STATE OF MINNESOTA
IN COURT OF APPEALS
A09-446

State of Minnesota,
Respondent,

vs.

Russell James Simon,
Appellant.

Filed May 18, 2010
Affirmed
Schellhas, Judge

Isanti County District Court
File No. 30-CR-08-571

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Jeffrey Edblad, Isanti County Attorney, Cambridge, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

SCHELLHAS, Judge

Appellant challenges his convictions of attempted second-degree murder, second-degree assault, and felon in possession of a firearm and, alternatively, his upward-departure sentence for his conviction of attempted second-degree murder. Appellant claims that: (1) the district court erred by admitting evidence of the result of a drug test on a urine sample ordered at his first appearance; (2) the prosecution engaged in misconduct; (3) the evidence was insufficient to support his convictions of attempted second-degree murder; and (4) his upward-departure sentence was based on improper aggravating factors. We affirm.

FACTS

P.W. met appellant Russell James Simon in May 2007, and in February 2008, appellant and his minor son, J.S., moved into P.W.'s home, where she resided with her minor son, M.W.

T.P. and appellant had a 20-year friendship. Sometime in April 2008, appellant contacted T.P. and, during the first two weeks of May 2008, T.P. helped appellant do some remodeling work in P.W.'s home. During this period, T.P. sometimes slept at P.W.'s home in the downstairs family room.

In the early evening on May 14, 2008, appellant and T.P. went to at least two bars in Cambridge, where they drank until closing time around 1:00 a.m. T.P. drove back to P.W.'s home because appellant was intoxicated. In the early morning hours of May 15, appellant, T.P., and P.W. were in the garage smoking cigarettes, when, in P.W.'s words,

appellant suddenly "went nuts" and "went after [T.P.]," shoving him and causing him to fall into a television set. T.P. then punched appellant, and appellant struck T.P. on his wrist and across his nose with a statue. Following that altercation, appellant threw an open water bottle at P.W. and ordered her to go upstairs. As P.W. followed appellant upstairs, he slammed her head into a wall, breaking the sheetrock and causing P.W. to fall to her knees. P.W. then heard a bang, saw a flash from the landing above her, and thought a bullet grazed her left arm. Appellant then shot at T.P., ordered him out of the house, and fired another shot. As T.P. left the house, he heard the gun discharge again. T.P. urged P.W. to leave the house, but she would not abandon her son, M.W.

From the woods near the house, T.P. dialed 911 and reported that an assault with a weapon had occurred. Deputy Lance Olson and two other officers arrived at the house in less than ten minutes, and T.P. came out of the woods. The officers observed that T.P. had a large straight laceration across the bridge of his nose.

Inside the house, appellant was swearing at P.W., calling her names, and demanding that she come into the bedroom. Because M.W. was crying in his bedroom, appellant allowed P.W. to attend to M.W., telling her, "You have ten minutes, bitch, to get in here and start s--king my d--k or I'm going to kill you and him." After P.W. attended to M.W., she joined appellant in the bedroom. Appellant had a .380 handgun next to him on the side of the bed. At one point, M.W. cried out again, asking P.W. if she was alright and P.W. told him she was, trying to comfort him. After 15 to 20 minutes, appellant fell asleep.

The police entered P.W.'s house at 5:46 a.m., after 19 attempts to make contact with appellant by phone and calling for back-up from the BCA and state patrol. Once inside, Deputy Petz noticed that the wood railing to the staircase leading from the basement to the main floor was splintered and had a bullet hole in it. Police found appellant and P.W. in bed in the master bedroom, and found a .380 handgun underneath appellant's body. The police arrested appellant and took P.W. and T.P. to the hospital emergency room to be treated for their injuries. P.W. had a concussion, her right knee was contused and swollen, and her left upper arm was swollen, tender and sore. T.P. had pain in his left wrist and his nose was broken.

