STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1491

State of Minnesota,
Respondent,

vs.

Dethoudone Phaengsy,
Appellant.

Filed July 18, 2011
Affirmed
Muehlberg, Judge[*]

Hennepin County District Court
File No. 27-CR-09-45679

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

Michael O. Freeman, Hennepin County Attorney, Paul R. Scoggin, Assistant County Attorney, Minneapolis, 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 Ross, Presiding Judge; Stoneburner, Judge; and Muehlberg, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

MUEHLBERG, Judge

Appellant challenges the district court's upward-durational departure in sentencing him for first-degree assault, arguing that the district court abused its discretion in relying upon the serious nature of the victim's injuries and appellant's participation in the assault with a group of people, in finding that appellant committed the assault with particular cruelty, and in finding that the victim was particularly vulnerable. We affirm.

FACTS

On June 19, 2009, 56-year-old N.B. was at the residence of an acquaintance, Melissa Daniels. N.B. allegedly owed Daniels money, and the two were arguing. Appellant Dethoudone Phaengsy, who had been drinking beer that day, later told investigators he grew tired of waiting for someone to hit N.B.; so he hit N.B., at which point others "started teeing off on [N.B.]," punching, kicking, and stomping on him.

Phaengsy admitted he punched N.B. twice and another person hit N.B. once, which caused N.B. to fall against a staircase. At that point, the group of four people began stomping on N.B., and Phaengsy admitted stomping on N.B.'s stomach a number of times. N.B. was on the ground, asking the group to stop. He may have tried to defend himself by throwing a punch, but no one alleges he did any more than that. When Phaengsy stopped assaulting N.B., the others continued, hitting N.B. with a chair and a barbeque grill.

Phaengsy and the assailants then fled. Phaengsy claims Daniels told someone to call police before they fled. Police arrived and had N.B. transported to an emergency

room. Months later, Phaengsy gave police information about the assault, including the names of the people involved.

The assault on N.B. left him with a severe traumatic brain injury, in a semi-vegetative state. N.B. was taken to the emergency room comatose, and he remains persistently cognitively unresponsive today. He lives in a medical-care center, where he will live for the rest of his life, requiring full-time care. His arms are paralyzed in an unmovable position across his chest, and his legs flail continuously and without control, causing him to regularly fall out of bed. He has a gastric feeding tube and a tracheostomy, which both appear to be permanent. He "stares into space" and is "consistently unresponsive." He does not recognize family members and, with the exception of an instance or two, does not respond to questions. He has a shorter-than-normal life expectancy, and his doctor testified that "[t]he likelihood of any further significant improvement or ever living independently is quite poor." N.B.'s 70-year-old wife reports she has paid $491,000 for his care and reports an incalculable emotional toll on herself and N.B.'s family.

Respondent State of Minnesota charged Phaengsy with first-degree assault committed for the benefit of a gang. Phaengsy pleaded guilty to first-degree assault under Minn. Stat. § 609.221 (2008), and the for-the-benefit-of-a-gang charge was dismissed. Phaengsy waived his rights under *Blakely* to have a jury determine the existence of aggravating factors and agreed to submit the issue to the court upon stipulated facts.

At Phaengsy's sentencing trial, the district court granted the state's request for an upward-durational departure, finding the following aggravating factors had been proven beyond a reasonable doubt: (1) N.B.'s injuries are serious and permanent; (2) N.B. was treated with particular cruelty; (3) Phaengsy committed the assault as part of a group of three or more people who all actively participated; and (4) N.B. was particularly vulnerable. The district court sentenced Phaengsy to 234 months in prison, an upward departure from the presumptive sentence of 122 months. This appeal followed.

D E C I S I O N

The Minnesota Sentencing Guidelines are meant "to establish rational and consistent sentencing standards . . . proportional to the severity of the offense of conviction and the extent of the offender's criminal history." Minn. Sentencing Guidelines I (2008). "[The] sentencing court has no discretion to depart from the sentencing guidelines unless aggravating or mitigating factors are present." *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). If aggravating or mitigating factors are present, the district court has broad discretion to depart from the presumptive sentence under the sentencing guidelines. *State v. Best*, 449 N.W.2d 426, 427 (Minn. 1989).

