STATE OF MINNESOTA
IN COURT OF APPEALS
A10-639

State of Minnesota,
Respondent,

vs.

Jonathan Michael Diepold,
Appellant.

Filed March 15, 2011
Affirmed in part and reversed in part
Stauber, Judge

Dakota County District Court
File No. 19HACR084125

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Lawrence F. Clark, Assistant County Attorney, Hastings, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Robert M. Christensen, Steven J. Wright, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Worke, Judge; and Stauber, Judge.

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

STAUBER, Judge

On appeal from his convictions of multiple offenses, appellant argues that (1) the evidence was insufficient to sustain his convictions of aggravated robbery and

kidnapping, unsafe release; (2) the district court abused its discretion by sentencing him to a double upward departure for aggravated robbery; (3) his sentence is unfairly disparate to the sentences of his co-defendants because the record indicates that his codefendants were the more culpable perpetrators; and (4) the district court erred by separately sentencing appellant for third-degree assault and aggravated robbery because they constitute a single behavioral incident. We affirm in part and reverse in part.

FACTS

In October 2008, appellant Jonathon Michael Diepold was charged with the following offenses: (1) kidnapping with the victim released in a safe place; (2) kidnapping with the victim not released in a safe place; (3) aggravated robbery; (4) two counts of third-degree assault; (5) two counts of false imprisonment; (6) two counts of fourth-degree assault; and (7) theft. The alleged offenses were committed against J.H., a 24-year-old male who was previously diagnosed as having fetal alcohol syndrome, attention deficit disorder, and oppositional defiant disorder. In light of J.H.'s diagnosis, he is considered borderline or mildly mentally retarded.

Appellant waived his right to a jury trial and submitted the matter to the district court for a trial on stipulated facts. At trial, the district court received police reports; transcribed statements of appellant, his codefendants, and witnesses; medical reports; social service records; photographs; and a video of the scene of the incident. This evidence established that on the evening of October 10, 2008, Timothy Ketterling, N.D., and J.H. were together at J.H.'s residence. At about 11:15 p.m., Ketterling drove the group to the "Bridge Square Park" (the square) in Northfield, where the group met

appellant and John Maxwell Maniglia. N.D., who knew that J.H. was mentally handicapped, approached appellant and Maniglia crying and informed them that J.H. had assaulted her earlier that evening. Appellant and Maniglia then began arguing with J.H. in the square.

After drawing the attention of others and becoming concerned when police drove by, appellant suggested that they go to the woods to continue the argument. Ketterling drove appellant, Maniglia, N.D., and J.H. to an area outside of town called the arboretum, where the group walked about 500 feet down a path into the woods. Appellant claimed that during the hike, J.H. made insulting comments directed at him and would not admit that he assaulted N.D. Appellant admitted that, as a result, he was the first person to assault J.H.

The assault of J.H. lasted several hours and consisted of appellant and Maniglia kneeing and kicking J.H., and striking him with open hands, fists, and tree branches. Appellant and Maniglia also heated up a lighter, cellophane, and a credit card, and proceeded to burn J.H. on his neck, arm, and abdomen with these items. In addition, appellant and Maniglia, who were in the National Guard, required J.H. to perform various military-style exercises such as "pushups" and "scissor kicks." Appellant admitted that J.H. was required to say "yes: drill sergeant," and that if J.H. did not do the exercises, J.H. was threatened with further violence.

Maniglia and appellant were responsible for most of the assaultive conduct, with appellant described as the primary aggressor on October 10, 2008. But N.D. also kicked

and hit J.H. several times and encouraged the others as they assaulted J.H. Throughout the assault, J.H. never fought back and was not allowed to leave.

The assaults continued until about 5:30 a.m. when J.H. was advised that the assaults would stop if he gave appellant and Maniglia his video games. J.H. was told that if he did not provide them with the games, he would "come up for assignment." J.H. was also told that he would not get his glasses and cell phone back unless he gave them the games. The group then went back to J.H.'s home where J.H. was instructed to retrieve the video games. Appellant and Maniglia took about 15 video games from J.H., which they sold and divided the proceeds between themselves.