Upon further investigation, the police found a .380 round on the staircase leading from the main level of the home to the lower level. They found a spent shell casing one step below the .380 round. And they found another spent casing on the basement floor. The police noticed a damaged staircase spindle and, based on its appearance, Investigator Bowker opined at trial that someone had fired a bullet from the top of the stairway in a downward trajectory, consistent with P.W.'s version of what had happened. The police found a bag containing a trace amount of methamphetamine in a trash can.

Respondent State of Minnesota charged appellant with: attempted first-degree premeditated murder of P.W. (count I); attempted first-degree premeditated murder of T.P. (count II); attempted second-degree murder of P.W. (count III); attempted second-degree murder of T.P. (count IV); first-degree criminal sexual conduct (counts V and VI); second-degree assault with a dangerous weapon of P.W. (count VII); second-degree

assault with a dangerous weapon of T.P. (count VIII); and felon in possession of a firearm (count IX).

At trial, appellant testified that he came home drunk, vomited in his bedroom, and joined P.W. and T.P. downstairs. He testified that he found T.P. and P.W. kissing, felt angry and betrayed, and pushed T.P. into the television. He claimed that he hit T.P. with a statue so that he could get up off the floor after T.P. knocked him down. He testified that T.P. and P.W. told him that his relationship with P.W. was over and to leave and that "the gun went off," missing appellant. Appellant remembered P.W. helping him into bed but could not remember anything else until being awakened by police. Appellant noticed a gun underneath him in bed but claimed he did not put it there.

The jury found appellant guilty of counts III, IV, VII, VIII, and IX.[1] The district court sentenced appellant to 60 months' imprisonment for his conviction of felon in possess of a firearm (count IX), and concurrently to 240 months for attempted second-degree murder of P.W. (count III), and 213 months for attempted second-degree murder of T.P. (count IV). This appeal follows.

D E C I S I O N

I

Appellant first argues that the district court abused its discretion by admitting evidence of his drug use. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the

[1] The jury found appellant not guilty of counts I, II, V and VI, attempted first-degree premeditated murder of P.W., attempted first-degree premeditated murder of T.P., and two counts of first-degree criminal sexual conduct.

appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

At the time of his first appearance, appellant was in custody and appeared without counsel. Early in the hearing, the district court appointed a public defender to represent appellant, but the attorney was not present at the hearing. Later in the hearing, the district court ordered appellant to produce a urine sample for drug testing. Appellant's urine sample tested positive for methamphetamine. Before trial, appellant moved for suppression of the drug-test results. The district court ruled that the drug-test results were unduly prejudicial and would be inadmissible unless the prosecution could lay a foundation and show relevance. During pretrial and trial, the court reiterated these requirements for admission of the drug-test results.

Admission of Drug-Test Results

During cross-examination by appellant's counsel, T.P. testified that he saw appellant smoking or attempting to smoke meth in the house the night of the incident. Despite the district court's pretrial ruling, appellant's counsel did not seek a curative instruction in response to T.P.'s testimony. Instead, in an apparent effort to impeach T.P., appellant's counsel asked T.P. several follow-up questions thereby providing T.P. the opportunity to confirm that he saw appellant smoking or trying to smoke meth:

> T.P.: I walked in and Russ was doing something and he wouldn't have been doing it if she would have been in the room.
> . . .

DEFENSE COUNSEL: Mr. [T.P.], you mentioned earlier during this cross-examination you had left the garage to go to the bathroom[.]
T.P.: Yes.
. . .
DEFENSE COUNSEL: And you made a comment, you said you knew she was not in that room because Russ was doing something[.]
T.P.: Yep.
DEFENSE COUNSEL: Okay. What are you referring to?
T.P.: I walked in and he was hitting the pipe.
DEFENSE COUNSEL: What do you mean?
T.P.: Smoking meth.
DEFENSE COUNSEL: He was doing what?
T.P.: He was smoking meth.
DEFENSE COUNSEL: He was smoking what?
T.P.: Meth.
DEFENSE COUNSEL: How do you know that?
T.P.: Because I seen him.
DEFENSE COUNSEL: Okay. You saw him smoking meth?
T.P.: Yep.
DEFENSE COUNSEL: And you wouldn't tell the jury that just to make Mr. Simon look bad, would you?
T.P.: No.
DEFENSE COUNSEL: Because that's what you saw?
T.P.: That's what I saw.

