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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0851**

Christopher Lee Tate, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed November 25, 2013
Affirmed
Bjorkman, Judge**

Hennepin County District Court
File No. 27-CR-06-061932

Cathryn Middlebrook, Interim Chief Appellate Public Defender, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Stauber, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his sentence for fourth-degree criminal sexual conduct, arguing that the upward durational departure was invalid because (1) the departure was

based solely on the agreement of the parties, (2) the district court did not independently assess or make departure findings based on the victim's injuries, and (3) injury to the victim is not a proper ground for a departure because it is an uncharged offense or element of the offense. We affirm.

FACTS

On September 7, 2006, appellant Christopher Tate followed A.E. into an alley, pushed her against a building, and sexually assaulted her by touching her breasts, buttocks, and vagina, and attempted to penetrate her with his penis. The attack left A.E. with scrapes, cuts, and bruises to her arms, leg, and back. Tate was charged with second-degree criminal sexual conduct and attempted first-degree criminal sexual conduct. He pleaded guilty to an amended count of fourth-degree criminal sexual conduct under Minn. Stat. § 609.345, subd. 1(c) (2006), and agreed to a 42-month sentence, an upward durational departure.

At the guilty-plea hearing, Tate agreed that the victim's injuries are an aggravating factor that sustains the upward departure, and waived his right to a trial on that factor:

DEFENSE COUNSEL: Now, you also understand that you personally would have a right to require the state of Minnesota to prove—well, we are agreeing that the aggravating factor for that upward departure is the injury to the victim in this case which was essentially scratches, correct?

TATE: Correct.

DEFENSE COUNSEL: Now, you would have a right to have that aggravating factor proved beyond a reasonable doubt to a jury, you could demand that, correct?

TATE: Correct.

DEFENSE COUNSEL: But as part of this negotiation you will be admitting that there was that injury and you are giving up your right to have that aggravating factor determined by a jury or a court beyond a reasonable doubt?

TATE: That's correct.

The following exchange took place at sentencing:

THE COURT: This is an upward durational departure by agreement of the parties. And was there any other, other than the plea negotiation, was there other rationale for that?

DEFENSE COUNSEL: I believe one of them was injuries to the complaining witness, Your Honor.

THE COURT: Does your file reflect anything?

PROSECUTOR: Your Honor, that's what [the trial prosecutor's] notes indicate.

The district court imposed the agreed-upon 42-month sentence.

Tate filed a postconviction petition seeking correction of his sentence under Minn. R. Crim. P. 27.03, subd. 9. The district court denied the petition and this appeal follows.

D E C I S I O N

Departures from the presumptive guidelines sentence are justified only when substantial and compelling circumstances are present in the record. *State v. McIntosh*, 641 N.W.2d 3, 8 (Minn. 2002). A district court may impose a greater sentence based on a defendant's admission, so long as the admission is accompanied by a valid waiver of the right to a jury trial on the particular factors that support an enhanced sentence. *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 2537 (2004); *State v.*

Dettman, 719 N.W.2d 644, 651-52 (Minn. 2006). The district court must state on the record the reasons for the departure. *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985). This court reviews a district court's decision to depart from the sentencing guidelines for abuse of discretion. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003). We will reverse only if the articulated reasons for the departure are improper or inadequate, or lack sufficient evidentiary support. *Tucker v. State*, 799 N.W.2d 583, 586 (Minn. 2011). Whether a particular upward-departure ground is permissible is a question of law, which we review de novo. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

Tate argues that the district court abused its discretion by imposing an aggravated sentence because the departure was based solely on the plea agreement, the court made no finding as to an appropriate departure ground, and the victim's injuries are not a proper departure basis. We address each argument in turn.

A district court may not depart from a presumptive guidelines sentence solely on a plea agreement. *State v. Misquadace*, 644 N.W.2d 65, 71 (Minn. 2002). Contrary to Tate's assertions, that did not happen here. During the plea hearing, Tate acknowledged that the upward departure is based on the aggravating factor of injury to the victim. The record establishes that the victim was injured and Tate expressly waived his right to a *Blakely* trial on that factor. And at sentencing, the district court identified the victim's injuries as a departure ground, satisfying its obligation to state the reasons supporting departure. See Minn. Sent. Guidelines cmt. II.D.04 (2006) ("When a plea agreement is made that involves a departure from the presumptive sentence, the [district] court should

cite the reasons that underlie the plea agreement or explain the reasons the negotiation was accepted.”).

Tate next argues that his sentence cannot stand because the district court did not independently assess the victim’s injuries and made no findings that the injuries support an upward departure. We disagree. Tate stipulated that he injured the victim and that the injuries warrant the upward durational departure. Accordingly, the district court was not required to determine whether the victim sustained injuries or make related findings of fact. See *Misquadace*, 644 N.W.2d at 71 (stating that parties to a plea agreement “might agree on grounds for departure that the [district] court could review for adequacy”); *State v. Yaritz*, 791 N.W.2d 138, 144 (Minn. App. 2010) (“When the facts are established by a . . . defendant’s post-waiver, sworn admissions . . . we discern no useful purpose in requiring the district court to restate the substance of the facts as ‘findings of fact.’ Instead, the record is adequate if the district court clearly identifies the aggravating factors on which it relies and thereby explains why the facts provide a substantial and compelling reason to depart.”), *review denied* (Minn. Feb. 23, 2011). The district court’s failure to make findings regarding the victim’s injuries does not require reversal.

Finally, Tate asserts that injury to the victim is not an appropriate departure ground because it is an element of the offense or of the dismissed second-degree criminal-sexual-conduct offense. We agree that a district court may not base a sentencing departure on a factor that constitutes an element of the underlying crime. *State v. Jones*, 745 N.W.2d 845, 849 (Minn. 2008). But that prohibition is not implicated here because personal injury is not an element of fourth-degree criminal sexual conduct, so it is a

proper basis for departure. Minn. Stat. § 609.345, subd. 1(c) (stating that fourth-degree criminal sexual conduct occurs when “the actor uses force or coercion to accomplish the sexual contact”). We also agree that a district court may not depart based on factors that are elements of uncharged offenses. *Jones*, 745 N.W.2d at 849. But the rule only prohibits upward durational departures based on facts that could support “uncharged *lesser-included* offenses.” *State v. Edwards*, 774 N.W.2d 596, 606 (Minn. 2009) (emphasis added). Criminal sexual conduct in the second degree is not a lesser-included offense of fourth-degree criminal sexual conduct. And because the legislature authorized cumulative punishment for criminal sexual conduct, *see* Minn. Stat. § 609.035, subd. 6 (2006), a district court may depart upward based on conduct that is an uncharged offense. *State v. Weaver*, 796 N.W.2d 561, 570-71 (Minn. App. 2011) (affirming sentence departure based on a ground that encompassed an element of uncharged offense because cumulative punishment is permitted for the uncharged offense), *review denied* (Minn. July 19, 2011). Accordingly, the fact that personal injury is an element of a more serious charged offense that was dismissed does not prohibit its use as a departure ground.

On this record, we conclude that the district court did not abuse its discretion by departing upward from the presumptive guidelines sentence.

Affirmed.