In the afternoon of October 11, 2008, appellant spoke to J.H. on the phone. According to appellant, J.H. made insulting comments to appellant about his girlfriend, admitted to hitting N.D., and stated that he liked to assault women. Appellant also spoke with N.D. a number of times and she claimed that she had been assaulted again by J.H. As a result, appellant called Glen Richard Ries and arranged for him to pick up appellant and Maniglia and drive them to the square. In the meantime, N.D. called an acquaintance and convinced him to take N.D. and J.H. to the square. N.D. was able to convince J.H. to go to the square by telling him they were going to meet a girl.

Ries, Maniglia, and appellant arrived at the square at about 9:00 p.m. where they met N.D. and J.H. A conversation ensued, in which J.H. made insulting comments toward appellant and Maniglia. Appellant then stated that they were not going to talk there, and demanded that N.D. and J.H. get in the truck. On the ride out of town, J.H. told N.D. that he knew that he was going to get assaulted again.

The group drove to the same location as the previous night, and Ries dropped them off near "a steel bridge." Ries also provided appellant and Maniglia with an asp that he had in the truck. While Ries watched for traffic, appellant, Maniglia, J.H., and N.D. walked down the path into the woods, where appellant and Maniglia began to assault J.H. again. Appellant struck J.H. on the legs with the asp, and struck him over the head numerous times with a piece of baseboard trim that J.H. had brought to the square. Appellant and Maniglia also struck J.H. in same manner as the night before; slapping, hitting, kicking, and kneeing him. And, over appellant's objection, Maniglia tied J.H. to a tree using a belt. Although it is not clear who initiated the assault on October 11, 2008, Maniglia was described as being more of the aggressor on the second night of assaults.

Much like the incident that occurred the night before, J.H. never fought back when assaulted by appellant and Maniglia. Eventually, J.H. was able to convince Maniglia that he did not assault N.D. Maniglia then confronted N.D. who admitted that she made up being assaulted because she was upset with J.H. N.D. also told appellant and Maniglia that J.H. was mentally disabled.

N.D.'s admissions prompted the assaults to stop, and N.D. was instructed to walk to town. Maniglia also led J.H. to the steel bridge where he was given instructions on how to get back to town. J.H. was then left in a wooded area on a dark winding gravel road at approximately 11:30 p.m. He was left about two-tenths of a mile from Highway 47, and was eventually picked up by a passerby who gave him a ride to the hospital. Photographs of J.H. show abrasions and bruising all over his body, as well as burn marks on his neck, arm, and abdomen. J.H.'s eye was also severely bruised and swollen, and

medical reports indicate that he had temporary loss of his eyesight in his right eye. Finally, J.H. suffered two broken ribs, which occurred during the first assault.

The district court found appellant guilty of all charged offenses except one count of third-degree assault and both counts of fourth-degree assault. The court also found that numerous aggravating factors were present. The court then sentenced appellant as follows: (a) one-year-and-one-day for third-degree assault; (b) 21 months for kidnapping; (c) a double upward departure of 96 months for aggravated robbery; and (d) an upward departure of 120 months for kidnapping, unsafe release. The sentences were ordered to be served concurrently. This appeal followed.

D E C I S I O N

I.

Appellant argues that the evidence is insufficient to sustain his convictions of (1) aggravated robbery; and (2) kidnapping with the victim not released in a safe place. In reviewing the sufficiency of the evidence, this court "must uphold the conviction if, based on the evidence contained in the record, the district court sitting as the finder of fact could reasonably have found [the defendant] guilty." *State v. Franks*, 765 N.W.2d 68, 73 (Minn. 2009) (quotation omitted). This court may not re-weigh the evidence but rather construes the evidence in the light most favorable to the verdict. *Id.* The reviewing court must consider not only the evidence in the record, but also any legitimate inferences from that evidence. *Id.* But whether particular conduct is encompassed by a criminal statute is an issue of statutory construction that this court reviews de novo. *State v. Tomlin*, 622 N.W.2d 546, 548 (Minn. 2001).