Based on T.P.'s testimony, and despite appellant's objection, the district court determined that its requirements for admission of the drug-test results had been satisfied and admitted them into evidence. During T.P.'s cross-examination, appellant's counsel opened the door to the admission of the drug-test results, walked through the door with his continued questioning, and left the door open for admission. We conclude that appellant waived his objection to the admission of the drug-test results. *See State v. DeSchoatz*, 280 Minn. 3, 313, 157 N.W.2d 517, 524 (1968) (stating that when defendant introduces otherwise

inadmissible evidence, he cannot later complain that permitting such testimony was error on the part of the trial court).

Sixth Amendment Right to Counsel

Appellant argues that the district court erred by admitting the drug-test results because: (1) his Sixth Amendment right to counsel was violated at his first appearance; (2) the court's order for production of the urine sample violated rules 6.02 and 9.02 of the Minnesota Rules of Criminal Procedure; and (3) the court's order for production of the urine sample constituted an illegal search not supported by probable cause.

A defendant's right to counsel attaches at the first appearance for all *subsequent proceedings*. Minn. R. Crim. P. 5.01(b). A defendant does not have the right to counsel at a hearing in which the sole purpose is to fix bail and appoint an attorney. *State ex rel. Ahlstrand v. Tahash*, 266 Minn. 570, 570, 123 N.W.2d 325, 326 (1963). Rule 5.01 requires that a defendant appearing initially before a judge be advised of various rights, including "[t]hat the defendant has a right to counsel in all *subsequent proceedings*, including police line-ups and interrogations, and if the defendant appears without counsel and is financially unable to afford counsel, that counsel will forthwith be appointed without cost to the defendant." Minn. R. Crim. P. 5.01(b) (emphasis added). Here, the sole purpose of appellant's first appearance was for the district court to set bail and any conditions of release and appoint counsel for appellant, if appropriate. Given the purpose of appellant's first appearance, he did not have a right to counsel; therefore, appellant's Sixth Amendment right to counsel was not violated at his first appearance.

Minn. R. Crim. P. 6.02

Appellant argues that the district court ordered the drug test at his first appearance as a condition of release pursuant to Minn. R. Crim. P. 6.02. As such, appellant argues, the district court erred by admitting the drug-test results at trial because they were inadmissible under rule 6.02, subdivision 3. Subdivision 3 authorizes a prerelease "investigation into the accused's background" so that the district court can "acquire the information required for determining the conditions of release." The investigation "may be made prior to or contemporaneously with the defendant's appearance before the court, judge or judicial officer." *Id.* "Any information obtained from the defendant in response to an inquiry during the course of the investigation and any evidence derived from such information, shall not be used against the defendant at trial." *Id.*

Although appellant argues that the district court ordered the drug test pursuant to rule 6.02, his argument is not supported by the record. The record reflects that the court ordered appellant to produce the urine sample *after* it set bail and conditions of release. Rule 6.02, subdivision 3, therefore is not applicable.

Minn. R. Crim. P. 9.02

Appellant also argues that by ordering the drug test at his first appearance, the district court violated rule 9.02, subdivision 2(1)(f), because neither the prosecution nor the court provided notice to appellant's appointed counsel. The rule provides:

> Upon motion of the prosecuting attorney *with notice to defense counsel* and a showing that one or more of the discovery procedures hereafter described will be of material aid in determining whether the defendant committed the

> offense charged, the trial court at any time before trial may, subject to constitutional limitations, order a defendant to:
>
> (f) Permit the taking of samples of the defendant's blood, hair, saliva, urine, and other materials of the defendant's body which involve no unreasonable intrusion thereof.