The sentencing guidelines list aggravating factors that may be used as support for an upward-durational departure. Minn. Sent. Guidelines II.D.2.b (2008). The list is "illustrative" and "not intended to be . . . exclusive or exhaustive." *Id.* at cmt.II.D.201 (2008). The district court must determine beyond a reasonable doubt that aggravating factors exist in order to grant an upward departure. Minn. Stat. § 244.10, subd. 7 (2008). "The guidelines sentencing scheme intended that departures from the presumptive

sentence be the exception, having application 'to a small number of cases.'" *State v. Jones*, 745 N.W.2d 845, 848 (Minn. 2008) (quoting *State v. Misquadace*, 644 N.W.2d 65, 68 (Minn. 2002)). "Departures are warranted only when substantial and compelling circumstances are present." *Id.* "Substantial and compelling circumstances are those demonstrating that 'the defendant's conduct in the offense of conviction was *significantly* more or less serious than that typically involved in the commission of the crime in question.'" *Id.* (quoting *Misquadace*, 644 N.W.2d at 69).

Standard of Review

Whether consideration of a particular reason for an upward departure is proper is a question of law subject to a de novo standard of review. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). But "[w]e review a sentencing court's departure from the sentencing guidelines for abuse of discretion." *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003). Reversal of an upward departure is warranted only if the reasons for the departure are improper or inadequate and if there is insufficient evidence to justify the aggravated sentence for the offense. *Taylor v. State*, 670 N.W.2d 584, 588 (Minn. 2003).

Although factors may be considered together to justify a departure, one factor on its own may be sufficient to justify a departure. *See, e.g., State v. Losh*, 721 N.W.2d 886, 897 (Minn. 2006) (holding two aggravating factors justified departure); *State v. O'Brien*, 369 N.W.2d 525, 527 (Minn. 1985) (stating departure justified when only one aggravating factor is present).

(1) Serious and Permanent Injuries

Phaengsy contends the district court improperly considered the serious and permanent nature of N.B.'s injuries in upwardly departing, because first-degree assault inherently requires serious and permanent injuries, which cannot be used as a reason to upwardly depart. The district court found that:

> [N.B.] will require around-the-clock care for the duration of his life; he will never live independently, and the level of care he requires is such that his family will never be able to bring him home for care. In actuality, this is the rare case where the seriousness and permanence of the victim's injuries may be worse than death.

A person commits first-degree assault when that person "assaults another and inflicts great bodily harm." Minn. Stat. § 609.221, subd. 1 (2008). Great bodily harm is defined as bodily injury that (1) creates a high probability of death, or (2) causes serious permanent disfigurement, or (3) causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or (4) causes other serious bodily harm. Minn. Stat. § 609.02, subd. 8 (2008).

"The reasons used for departing must not themselves be elements of the underlying crime." *State v. Blanche*, 696 N.W.2d 351, 378-79 (Minn. 2005). For instance, where the statutory language defining the offense of drive-by shooting as the discharging of a firearm "at or toward a person," largely encompassed the facts relied on by the court in departing, the departure was not justified. *State v. Thao*, 649 N.W.2d 414, 423 (Minn. 2002) (citing Minn. Stat. § 609.66, subd. 1e (2000)). This is because firing

eight shots randomly toward a group of people on a basketball court was not more serious than the typical drive-by shooting. *Id.* at 424.

However, we have held that upward-durational departures are appropriate in cases involving "not simply . . . one of the factors defining 'great bodily harm;' [but] *all* of them," where victims are "subject to a high probability of death *and* serious permanent disfigurement *and* a permanent impairment of a bodily function *and* other serious bodily harm." *State v. Felix*, 410 N.W.2d 398, 401 (Minn. App. 1987), *review denied* (Minn. Sept. 29, 1987). And, in *Dillon*, appellant was convicted of first-degree assault for inflicting serious and permanent injuries on his wife. *Dillon*, 781 N.W.2d at 593. The district court sentenced appellant to 240 months, an upward departure from the presumptive sentence of 86 months. *Id.* We affirmed the district court's consideration of the severity and permanence of the victim's injuries as an aggravating factor because, like in *Felix*, the victim's injuries satisfied all four factors constituting great bodily harm. *Id.* at 602.

