STATE OF MINNESOTA
IN COURT OF APPEALS
A10-974

State of Minnesota,
Respondent,

vs.

Ronald Alfred Thomas,
Appellant.

Filed April 5, 2011
Affirmed
Connolly, Judge

Polk County District Court
File No. 60-CR-08-1902

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, Crookston, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Randall, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

CONNOLLY, Judge

Appellant challenges his sentence, arguing that the district court abused its discretion in sentencing him to an upward durational departure on the basis of two aggravating factors, that the victim was particularly vulnerable and that appellant acted with particular cruelty. Because we see no abuse of discretion, we affirm.

FACTS

Police officers who responded to a call from an apartment building on July 11, 2008, found P.A.G., a woman, lying in the hall in bloody clothes, bleeding from her head. She had bruises on her neck, a laceration on her forehead, and another laceration and a hematoma on her head. P.A.G. told the police she had been raped by a man whom she had met and accompanied to his home, apartment 45, and that he was still in the apartment.

The officers went to the apartment and found appellant Ronald Thomas, naked, on the floor. Blood-stained items including a table knife, a bra and underwear, and a small sledge hammer were in the apartment, which was itself full of blood stains.

Appellant was charged with three counts of criminal sexual conduct in the first-degree, one count of assault in the first degree, and one count of assault in the second degree. In January 2010, he entered an *Alford* plea to one count of first-degree criminal sexual conduct and waived his right to have a jury determine aggravating factors. The other counts were dismissed.

Appellant's presentence investigation report indicated that his presumptive sentence in this matter was 234 months in prison in a range of 199 to 281 months. In March 2010, the district court found that P.A.G. was a particularly vulnerable victim and that particular cruelty was involved and sentenced appellant to the statutory maximum, 360 months in prison.

Appellant argues that his sentence was an abuse of discretion.

D E C I S I O N

This court reviews de novo whether there was a valid reason to depart from the presumptive sentence, but reviews for an abuse of discretion a district court's decision whether to depart. *Dillon v. State*, 781 N.W.2d 588, 594-95 (Minn. App. 2010) *review denied* (Minn. July 20, 2010). This court has

> generally deferred entirely to the district court's judgment on the proper length of departures that result in sentences of up to double the presumptive term. [It has] found no cases in which an appellate court has held that adequate grounds to depart exist but that the district court abused its discretion by extending the sentence up to twice its presumptive term.

Id. at 596 (citations omitted). The 360-month sentence imposed was substantially less than double the presumptive sentence, or 468 months. Thus, if there was a valid reason to depart, the likelihood of an abuse of discretion in the length of the departure is minimal.

Appellant claims the district court's findings do not support the departure because, to find particular vulnerability and particular cruelty, the district court "reli[ed] on other offenses that [were] not part of the charge and of which the defendant was not

convicted."[1] *See Taylor v. State*, 670 N.W.2d 584, 588 (Minn. 2003) (prohibiting reliance on other offenses).

Appellant argues that, because the state could have, but did not, charge him with a crime of which the victim's vulnerability was a component, *i.e*. violation of Minn. Stat. § 609.342, subd. 1(e)(ii) (2008) (sexual penetration causing personal injury of a complainant who the defendant knows or had reason to know is mentally impaired, mentally incapacitated, or physically helpless) the victim's vulnerability cannot be an aggravating factor for the crime to which he pleaded guilty, i.e., violation of Minn. Stat. § 609.342, subd. 1(e)(i) (2008) (sexual penetration causing personal injury accomplished by the use of force or coercion). But "because the rule against using uncharged criminal conduct as a basis for an upward departure stems from the prohibition under Minn. Stat. § 609.035, subd. 1 [(2008)], against cumulative punishment when an offender's conduct constitutes more than one offense, the rule need not apply when the prohibition is inapplicable." *State v. Yaritz*, 791 N.W.2d 138, 149 (Minn. App. 2010) (citing *State v. Grampre*, 766 N.W.2d 347, 352 (Minn. App. 2009) *review denied* (Minn. Aug. 26, 2009)).

Appellant also argues that, because evidence supporting the aggravating factors could have supported the inference of intent needed for a charge of attempted murder in the second degree, and the state chose not to charge him with attempted murder in the second degree, the evidence "cannot support an upward departure."

[1] Appellant does not challenge the district court's finding that he failed to aid the victim, and we do not address it.

Appellant relies on *Taylor*, in which the defendant was convicted of violating Minn. Stat. § 609.341, subd. 11(c) (2002) (sexual contact with a person under 13 by an actor more than 36 months older than the complainant) for engaging in sexual conduct with a three-year-old who was enrolled in the defendant's wife's daycare program. 670 N.W.2d at 585. Because the victim's age and the defendant's position of authority were factors considered by the legislature in defining the offense, neither could be considered as causing the aggravating factor of vulnerability. *Id*. at 589.

But *Taylor* is distinguishable. It concluded that, to be a ground for departure, evidence must support both "defendant's guilt of some other offense" and "the conclusion that the defendant committed the instant offense for which he is being sentenced in a particularly serious way." *Id*. at 588. In *Taylor*, the evidence supported only the first. *Id*. at 585-89. But here, the evidence that appellant beat and choked P.A.G. to the point where she intermittently lost consciousness and then sexually assaulted her over several hours does lead to the conclusion that appellant committed the statutory "sexual penetration causing personal injury accomplished by the use of force or coercion" in a particularly serious way. *See* Minn. Stat. § 609.342, subd. 1(e)(i). Thus, the victim's vulnerability was appropriately considered as an aggravating factor. *See Dillon*, 781 N.W.2d at 600 (approving victim's vulnerability as an aggravating factor where defendant continued to assault victim who appeared to be unconscious, evidence did not show that victim had defended herself, defendant's assault rendered victim vulnerable, and assault was more effective because victim was vulnerable).

Finally, appellant argues that the district court failed to consider the mitigating factors, such as his inability to remember the assault because he was under the influence of alcohol and drugs at the time, his remorse for the offense, and the letters written in his favor by family members and friends. But the district court's comments show that it did consider these factors, stating, for example, "I've read all the letters from all the people who are supportive of you"; "rather than assisting the victim in this case who was very, very severely hurt you were spending time trying to cover up what happened in the apartment . . . [and] she had to crawl to get her own medical assistance"; "if you truly don't have a memory of this, it's even more scary to think that this is what can happen when you are under the influence of alcohol and drugs."

The district court did not abuse its discretion in sentencing appellant to an upward durational departure less than double the presumptive sentence.

Affirmed.