Minn. R. Crim. P. 9.02, subd. 2(1)(f) (emphasis added). And rule 9.02, subdivision 2(2), provides that "[w]henever the personal appearance of the defendant is required for the foregoing purposes, reasonable notice of the time and place thereof shall be given by the prosecuting attorney to defense counsel."

But based on language contained in the comment to rule 9, the state argues that notice to appellant alone was sufficient at his first appearance. The comment to rule 9.02, subdivision 2, provides that

> *Following a complaint charging a felony* or gross misdemeanor, the order [requiring the defendant to personally submit to the non-testimonial identification and other procedures described in the rule] may be obtained at the first appearance of the defendant under Rules 4.02, subd. 5(1) and 5, or at or before the Omnibus Hearing under Rule 11 from the court before which that hearing is held. It may be obtained from the district court at any time before trial, but preferably at or before the Omnibus hearing.
>
> *Rule 9.02, subd. 2(2), requiring notice to defense counsel of the time and place for the personal appearance of the defendant, would include the defendant if the defendant represents herself or himself or is unrepresented.*

Minn. R. Crim. P. 9.02, subd. 2 cmt. (emphasis added).

Here, appellant made his first appearance without counsel, requested court appointed counsel, and the district court appointed the public defender to represent him. But because the public defender was not present at the hearing, appellant was

unrepresented when the court ordered him to produce a urine sample. Pursuant to the comment to rule 9.02, notice to appellant at the hearing of the prosecution's request for a urine sample for drug testing satisfied rule 9.02, subdivision 2(2). And, even if, pursuant to rule 9.02, subdivision 2(2), the prosecution should have attempted to notify appellant's public defender of the prosecution's intention to ask the district court to order appellant to produce a urine sample, defendant was not prejudiced in this case. *See State v. Dye*, 333 N.W.2d 642, 644 (Minn. 1983) ("It is clear that had application been made to take samples of hair and saliva after notice to defense counsel, under the factual circumstances here existing, the court would have ordered the procedure [under] Rule 9.02, subd. 2(1)(f).").

Similarly, under the factual circumstances here, it is clear that had the prosecution notified the public defender of its intention to apply for the order for a urine sample and drug testing, the district court would have ordered production of the urine sample. Given the dissipation of drugs in a defendant's body, time was of the essence in obtaining a urine sample from appellant for drug testing. *See State v. Shriner*, 751 N.W.2d 538, 549-50 (Minn. 2008) ("The rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause to believe that defendant committed criminal vehicular homicide or operation."). And in *State v. Netland*, 762 N.W.2d 202, 213 (Minn. 2009), the supreme court stated that

> exigency does not depend on the underlying crime; rather, the evanescent nature of the evidence creates the conditions that justify a warrantless search. It is the chemical reaction of

> alcohol in the person's body that drives the conclusion on exigency, regardless of the criminal statute under which the person may be prosecuted.

Here, the prosecution argued to the district court that methamphetamine dissipates quickly. We see no reason not to treat the dissipation of drugs in appellant's urine as an exigent circumstance justifying no advance notice to appellant's public defender.

Appellant has not shown that he was prejudiced by the lack of notice to his attorney, and his argument that a violation of rule 9.02 supports a reversal of his convictions and remand fails.

Probable Cause for Search

Appellant argues that the court's order that he produce a urine sample violated his Fourth Amendment right against an unreasonable search because the order constituted a search without probable cause. As described above, the prosecution requested that the court order the production of a urine sample for drug testing after the prosecution filed a complaint, signed by a judge, with the district court. The judge's signature appears after a probable cause statement contained in the complaint. On the basis of the complaint and the prosecution's argument at appellant's first appearance, the district court ordered appellant to produce the urine sample for drug testing. The court had sufficient probable cause to believe that the offenses described in the complaint had been committed by appellant, and therefore the court's order for production of the urine sample and drug testing was based on probable cause. Appellant's argument fails. The district court did not abuse its discretion in admitting the drug-test results.

