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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2219**

State of Minnesota,
Respondent,

vs.

Marcus Aaron Smith,
Appellant.

**Filed December 22, 2009
Affirmed
Hudson, Judge**

Hennepin County District Court
File No. 27-CR-08-26882

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

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Marie Wolf, Interim Chief Public Defender, Michael W. Kunkel, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

On appeal from his conviction of third-degree assault, appellant argues that the district court erred by basing its upward durational departure on facts underlying a charge dismissed pursuant to a plea agreement. Because the district court cited adequate other grounds for the departure, we affirm.

FACTS

The state charged appellant Marcus Aaron Smith by amended complaint with one count of third-degree assault in violation of Minn. Stat. § 609.223, subd. 1 (2006), and one count of kidnapping in violation of Minn. Stat. § 609.25, subds. 1(2), 2(1) (2006). The state filed notice of intent to seek an upward departure.

The complaint alleged that, on or about May 29, 2008, at approximately 3:00 a.m., the adult female victim, J.L.H., was in her home with appellant, her ex-boyfriend. The two began to argue, and appellant struck J.L.H. in the face. J.L.H. told appellant that she needed an ambulance and tried to leave the home, but appellant physically restrained her. After two hours, appellant stated that he would leave to call an ambulance. J.L.H. also left to find a pay phone. Appellant caught J.L.H. before she made a call, told her that he had already called an ambulance, and took J.L.H. back to the apartment. When no ambulance arrived, J.L.H. promised not to call the police if she could call an ambulance. Appellant agreed. The subsequent medical examination revealed that J.L.H. had a broken jaw.

Appellant pleaded guilty to third-degree assault. Pursuant to a plea agreement, the state agreed to dismiss the kidnapping charge. Appellant agreed to waive his right to a sentencing jury trial, leaving the sentence to be determined by the district court up to a maximum term of 60 months.

At sentencing, the state set forth two grounds for an upward departure from the presumptive sentence of 30 months. First, the state argued that appellant met the criteria for sentencing under Minn. Stat. § 609.1095, subd. 2 (2006). Second, the state argued that an upward durational departure was warranted based on the particular cruelty of appellant's conduct.

J.L.H. testified at the sentencing hearing that, after appellant struck her, she was bleeding profusely and in severe pain. She stated that she asked to go to the hospital but that appellant told her that she did not need to go. She testified that, for "about two and a half hours," appellant would not let her leave the house even though she had made clear that she was in pain. J.L.H. further testified that appellant told her that he would phone for help and that he had asked someone to call 911. But no help ever arrived, and J.L.H. believes no call was made.

The district court determined that an upward departure was warranted. It found that, although appellant did not meet the statutory criteria for sentencing pursuant to Minn. Stat. § 609.1095, subd. 2, he met the criteria for sentencing as a career offender under Minn. Stat. § 609.1095, subd. 4 (2006). The district court also cited the particular cruelty of appellant's conduct as a separate ground for departure. Appellant was

sentenced to the statutory maximum term of 60 months, a double durational upward departure from the presumptive sentence of 30 months. This appeal follows.

DECISION

Appellant argues that his case must be remanded to the district court for imposition of the presumptive sentence because the district court had no valid grounds upon which to base an upward durational departure.

A district court's decision to depart from a presumptive sentence is reviewed for abuse of discretion. *State v. Stanke*, 764 N.W.2d 824, 827 (Minn. 2009). Reversal is warranted only if the reasons given for departure are inadequate or improper and there is insufficient evidence in the record to justify the departure. *State v. Jackson*, 749 N.W.2d 353, 357 (Minn. 2008). A district court must order the presumptive sentence provided by the sentencing guidelines unless there are "substantial and compelling circumstances" that 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).

