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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2280**

Eric Joseph Petersen, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 11, 2009
Affirmed
Kalitowski, Judge**

Hennepin County District Court
File No. 27-CR-06-019789

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

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

UNPUBLISHED OPINION

KALITOWSKI, Judge

In this postconviction appeal, appellant Eric Joseph Petersen challenges the district court's denial of his motion to modify his sentence. Although appellant received the 90-

month sentence he agreed to in his plea bargain, appellant argues that (1) the district court erred in imposing an upward durational departure and (2) he was wrongly sentenced for a severity level 9 offense, instead of a severity level 8 offense. We affirm.

DECISION

Appellant was charged in Hennepin County District Court with one count of conspiracy to commit first-degree murder, under Minn. Stat. §§ 609.175, subd. 2 (2004); 609.185(a)(1) (2004), and one count of conspiracy to commit second-degree murder under Minn. Stat. §§ 609.175, subd. 2; 609.19, subd. 1 (1) (2004). The complaint was filed while appellant was in jail awaiting trial for a first-degree criminal sexual assault case, in which appellant's girlfriend, S.A., was the victim. The conspiracy charges were brought after appellant sought out a fellow inmate in jail, J.W., for assistance in hiring two men to prevent S.A. from testifying in his pending criminal sexual assault trial.

Appellant pleaded guilty to an amended charge of conspiracy to commit kidnapping – unsafe release, in violation of Minn. Stat. § 609.25, subd. 2(2) (2004). The plea agreement called for the dismissal of the conspiracy to commit murder charges, as well as the pending criminal sexual assault charges against him. Appellant waived his rights under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), with the explicit understanding that his 90-month sentence would be an upward departure from the guidelines, regardless of what his criminal-history score was. As grounds for the upward departure, the district court found on the record that S.A. was to be treated with particular cruelty if the conspiracy and kidnapping had gone forward. The district court believed the parties' "negotiation called for an upward departure from the 67 months presumptive

sentence to 90 months executed,” and appellant was then committed to the Commissioner of Corrections.

After sentencing, appellant moved for modification of his sentence based on his claims that: (1) he was wrongly sentenced for conspiracy to commit kidnapping with great bodily harm – a severity level 9 offense; (2) the factors relied on by the district court in imposing an upward departure did not make the commission of the conspiracy to kidnap with unsafe release more serious or atypical and therefore, departure was impermissible; and (3) the departure was improperly based on an element comprising the offense. The postconviction court denied appellant’s motion, concluding that the court’s sentencing departure was appropriately based on the grounds of particular cruelty, as supported by the record evidence and a clearly negotiated plea agreement, and appellant’s sentence for the crime of conspiracy to kidnap – unsafe release was permissible under the sentencing guidelines.

I.

Appellant argues that the district court erred in imposing an upward durational departure because the factors for the departure were inappropriate and did not make appellant’s commission of the conspiracy to kidnap more serious or atypical. We disagree.

Appellate courts “afford great deference to a district court’s findings of fact and will not reverse the findings unless they are clearly erroneous. The decisions of a postconviction court will not be disturbed unless the court abused its discretion.” *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001) (citation omitted). Nevertheless, the district

court's findings relating to "aggravating or mitigating circumstances justifying departure from the presumptive sentence must be present in the record." *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). The district court "may consider the defendant's admissions, statements, and agreements contained in the negotiated plea." *State v. Pearson*, 479 N.W.2d 401, 405 (Minn. App. 1991), *review denied* (Minn. Feb. 10, 1992).

Negotiated plea agreements that include a sentencing departure are justified under the sentencing guidelines in cases where substantial and compelling circumstances exist. *State v. Misquadace*, 644 N.W.2d 65, 71 (Minn. 2002). "A plea agreement standing alone, however, does not create such circumstances in its own right. Rather, when reviewing a plea agreement that includes a sentencing departure, the court must determine whether the offense of conviction reflects any aggravating or mitigating circumstances that warrant a departure." *Id.* For felony convictions, the district court must state, on the record, findings of fact as to the reasons for departure. Minn. R. Crim. P. 27.03, subd. 4(C). A sentencing departure will be affirmed despite inadequate reasons if "there is sufficient evidence in the record to justify the departure." *State v. McIntosh*, 641 N.W.2d 3, 8 (Minn. 2002) (quotation omitted).

Particular Cruelty & Unnecessary Danger

Under the sentencing guidelines, when a victim is treated with "particular cruelty" for which the defendant should be held responsible, departure is appropriate. Minn. Sent. Guidelines II.D.2.b(2). Here, the postconviction court found that sufficient evidence existed on the record to justify the reason given for the upward departure; specifically that S.A. was to be treated with particular cruelty when kidnapped. We agree.

The kidnapping statute, Minn. Stat. § 609.25, subd. 1 (2004), provides that whoever, for the purpose of terrorizing the victim, “confines or removes from one place to another, any person without the person’s consent . . . is guilty of kidnapping and may be sentenced as provided in subdivision 2.” Subdivision 2 provides that “if the victim is not released in a safe place,” the offender may be sentenced to imprisonment for not more than 40 years. Minn. Stat. § 609.25, subd. 2(2). The record here shows that appellant’s conspiracy to kidnap S.A. extended beyond the mere elements of confinement and unsafe release. At the plea hearing, appellant admitted that he instructed the kidnappers to rear-end S.A.’s vehicle off the road and kidnap her.