II

Appellant argues that the prosecution's failure to properly instruct its witnesses caused the jury to hear multiple prejudicial statements which denied appellant his constitutional right to a fair trial. Specifically, appellant claims that the prosecution engaged in misconduct by improperly eliciting: 1) vouching testimony; 2) reference to appellant's time in prison; 3) reference to appellant's marijuana use; and 4) reference to appellant's possession of "Rush."

The Minnesota Supreme Court has identified "eliciting inadmissible evidence" and "inflaming the passions and prejudices of the jury," among other things, as improper trial conduct for prosecutors. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). An appellate court's standard of review for claims of prosecutorial misconduct depends on whether an objection was raised at the time of the alleged error. *State v. Yang*, 774 N.W.2d. 539, 559 (Minn. 2009). For claims of prosecutorial misconduct to which the defendant objected at trial, we apply a two-tiered harmless-error test. *Id.* "For cases involving claims of unusually serious prosecutorial misconduct, there must be certainty beyond a reasonable doubt that misconduct was harmless." *Id.* "We review cases involving claims of less-serious prosecutorial misconduct to determine whether the misconduct likely played a substantial part in influencing the jury to convict." *Id.*

Vouching Testimony

Prior to trial, the district court granted the prosecution's motion to bar witnesses from vouching for other witnesses and instructed both parties to admonish their witnesses not to "volunteer testimony that is not asked for." Appellant asserts, and we agree, that

his objection to the purported vouching testimony is preserved even though he did not object at trial. *See* Minn. R. Evid. 103(a) ("Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error.").

At trial, Deputy Olson testified that when Agent Florell asked him whether, upon arrival at P.W.'s home, he believed what he had been told about the situation was truthful, Olson answered, "we believed what [T.P.] was telling us was the truth." Olson also testified that the police kept asking T.P. questions to determine if his story was consistent, and "from what I gathered he kept, for the most part, you know, everything was pretty much the same." Deputy John McCarty, who arrived at the scene sometime later, testified that "law enforcement [believed T.P.] to be the victim." Investigator Chris Janssen, the officer who interviewed the state's two main witnesses, testified that although the statements of T.P. and P.W. were inconsistent, he was not concerned "[b]ecause certain facts stayed consistent."

"[O]ne witness cannot vouch for or against the credibility of another witness." *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998). Vouching testimony is improper because it interferes with the jury's duty to assess credibility. *State v. Blanche*, 696 N.W.2d 351, 374 (Minn. 2005). "[T]he credibility of a witness is for the jury to decide, not a witness." *State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995). In *Koskela*, the supreme court expressed concern about a police officer's testimony that "[he] had no doubt whatsoever that [he] was taking a truthful statement." *Id.* But the court concluded

that the officer's opinion on the truthfulness resulted in no prejudice to the defendant, stating:

> In cases where there is little more evidence than the contradictory testimony of witnesses, an opinion by a witness for the prosecution as to the credibility of the defendant can be nothing less than telling the jury how to decide the case and can be prejudicial to the defendant. Here, however, the testimony of other witnesses and evidence found at the crime scene made appellant's confession, the subject of Lieutenant Gautsch's opinion on truthfulness, little more than corroborative. Therefore, we conclude there was no prejudice to the appellant in permitting Lieutenant Gautsch to testify as to appellant's credibility.

Id.

Here, we conclude that the responding officers' testimony about their investigation did not constitute vouching because they did not testify about the truthfulness of any witness's credibility. And we conclude that the prosecution's questions were not improper because the prosecution did not ask any of its witnesses to opine about the credibility of a trial witness. Rather, the prosecution solicited explanatory testimony from the officers about their investigation, the course it took, and why. Even if the officers' testimony did constitute vouching, like in *Koskela*, based upon "the testimony of other witnesses and evidence found at the crime scene," the officers' testimony was "little more than corroborative." *Id.*

Appellant's argument that the prosecution's solicitation of this testimony constituted prosecutorial misconduct fails.