A. Aggravated robbery

A simple robbery involves the use or threatened use of force to "overcome the person's resistance or powers of resistance to, or to compel acquiescence in, the taking or carrying away of the property . . . ." Minn. Stat. § 609.24 (2008). The robbery becomes aggravated robbery in the first degree if the defendant "while committing a robbery, . . . inflicts bodily harm upon another." Minn. Stat. § 609.245, subd. 1 (2008).

Appellant argues that by its use of the word "while," section 609.245, subdivision 1, "plainly requires at least a minimal level of simultaneity between the robbery and the infliction of bodily harm." Appellant also argues that the undisputed evidence establishes that he and Maniglia took the video games at least 30 minutes after the bodily injury was inflicted in the woods. Thus, appellant argues, "[b]ecause no bodily harm was inflicted *while* the robbery was committed," there is insufficient evidence to support his conviction of aggravated robbery.

We disagree. A conviction of aggravated robbery requires the state to establish that the use of force preceded or accompanied the taking or carrying away of the property and that force was "used to overcome the victim's resistance or compel his acquiescence." *State v. Kvale*, 302 N.W.2d 650, 653 (Minn. 1981).

Here, the 30-minute-time-gap does not sufficiently separate the conduct. The undisputed evidence establishes that J.H. suffered bodily harm after appellant and Maniglia slapped, punched, kicked, kneed, and burned J.H. on October 10, 2008. The record also reflects that after enduring the assault for several hours, J.H. agreed to give appellant and Maniglia his video games in exchange for the assaults to end. In fact,

appellant admitted that he told J.H. that if he did not give them the video games, that J.H. would "come up for assignment." The record further reflects that J.H. gave appellant and Maniglia the games as demanded. This evidence demonstrates that the assault in the woods was intertwined with the taking of J.H.'s property such that the conduct is inseperable. Accordingly, there is sufficient evidence to support appellant's conviction of aggravated robbery.

B. Kidnapping, unsafe release

Minnesota law provides:

> [I]f the victim is not released in a safe place, or if the victim suffers great bodily harm during the course of the kidnapping, [the defendant shall be sentenced] to imprisonment for not more than 40 years or to payment of a fine of not more than $50,000, or both.

Minn. Stat. § 609.25, subd. 2(2) (2008). If the trier of fact finds that the victim was released in a safe place, the maximum sentence is 20 years' imprisonment and a fine of $35,000. *Id.*, subd. 2(1) (2008). Because there is no published caselaw specifically defining a "safe place" under the statute, we consider the totality of the circumstances in deciding whether the victim was released in a "safe place."

Appellant argues that there was insufficient evidence to support the district court's conclusion the he released J.H. in an unsafe place. We disagree. Although J.H. was led to the steel bridge, pointed in the direction of a highway with nearby houses, and told he was free to go, there were other circumstances that support a determination that J.H. was released in an unsafe place. The record reflects that J.H. had just endured two consecutive nights of vicious beatings, which included being kicked, burned, kneed,

punched, and struck with various objects, resulting in numerous injuries including two broken ribs and loss of vision in one eye. The record also reflects that in addition to being a vulnerable adult with mental disabilities, J.H. was disoriented from the beatings. The record further reflects that it was dark and that J.H. was left in a wooded area far enough away from the highway that, considering his condition, there was no assurance that he would safely reach proper assistance. Thus, on this record, there is sufficient evidence to support appellant's conviction of kidnapping, unsafe release.

II.

A district court must order the presumptive sentence specified in the sentencing guidelines unless there are "identifiable, substantial, and compelling circumstances" to warrant an upward departure from the presumptive sentence. Minn. Sent. Guidelines II.D. (2008). "'Substantial and compelling' circumstances are those showing that the defendant's conduct was significantly more or less serious than that typically involved in the commission of the offense in question." *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). 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).