The essential elements of a criminal charge cannot also be used to sustain an upward departure. *State v. Peterson*, 329 N.W.2d 58, 60 (Minn. 1983). But the record shows that the manner in which appellant planned to kidnap S.A.—rear-ending her car off the road, taking her, and duct taping her mouth—entailed danger and gratuitous violence unnecessary to the commission of the crime of kidnapping. *See State v. Morales*, 324 N.W.2d 374, 377 (Minn. 1982) (upholding departure on ground that crime was unnecessarily cruel because offender gratuitously inflicted personal injury). This manner of kidnapping does not constitute any element of the offense of kidnapping – unsafe release. Appellant’s plan to run S.A. off the road could have caused serious physical injury to S.A., as well as other drivers on the road, and that type of danger goes beyond the kidnapping element of terrorizing the victim. *See State v. Barber*, 372 N.W.2d 783, 785 (Minn. App. 1985) (concluding upward departure is justified when

defendant's conduct is particularly serious and represents a greater-than-normal danger to the safety of other people), *review denied* (Minn. Sept. 19, 1985).

We conclude that the postconviction court did not abuse its discretion by determining that sufficient evidence supported its finding that appellant's conspiracy to kidnap without safe release was significantly more serious than the typical kidnapping.

Particular Cruelty & Danger to Others

In addition, the postconviction court properly determined that the record contains evidence of particular cruelty due to the planned commission of the crime in the presence of S.A.'s mother and child. A durational departure is justified where the conduct underlying the offense is particularly serious and represents a greater-than-normal danger to the safety of other people. *Id.* Further, whether the victim was subjected to particular cruelty may be determined by the impact of the crime on other people. *See State v. Norton*, 328 N.W.2d 142, 146 & n.2 (Minn. 1982) (considering the impact of a crime on people other than the victim in determining whether the crime was committed in a particularly cruel way) (citations omitted). Here, the record shows that appellant disclosed to J.W. certain addresses and information about other persons besides S.A., including her juvenile son. Appellant provided the following information: detailed directions to S.A.'s residence, the identity of S.A.'s mother and directions to her residence in case S.A. was staying there, S.A.'s work schedule, S.A.'s schedule for picking up her son, and the location of his school.

Applying the holdings of *Barber* and *Norton* to these facts, we conclude that the postconviction court did not abuse its discretion in finding that appellant's "instructions

to the hitmen involved other persons regardless of their age or vulnerability, and therefore, increased the likelihood that innocent bystanders would have been placed in a position of serious danger.”

Uncharged Offense

Appellant argues that the grounds for particular cruelty were improperly based on the uncharged offense of conspiracy to commit kidnapping with great bodily harm. We disagree.

A departure cannot be based on uncharged criminal conduct. *State v. Jackson*, 749 N.W.2d 353, 357 (Minn. 2008). “The guidelines do not contemplate enhanced sentences based on uncharged criminal conduct that would be far greater than what would otherwise be permitted based on charged criminal conduct.” *Id.* Here, the postconviction court concluded that the upward departure was not based on great bodily harm, but rather was based on the particular cruelty of the kidnapping.

The aggravating circumstances of particular cruelty, unnecessary danger, and harm to others are not elements of the uncharged offense of kidnapping – great bodily harm. *See* Minn. Stat. §§ 609.25 (prohibiting kidnapping); 609.02, subd. 8 (2004) (defining great bodily harm). And the issue of great bodily harm was not cited by the postconviction court in support of the upward departure. In addition, this record lacks any particular facts that would support the charge of kidnapping – great bodily harm. Therefore, we conclude that the postconviction court did not abuse its discretion in determining that the evidence of particular cruelty supports the departure.

II.

Appellant argues that the postconviction court abused its discretion in denying appellant's motion to modify his sentence because he was wrongly sentenced for a severity level 9 offense instead of the severity level 8 offense of conspiracy to commit kidnapping – unsafe release. We disagree.

In reviewing a postconviction court's denial of relief, issues of law are reviewed de novo and issues of fact are reviewed for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). And Minnesota law provides that one who conspires to commit a felony may be sentenced to not more than one-half the imprisonment provided for that felony. Minn. Stat. § 609.175, subd. 2; Minn. Sent. Guidelines cmt. II.G.01 (2006).¹

In addition, departure is appropriate if the commission of a crime includes an aggravating factor, such as particular cruelty. *See* Minn. Sent. Guidelines cmt. II.D.2.b(2). When an upward departure is justified in sentencing due to substantial and compelling circumstances documented in the record, generally the limit on the duration of the sentence is double the presumptive sentence. *State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981). Here, considering that appellant has a criminal-history score of 4, appellant's 90-month sentence, based in part on the aggravating factor of particular cruelty, falls within the range of 75-105 months, which is double the presumptive

¹ The 2006 version of the sentencing guidelines are used in this case because that version became effective August 1, 2005, and the incident occurred in March 2006.

sentence range of 37.5-52.5 months for the conspiracy crime of kidnapping – unsafe release.

Therefore, although the district court was mistaken as to the severity level of the conspiracy crime of kidnapping – unsafe release, appellant’s 90-month sentence, which he explicitly agreed to in his plea agreement, falls within the lawful range provided for a severity level 8 offense for an offender with a criminal-history score of 4. Thus, we conclude that the postconviction court did not abuse its discretion by determining that appellant’s agreed-upon 90-month sentence did not exceed a double durational departure from the presumptive range.

Additionally, the district court did not abuse its discretion because the court properly based the reasons for departure on both the negotiated plea agreement and aggravating circumstances. *See Misquadace*, 644 N.W.2d at 71 (concluding that negotiated plea agreements that include a sentencing departure are justified if the court determines that the offense reflects aggravating circumstances that warrant a departure).

Affirmed.