Reference to Time in Prison

Appellant argues that P.W.'s reference to the term "dry snitcher" violated the district court's prohibition against the introduction of evidence about appellant's past time in prison. Although appellant did not object to this reference at trial, a prior motion again preserved the issue on appeal. *See* Minn. R. Evid. 103(a). During her testimony, P.W. relayed a prior conversation with appellant in which the term "dry snitcher" was used. P.W. explained that appellant called M.W. "a dry snitcher because that's what they call them in prison." But P.W. offered this testimony without any reference to appellant's past time in prison. Appellant's argument that P.W.'s testimony was the result of prosecutorial misconduct fails.

Reference to Marijuana Use

Appellant argues that the testimony of the state's laboratory witness about marijuana found in his system after his arrest was an attack on his character by "showing that he used multiple types of drugs." Appellant's counsel objected to the testimony, and the district court sustained the objection and asked the jury to disregard the witness's answer. Even if we were to conclude that the prosecution's questions constituted prosecutorial misconduct, which we do not, the district court sustained defense counsel's objection and ordered the answer stricken from the record. We presume that the jury followed the court's instructions and conclude that appellant suffered no apparent prejudice. *See Ferguson*, 581 N.W.2d at 835 ("Courts presume that juries follow the instructions they are given.").

Reference to Appellant's Possession of "Rush"

Appellant argues that two references to "Rush" by the prosecution's witnesses were not harmless beyond a reasonable doubt. The district court sustained each of appellant's objections and instructed the jury to disregard the testimony. We are unpersuaded that the prosecution engaged in any misconduct in connection with the witnesses' testimony referencing "Rush." *Id.* Moreover, we presume that the jury followed the court's instructions to disregard the testimony, and we conclude that appellant suffered no apparent prejudice. *Id.*

III

Appellant argues that, although his conduct was consistent with second-degree assault, it was not consistent with intent to kill and his convictions of attempted second-degree murder therefore must be reversed.

A defendant who requests a reviewing court to reverse the factual findings of the jury "bears a heavy burden." *State v. Vick*, 632 N.W.2d 676, 690 (Minn. 2001). Appellate review is "limited to ascertaining whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged." *State v. Loving*, 775 N.W.2d 872, 882 (Minn. 2009) (quotations omitted). The appellate court must "view the evidence in a light most favorable to the verdict and assume that the jury believed the state's witnesses and disbelieved contrary evidence." *Id.* (quotation omitted). The jury's verdict will be upheld if, "giving due regard to the presumption of innocence and to the state's burden of proof

beyond a reasonable doubt, [the jury] could reasonably have found the defendant guilty." *State v. Pierson*, 530 N.W.2d 784, 787 (Minn. 1995).

A conviction based on circumstantial evidence will be upheld if the reasonable inferences drawn from the evidence are "consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis other than guilt." *State v. Leake*, 699 N.W.2d 312, 319 (Minn. 2005). Even in cases based on circumstantial evidence, the supreme court has recognized that the "jury is in the best position to evaluate the evidence," and we "will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture." *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998).

Under Minn. Stat. § 609.19, subd. 1(1) (2006), whoever causes the death of a human being "with intent to effect the death of that person" but without premeditation is guilty of second-degree murder. And "[w]hoever, with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime is guilty of an *attempt* to commit that crime." Minn. Stat. § 609.17, subd. 1 (2006) (emphasis added). Here, the evidence that appellant fired a handgun several times in close proximity to P.W. and T.P. satisfies the "substantial step toward" and "more than preparation for" elements of section 609.17, subdivision 1.

But appellant argues more narrowly that the state did not prove beyond a reasonable doubt that he intended to effect the death of P.W. or T.P. Intent means that "the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result." Minn. Stat. § 609.02, subd. 9(3) (2008). Appellant's argument is unsupported by the previously summarized record evidence.

