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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1480**

State of Minnesota,
Respondent,

vs.

Timothy Ian Boland,
Appellant.

**Filed August 1, 2011
Affirmed
Hudson, Judge**

Anoka County District Court
File No. 02-CR-08-12082

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

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Attorney, Anoka, Minnesota (for respondent)

Melissa Sheridan, Assistant State Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Halbrooks, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

In this sentencing appeal following his conviction of first-degree intentional manslaughter, appellant argues that the district court erred by imposing an upward durational departure based on the aggravating factors of particular cruelty and invasion of

the victim's zone of privacy. Because the record supports the district court's determination that the crime was committed with particular cruelty and within the victim's zone of privacy, the district court did not abuse its discretion in imposing an upward durational departure, and we affirm.

FACTS

The state charged appellant Timothy Ian Boland with one count of second-degree intentional murder and one count of aiding and abetting second-degree intentional murder resulting from an incident that caused the death of his brother's girlfriend, N.W. Appellant entered an *Alford* plea to an amended charge of first-degree manslaughter, in violation of Minn. Stat. § 609.20(1) (2008).¹ Appellant agreed to waive his right to a jury trial on the issue of whether aggravating factors support an upward sentencing departure.

At appellant's plea hearing, he testified that after visiting a bar on the night of the incident, he and his brother returned to the house that his brother shared with N.W.

Appellant acknowledged that his brother, who also pleaded guilty to an offense arising from the evening's events, provided the following information about that evening. Appellant had an argument with N.W. in the home's garage about "setting up" her brother and father with police so that appellant's brother could obtain custody of his and N.W.'s shared child. During the argument, appellant hit N.W. in the head with a small baseball bat that he was carrying and continued hitting her until she appeared lifeless.

¹ An *Alford* plea is entered when a defendant maintains his or her innocence while conceding that there is a substantial likelihood that the evidence would support a jury conviction of the charged offense. *State v. Goulette*, 258 N.W.2d 758, 761 (Minn. 1977) (adopting holding of *N.C. v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970)).

Appellant refused to allow N.W. to be taken to the hospital, and appellant instead suggested making N.W.'s death look like a motorcycle accident. Appellant and his brother tied N.W.'s body to a motorcycle, placed the motorcycle on the tailgate of a pickup truck, and drove the truck at about 50 miles per hour, swerving to throw the body and the motorcycle from the truck.

The district court sentenced appellant to 132 months, an upward durational departure. The district court found that the state had proved the aggravating factors of: (1) committing the crime with particular cruelty, based on appellant's failure to assist N.W. or obtain medical assistance and attempting to cover up her death to make it appear to be an accident and (2) committing the crime within N.W.'s zone of privacy, based on the reasoning that the garage was part of her home, in which she was entitled to an expectation of privacy and security.

This appeal follows.

D E C I S I O N

Appellant argues that the district court erred by sentencing appellant to an upward departure based on the aggravating factors that the crime was committed with particular cruelty and within the victim's zone of privacy. This court reviews a district court's decision to depart from the presumptive sentence for an abuse of discretion. *Taylor v. State*, 670 N.W.2d 584, 588 (Minn. 2003). We examine the reasons given for an upward departure and determine whether they are "legally permissible and factually supported in the record." *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). This court will reverse the departure if the reasons for departing are "improper or inadequate." *Id.*

(citation and quotation omitted). We conduct a de novo review of whether a valid ground for departure exists, examining the factual findings that support the decision. *Dillon v. State*, 781 N.W.2d 588, 598 (Minn. App. 2010), *review denied* (Minn. July 10, 2010). Even if some of the stated reasons for the departure are improper or inadequate, this court will affirm if it concludes that the district court would have departed, based on other aggravating factors that are supported by the district court’s findings. *State v. Vance*, 765 N.W.2d 390, 395–96 (Minn. 2009).

The Minnesota Sentencing Guidelines provide presumptive sentences based upon the severity of the offense and the offender’s criminal history. Minn. Sent. Guidelines I, II. But the guidelines permit an upward sentencing departure based on a determination that “substantial and compelling circumstances” exist. Minn. Sent. Guidelines II.D. Such circumstances exist if “the defendant’s conduct in the offense of conviction was significantly more . . . serious than that typically involved in the commission of the crime in question.” *State v. Misquadace*, 644 N.W.2d 65, 69 (Minn. 2002).

The sentencing guidelines list treating the victim with particular cruelty as a proper aggravating factor to support an upward departure. Minn. Sent. Guidelines II.D.2.b(2). The district court listed two reasons supporting its determination that the victim was treated with particular cruelty: appellant’s failure to assist or summon medical assistance for the victim and appellant’s attempts to cover up her death and make it appear to have been an accident.

Failure to assist victim

The Minnesota Supreme Court has recently concluded that a defendant was entitled to postconviction relief because the district court abused its discretion by imposing an upward sentencing departure based solely on the defendant's failure to seek aid for the victim of his offense—second-degree unintentional murder committed during a second-degree felony assault. *State v. Tucker*, ___ N.W.2d ___, No. A09-666, 2011 WL 2555635 (Minn. June 29, 2011). The defendant's failure to secure medical aid did not demonstrate the aggravating factor of particular cruelty because his conduct of fleeing and abandoning the victim was of a kind usually associated with the commission of that offense. *Id.* at *3–4; *cf. State v. Robideau*, 783 N.W.2d 390, 403 (Minn. App. 2010) (concluding that failure to render aid to victim of intentional second-degree murder cannot constitute aggravating factor in sentencing a defendant convicted of that offense), *rev'd on other grounds*, 796 N.W.2d 147 (Minn. 2011). The court in *Tucker* noted that, while it did not foreclose the possibility of a valid departure for failing to render medical aid, it had never affirmed a departure solely on that basis. *Tucker*, 2011 WL 2555635 at *3, *3 n.3.