Here, the district court sentenced appellant to 96 months for the aggravated robbery conviction, a double upward departure from the presumptive sentence. The district court based its decision to depart on the following aggravating factors:

(1) vulnerability of the victim; (2) multiple forms of assault resulting in various types of injuries; (3) particular cruelty; and (4) the infliction of emotional harm.

Appellant argues that the district court abused its discretion by imposing a double upward departure for the aggravated robbery because none of the aggravating factors cited by the district court apply to the manner in which the aggravated robbery was committed. Rather, appellant contends that the aggravating factors apply to the assault and kidnapping convictions.

Appellant's argument again attempts to depict the aggravated robbery as a separate behavioral incident from the assault and kidnapping. But as we discussed above, the conduct that occurred in the woods is not separate and distinct from the taking of J.H.'s property because the conduct encompassed a single behavioral incident. This conduct consisted of appellant and Maniglia beating J.H. for hours, resulting in J.H. sustaining many injuries. The record also reflects that J.H. was treated with particular cruelty; J.H. was forced to participate in military type exercises, and he was beaten when he was unable to "correctly" perform the exercises. The record further details the extreme emotional harm J.H. sustained as a result of the incident. Although the record is unclear whether appellant was aware of J.H.'s status as a vulnerable adult at the time the aggravated robbery occurred, a single aggravating factor is sufficient to support an upward departure. *See State v. O'Brien*, 369 N.W.2d 525, 527 (Minn. 1985) (stating that the presence of a single aggravating factor is sufficient to uphold an upward departure). Because the record supports the presence of at least three aggravating factors that were present during the commission of the aggravated robbery, the district court did not abuse

its discretion in sentencing appellant to a double upward departure for the aggravated robbery conviction.

III.

Appellant argues that the district court abused its discretion because appellant received a greater sentence than his codefendants. This court reviews a sentence "to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court." Minn. Stat. § 244.11, subd. 2(b) (2008). The sentence will not be reversed unless the district court has abused its discretion. *State v. Ford*, 539 N.W.2d 214, 229 (Minn. 1995). A district court abuses its discretion when a sentence unfairly exaggerates the criminality of the defendant's conduct. *State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007).

Appellant argues that his sentence is unfairly disparate to the sentences of his codefendants because the record indicates that his codefendants were the more culpable perpetrators. We disagree. The record reflects that Maniglia received an executed sentence of 96 months for his conviction of kidnapping, unsafe release, and N.D. received a 96-month stayed sentence for her role in the crimes. But N.D. was a juvenile and Maniglia pleaded guilty pursuant to a plea agreement. The record reflects that appellant had the opportunity to plead guilty based on an agreement similar to Maniglia's, but appellant declined to exercise that option. Appellant's decision to reject the plea agreement placed him in a position to have the full extent of his criminal conduct exposed at trial, thus risking a longer sentence, and appellant was aware of that

possibility when he rejected the plea agreement. In addition, there is ample evidence to support the district court's decision to sentence appellant to 120 months. The district court found that appellant was described as being more of the aggressor on October 10, 2008, and appellant admitted to throwing the first punch. Moreover, despite appellant's claim that it was Maniglia who burned J.H. with the lighter, the record reflects that appellant held J.H. down during this action. The district court took all of the facts and circumstances into account when sentencing appellant and appellant cannot show that the sentence was an abuse of discretion.

IV.

Appellant finally argues that because his convictions of third-degree assault and aggravated robbery constitute a single behavioral incident, the district court erred by imposing separate sentences for the two convictions. *See* Minn. Stat. § 609.035, subd. 1 (2008) (stating that "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses"). As addressed above, the third-degree assault and the aggravated robbery constitute a single behavioral incident. The state concedes that the two crimes constitute a single behavioral incident. Accordingly, we vacate appellant's sentence for the third-degree assault.

Affirmed in part and reversed in part.