P.W.'s and T.P.'s testimony and the forensic evidence is sufficient to support a reasonable inference that appellant believed that, if he were successful in his aim with the handgun, he would cause the deaths of P.W. and T.P. Despite law enforcement's discovery of only two shell casings, the jury could reasonably infer that appellant was on a shooting rampage with the intent to kill P.W. and T.P. And the reasonable inferences from the evidence are inconsistent with any rational hypothesis other than guilt.

IV

Appellant argues that the district court abused its discretion by imposing an upward-departure sentence of 240 months for appellant's conviction of attempted second-degree murder of P.W. Appellant claims that the district court's ground for departure was improper.

In connection with counts I, III, V and VI, alleging offenses committed against P.W., the district court submitted aggravating-factors-verdict forms to the jury with two questions: (1) "Did [appellant]'s actions impact [P.W.]'s family in the commission of the offense?"; and (2) "Was there emotional and psychological harm to [P.W.] as a result of the commission of the offense?" The court instructed the jury to answer the questions on the aggravating-factors-verdict forms only if it found appellant guilty of the offenses. The jury answered the questions on the aggravating-factors-verdict form on count III in the affirmative.

"This court reviews a district court's decision to depart from the presumptive guidelines sentence for an abuse of discretion." *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). "If the reasons given for an upward departure are legally permissible and

factually supported in the record," we will affirm the departure. *Id*. "But if the district court's reasons for departure are 'improper or inadequate,' the departure will be reversed." *Id.* (quoting *State v. Jackson*, 749 N.W.2d 353, 357 (Minn. 2008)). A district court may "impose an upward sentencing departure if the evidence shows that the defendant committed the offense in question in a particularly serious way." *Id.* at 601. In considering whether the facts on which the district court bases its decision to impose an upward departure are legally permissible, we consider whether those facts are "'available' for departure." *Id*. at 601-02 (citing *State v. Jones*, 745 N.W.2d 845, 849 (Minn. 2008)). "The guidelines provide a nonexclusive list of aggravating factors that may be used as reasons for departure." *Jones*, 745 N.W.2d at 848 (citing Minn. Sent. Guidelines II.D.2(b)).

> These aggravating factors include: a victim's particular vulnerability known to the offender, particularly cruel treatment of the victim, repeat criminal sexual conduct involving victim injury, major economic offenses, major controlled substance offenses, crimes for hire, pattern sex offenders, dangerous offenders, group crimes, hate crimes, and certain identity-theft crimes.

Id. at 849 n.2 (citing Minn. Sent. Guidelines II.D.2(b)).

Impact of Commission of Offense on [P.W.]'s Family

We begin by expressing our concern about the vagueness of the first question on the aggravating-factors-verdict form regarding the impact on P.W.'s family of the commission of the offense of attempted second-degree murder. The district court gave the jury no instruction about the meaning of "impact" or "family" that are contained in the first question. Although the supreme court has "recognized that the presence of children

is an aggravating sentencing factor when the offense is committed in the actual presence of children," "[t]he mere presence of children in the home, absent any evidence that they saw or heard the offense, is not a substantial and compelling circumstance demonstrating that a defendant's conduct was significantly more serious than that typically involved in the commission of the offense." *State v. Vance*, 765 N.W.2d 390, 393, 394 (Minn. 2009).

In *Vance*, the court noted that a proper instruction to the jury "would indicate that the State had to prove that the children saw, heard, or otherwise witnessed the offense to support a finding that the offense was committed in the presence of children." *Id*. at 394. In this case, we will not speculate about the meanings attributed by the jury to the terms "impact" and "family," when the jury responded in the affirmative to the first question on the aggravating-factors-verdict form. Although the jury heard evidence that P.W.'s minor son, M.W., was present in the home when the offenses were committed, we cannot ascertain from the aggravating-factors-verdict form the additional facts found by the jury that support departure. *See State v. Rourke*, 773 N.W.2d 913, 919 (Minn. 2009) (quoting *Blakely v. Washington*, 542 U.S. 296, 301, 303-04, 1245 S. Ct. 2531, 2536, 2537 (2004)) (noting that a district court must afford the accused an opportunity to have a jury trial on the additional facts that support the departure and to have the facts proved beyond a reasonable doubt). And, we note that all of the cases cited by respondent are pre-*Blakely* and therefore do not illuminate the issue before us. Moreover, "the district court must explain why the circumstances or additional facts found by the jurors in a *Blakely* trial provide the district court a substantial and compelling reason to impose a sentence outside the range on the grid." *Id*. at 920. The district court's explanation is lacking in this case,