Sentencing as a career offender

Appellant first argues that the district court incorrectly determined that appellant qualified for sentencing as a career offender under Minn. Stat. § 609.1095 (2006). The state concedes this point. The district court determined that appellant qualified for sentencing under Minn. Stat. § 609.1095, subd. 4, which permits a departure when the

defendant has “five or more prior felony convictions” and the court determines that the current offense “was committed as part of a pattern of criminal conduct.” Minn. Stat. § 609.1095, subd. 4. A “prior conviction” means a conviction “that occurred before the offender committed the next felony resulting in a conviction.” *Id.*, subd. 1(c). Here, the court was presented with evidence of six prior felony offenses. But the convictions for these offenses occurred on only two dates when guilty pleas were entered: September 11, 2002 and October 1, 2004. Thus, appellant did not have the required “five or more prior felony convictions” qualifying him for sentencing under the career-offender statute. *See State v. Huston*, 616 N.W.2d 282, 283–84 (Minn. App. 2000) (holding that under the career offender statute, five prior *sequential* felony convictions, with each conviction preceding the subsequent offense, are required). The district court therefore erred in using appellant’s prior felony convictions as a basis for an upward durational departure.

But appellant’s sentence may still be affirmed if the district court stated an adequate independent basis to impose the sentence. *See Stanke*, 764 N.W.2d at 828 (holding that if the district court would have imposed the same sentence absent the improper factor, the sentence will be affirmed); *State v. Vance*, 765 N.W.2d 390, 395 (Minn. 2009) (“When a reviewing court concludes that a district court based a departure on both valid and invalid factors, a remand is required unless it determines the district court would have imposed the same sentence absent reliance on the invalid factors.”) (quotation omitted).

Sentencing for particular cruelty

The district court also based its upward departure on the particular cruelty of appellant's conduct. Appellant argues that the district court abused its discretion in doing so because the facts cited by the district court make up the basis of the dismissed kidnapping charge.

Under the Minnesota Sentencing Guidelines, an upward departure is warranted if “[t]he victim was treated with particular cruelty for which the individual offender should be held responsible.” Minn. Sent. Guidelines II.D.2.b.(2). Particular cruelty exists when the type of cruelty is “of a kind not usually associated with the commission of the offense in question.” *State v. Norton*, 328 N.W.2d 142, 146 (Minn. 1982) (quotation omitted). A finding of “particular cruelty” alone may be sufficient to justify a double upward departure. *State v. Martinez*, 319 N.W.2d 699, 701 (Minn. 1982).

Generally, a court may consider conduct underlying the charge of which the defendant is convicted as the basis for an upward durational departure. *Taylor v. State*, 670 N.W.2d 584, 588 (Minn. 2003). But an upward durational departure cannot be based on allegations forming the basis of a charge that was dismissed as part of a plea agreement because this may have the effect of unfairly depriving a defendant of the benefits of the plea bargain. *State v. Womack*, 319 N.W.2d 17, 19 (Minn. 1982); *State v. Arnold*, 514 N.W.2d 801, 802 (Minn. 1994). This exception has been limited to situations where the aggravating factors relate solely to the dismissed charge. *See State v. Winchell*, 363 N.W.2d 747, 750 (Minn. 1985) (stating that *Womack* does not apply where the agreement to dismiss a charge was not an implied concession by the state that the

defendant did not commit the dismissed charge, and the dismissed charge stemmed from the same conduct as the prosecuted charge).

Here, the district court found that appellant's conduct in preventing J.L.H. from leaving to seek medical attention was particularly cruel. While these facts form the basis of the assault charge, they also form the basis of the dismissed kidnapping charge. But we need not reach whether the district improperly based its particular cruelty finding on facts underlying the dismissed kidnapping charge because the district court stated another basis for finding particular cruelty.

The district court also found that particular cruelty existed because appellant was aware of the severity of J.L.H.'s injury, and "having seen what he did, he should have helped her get medical attention, and he did not." Failure to summon medical assistance for a victim is a valid basis for finding that an offense was committed with particular cruelty. *See, e.g., State v. Harwell*, 515 N.W.2d 105, 109 (Minn. App. 1994), *review denied* (Minn. June 15, 1994); *State v. Strommen*, 411 N.W.2d 540, 544–45 (Minn. App. 1987), *review denied* (Minn. Oct. 28, 1987). Significantly, failure to summon medical assistance is not an element of kidnapping. *See* Minn. Stat. § 609.25, subd. 1 (2006). Thus, irrespective of the dismissed kidnapping charge, appellant's cruelty in not seeking medical care for J.L.H. when he knew she was injured was properly considered by the district court. Appellant never summoned medical assistance, and appellant led J.L.H. to believe that help was on the way while she suffered with significant injuries for more than two hours. Therefore, the district court did not abuse its discretion in departing upwards from the presumptive sentence based on particular cruelty.

Affirmed.