Here, appellant was convicted of first-degree manslaughter in violation of Minn. Stat. § 609.20(1). A violation of that subdivision requires proof that a defendant “intentionally cause[d] the death of another person.” *Id.* Under the reasoning of *Tucker* and *Robideau*, appellant's conduct of failing to seek aid for N.W. was not atypical of the conduct involved in the commission of his offense, and we conclude that the district court

erred by using that conduct as an aggravating factor to support its imposition of an upward departure.

Attempting to cover up death

Appellant also argues that the district court improperly found that appellant's attempt to "cover up" the crime and dispose of her body in a particularly cruel way amounted to a valid aggravating factor. Under certain circumstances, a district court may consider the circumstances of disposal or concealment of a victim's body as an aggravating factor sufficient to support an upward sentencing departure. *State v. Leja*, 684 N.W.2d 442, 448–49 (Minn. 2004). In *Leja*, the Minnesota Supreme Court concluded that, when a defendant was convicted of aiding and abetting second-degree felony murder, the defendant's participation in concealing the victim's body did not provide an adequate reason for an upward sentencing departure. *Id.* at 449–50. The supreme court noted that the defendant was not the person who shot the victim or dismembered his body, there was no trauma to close relatives, and no evidence indicated that the defendant attempted to bargain with authorities using her knowledge of the body's location. *Id.* at 449.

Appellant argues, citing *Leja*, that appellant did not try to conceal the victim's body, but only the manner in which she died; that the victim's relatives did not experience trauma because the body was found before they knew she was missing; and that appellant did not attempt to use his knowledge of the body's location to negotiate a plea bargain. *Cf. id.* But the underlying facts show that, unlike the defendant in *Leja*, appellant initiated and personally carried out a plan to dispose of N.W.'s body in a

particularly cruel way to stage her death as an accident. The unusual circumstances surrounding appellant's treatment of N.W.'s body after her death support a determination that his conduct "was significantly more . . . serious than that typically involved in the commission of [the designated] crime." *Misquadace*, 644 N.W.2d at 69; *see also State v. Murr*, 443 N.W.2d 833, 837 (Minn. App. 1989) (concluding that transportation of victim's body in car trunk, combined with concealment of body, which led to its mutilation by coyotes, related to particular cruelty), *review denied* (Minn. Sept. 27, 1989); *State v. Johnston*, 390 N.W.2d 451, 456–57 (Minn. App. 1986) (concluding that attempt to dispose of victim's body in dumpster related to particular cruelty of crime), *review denied* (Minn. Aug. 27, 1986). Therefore, based on appellant's conduct, the district court did not abuse its discretion by imposing an upward departure based on the aggravating factor of particular cruelty.

Zone of privacy

A district court may impose an upward departure when the facts support a determination that a defendant committed a crime within a victim's zone of privacy. *State v. Kindem*, 338 N.W.2d 9, 17–18 (Minn. 1983). Minnesota appellate courts have defined that zone of privacy to include the victim's home and its curtilage, which may include the garage. *State v. Pickett*, 343 N.W.2d 670, 674 (Minn. App. 1984), *aff'd*, 358 N.W.2d 38 (Minn. 1984).

Appellant argues that the district court improperly imposed an upward durational departure based on this aggravating factor. He maintains that he was present in N.W.'s home by invitation of his brother, who lived with N.W., and that the state presented no

evidence that N.W. asked him to leave. *See, e.g., State v. Volk*, 421 N.W.2d 360, 366 (Minn. App. 1988) (concluding that zone-of-privacy aggravating factor did not apply when the victim invited the offender into his home), *review denied* (Minn. May 18, 1988). But *Volk* is distinguishable because in that case, the victim himself invited the defendant into his home. *Id.* Here, there is no evidence that N.W. invited appellant to come to the home, and her mere failure to object to his presence after he arrived with his brother does not equate to such an invitation. *See, e.g., State v. Copeland*, 656 N.W.2d 599, 603 (Minn. App. 2003) (affirming district court's imposition of upward departure based on invasion of zone of privacy when another resident, not the victim, invited the offender into the home). Appellant's crime was committed at night in the victim's garage, an area in which she was entitled to feel secure. *See State v. Coley*, 468 N.W.2d 552, 555 (Minn. App. 1991) (affirming imposition of aggravated sentenced based on "additional psychological shock" of being victim of crime occurring in one's home). The record supports the district court's finding that the crime was committed within the victim's zone of privacy, and the district court did not abuse its discretion by imposing an upward departure based on that aggravating factor.

In summary, we conclude that the district court did not abuse its discretion in sentencing appellant to an upward departure, based on the aggravating factors of (1) appellant's particular cruelty, as shown by his attempt to cover up the crime and dispose of N.W.'s body in a particularly cruel manner and (2) his commission of the crime within N.W.'s zone of privacy.

Affirmed.