perhaps, because the additional facts found by the jury were not clear. We therefore conclude that the jury's finding that appellant's "actions impact[ed] [P.W.]'s family in the commission of the offense," was not a valid basis for departure.

Emotional and Psychological Harm to P.W.

Appellant also argues that the emotional and psychological harm suffered by P.W. is not a valid departure ground because it does not focus on his conduct and whether his conduct was more serious than typical offenses of the same kind of which he was convicted. Under Minnesota law, the psychological impact of a crime on a victim may justify an upward durational departure. *See Edwards*, 774 N.W.2d at 602-03 (noting that the supreme court concluded in *State v. Ford*, 539 N.W.2d 214, 230 (Minn. 1995) that a district court's reason for upward departure on an attempted first-degree murder conviction—that "a victim suffered significant psychological trauma as a result of Ford's conduct"—was an allowable reason for departure).

Here, P.W. testified about the mental anguish and other adverse impacts she suffered as a result of appellant's crimes. She explained that she feared for her life as well as her son's life. Even after appellant was arrested, she moved out of her home and out of this state because of fear for her safety, even though her move caused her to be separated from her son, M.W. P.W. described how her mental anguish was compounded by the fact that M.W. witnessed the commission of appellant's offenses. The jury's finding was supported by sufficient evidence.

Consistent with *Rourke*, 773 N.W.2d at 920, here, the district court explained why the circumstances or additional facts found by the jurors in the *Blakely* trial provided the

district court a substantial and compelling reason to impose a sentence outside the range of the guidelines grid. The court noted that all jurors answered "yes" to the question about whether there was psychological harm to [P.W.], and the court explained that the jury's finding was an aggravating factor that was a substantial and compelling circumstance to depart upward from the guideline disposition. We agree.

We note also that at sentencing, the district court said:

> I will indicate that all these sentences are going to be concurrent. There's no question in my mind as the evidence came out that these incidents in the manner in which they occurred are concurrent, and I do not think that they were independently focused on separately so the Court finds that the sentences here should be concurrent.

We acknowledge that a district court has broad discretion in sentencing and, here, the district court acted well within its discretion in sentencing appellant concurrently. But we note that the court could have sentenced appellant consecutively on counts III and IV because of the multiple-victims exception to Minn. Stat. § 609.035 (2006). *See State v. Noble*, 669 N.W.2d 915, 920 (Minn. App. 2003) (citing Minn. Sentencing Guidelines II.F & cmt. II.F.04) (stating that when sentencing multiple felony convictions for crimes against multiple victims, consecutive sentencing is permissive and may be imposed without departure), *review denied* (Minn. Dec. 23, 2003). "When consecutive sentences are imposed, offenses are sentenced in the order in which they occurred," and "the presumptive duration for each offense sentenced consecutive to another offense(s) is determined by the severity level appropriate to the conviction offense at the zero criminal history column, or the mandatory minimum, whichever is greater." Minn. Sent.

Guidelines II.F., cmt. II.F.02 (2006). Appellant's presumptive sentence on count III was 193 months, and his presumptive sentence on count IV was 153, using a criminal-history score of zero. If the court, in its discretion, had sentenced appellant consecutively on counts III and IV, appellant's sentences would have totaled 346 months.

We conclude that the district court did not abuse its discretion by imposing an upward-departure sentence of 240 months for appellant's conviction of attempted second-degree murder of P.W.

Affirmed.