant carried out this kidnapping was atypical and particularly cruel. Therefore, this additional severe factor of particular cruelty justifies the district court's imposition of a consecutive sentence on the kidnapping conviction. *See, e.g.*, *State v. Glaraton*, 425 N.W.2d 831, 834 (Minn. 1988) (concluding that inflicting gratuitous physical injury, permanent physical injury, and

death threats constituted severe aggravating circumstances); *Jackson*, 596 N.W.2d at 267 (holding that particular cruelty in the form of death threats against victim and her parents, use of handcuffs, holding gun to victim's head, along with multiple penetrations, justified greater-than-double departure).

II.

Appellant argues that the district court erred in using a criminal-history score of one instead of zero to determine the duration of the consecutive kidnapping sentence. We agree.

The district court's determination of a defendant's criminal-history score will not be reversed absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002). But this court may reverse and remand for resentencing when a district court miscalculates a defendant's criminal-history score. *See State v. Benniefield*, 668 N.W.2d 430, 437-38 (Minn. App. 2003) (remanding for resentencing because appellant's criminal-history score was miscalculated due to the erroneous inclusion of two misdemeanors).

Here, the district court sentenced appellant to a 103-month consecutive kidnapping sentence, the high end of the presumptive range using a criminal-history score of one. Following this court's reasoning in *State v. Collins*, 580 N.W.2d 36, 45 (Minn. App. 1998), *review denied* (Minn. July 16, 1998), we conclude that the district court erred in using a criminal-history score of one instead of zero.

In *Collins*, we held that:

> If an inmate commits two offenses while serving the same prison sentence, the sentence for the second new offense, to be consistent with the guidelines, may only be made consecutive to the sentence for the first new offense if the court would be entitled to impose *permissive consecutive sentencing. The court must then use a criminal history score of zero for the second new offense.*

580 N.W.2d at 45 (emphasis added). Accordingly, the consecutive sentence for kidnapping – great bodily harm, as the second new offense, should be calculated using a criminal-history score of zero. And under the guidelines grid, using a criminal-history score of zero, the sentence range for this severity level VIII crime is 81 to 91 months, as compared with a 93- to 103-month range using a criminal-history score of one. Minn. Sent. Guidelines IV.

The state argues that *Collins* actually supports the imposition of appellant's 103-month sentence because although the district court in *Collins* erred in using a criminal-history score of one, the appellate court concluded that the "five month departure . . . is minor." *Collins*, 580 N.W.2d at 46. But in *Collins*, the district court noted that in using a criminal-history score of one, it believed that it was sentencing in accordance with the guidelines, but also stated that if "the sentence was interpreted as a departure, it was justified on the [departure] grounds of 'the involvement of a child . . . the family closeness . . . and the impact on the victim.'" *Id.* at 40. Here, in contrast to *Collins*, the district court did not express an intent to impose an upward departure on the duration of the kidnapping sentence.

We conclude that the district court abused its discretion in using a criminal-history score of one to determine the duration of the consecutive kidnapping sentence. We therefore reverse and remand for the imposition of consecutive sentences, with the duration of the consecutive kidnapping sentence to be determined within the 81- to 91-month range, as designated for a criminal-history score of zero.

Affirmed in part, reversed in part, and remanded.