We implicitly acknowledged this line of reasoning in *State v. Valentine*, 630 N.W.2d 429, 436-37 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Although this court reversed an upward departure that was based solely on the extent of the victim's injuries, we held that the case of first-degree murder is special. *Id.* The first-degree-murder statute does not refer to the *result* of a defendant's actions (the extent of the victim's injuries) but rather the defendant's *conduct*, which the district court did not use as a reason for upwardly departing. *Id.* at 437. In *Valentire*, we contrasted the first-degree-murder statute with the first-degree-assault statute, which includes "great bodily

harm" as an element of the offense, thus allowing consideration of the severity of the victim's injuries in aggravating-factor analyses when the statute describes the result of a defendant's conduct (*i.e.*, the serious and permanent nature of the victim's injuries). *Id.* at 436-37.

As such, the district court properly considered the serious and permanent nature of N.B.'s injuries an aggravating factor. And there is substantial evidence in the record to support the district court's conclusion that N.B.'s injuries are serious and permanent. Phaengsy stipulated to facts outlining the serious and permanent nature of N.B.'s injuries. Those facts include that N.B., a previously healthy 56-year-old man, has been subjected to a life of full-time medical care, is unable to speak or feed himself, is unaware of family and friends in his presence, and is prone to serious illnesses such as blood clots and pneumonia that will likely shorten his life. Phaengsy, who had been drinking alcohol all day, threw the first punch after listening to N.B., Daniels, and a third person argue over money. A strong argument can be made that but for Phaengsy's first punch, N.B. may never have been assaulted and the argument may have had a nonviolent end. Phaengsy gave no indication that a violent confrontation was expected or planned by the group or was inevitable in any way. He punched N.B. twice and stomped on N.B.'s stomach an unknown number of times while N.B. was on the ground, and his actions caused N.B. serious and permanent injury.

(2) Particular Cruelty

Phaengsy contends the district court abused its discretion in upwardly departing by considering the particular cruelty of the crime. An aggravating factor can be that "[t]he

victim was treated with particular cruelty for which the individual offender should be held responsible." Minn. Sent. Guidelines II.D.2.b.(2). The district court found that

> [Phaengsy's] assault of [N.B.] was committed with gratuitous infliction of pain and cruelty. [Phaengsy] struck [N.B.] first with his fists and admitted to stomping on and kicking [N.B.] while he was down on the ground. [N.B.] did not attempt to fight back and posed no threat to [Phaengsy], yet he was continuously beaten regardless of his consciousness.

Particular cruelty alone can justify a double upward departure. *State v. Harwell*, 515 N.W.2d 105, 109 (Minn. App. 1994), *review denied* (Minn. June 15, 1994).

"Cruelty is a matter of degree and it is not always easy to say when departure is or is not justified." *Holmes v. State*, 437 N.W.2d 58, 59 (Minn. 1989). The question is whether Phaengsy's conduct was so significantly different from that of other people committing the same crime that an upward departure is justified. *See State v. Esler*, 553 N.W.2d 61, 64 (Minn. App. 1996), *review denied* (Minn. Oct. 15, 1996). The typical first-degree assault requires the infliction of great bodily harm, which can be either (1) a high probability of death, or (2) serious permanent disfigurement, or (3) permanent or protracted loss or impairment of the function of a bodily member or organ, or (4) other serious bodily harm. Minn. Stat. § 609.02, subd. 8. Satisfaction of all four factors is more gratuitous, severe, and cruel than satisfaction of only one. An assault with a high probability of death does not always involve serious permanent disfigurement; likewise, an assault leaving a serious permanent disfigurement does not always yield a high probability of death. This particular assault left N.B. comatose and highly likely to die

early, left him in a permanent semi-vegetative state, left him without the use of most of his bodily and cognitive functions, and caused many other forms of serious bodily harm.

In *Dillon*, we affirmed the district court's consideration of the appellant's particular cruelty as an aggravating factor. *Dillon*, 781 N.W.2d at 601. Comparing the circumstances of the present crime to this one, the beating was just as gratuitous, was carried out with the use of devices by a group of people instead of just one, and resulted in far more serious injuries with much more permanence. The supreme court attaches "particular significance" to the infliction of permanent injuries. *State v. Van Gorden*, 326 N.W.2d 633, 635 (Minn. 1982). The district court's conclusion was proper.

Failure to Obtain Medical Aid

The district court also cited Phaengsy's failure to obtain medical aid as an aggravating factor, stating "[Phaengsy] and his cohorts fled the scene and left [N.B.] there to suffer extraordinary injuries or even death as a result of the beating." Although failure to obtain medical aid is not included in the sentencing guidelines' nonexclusive list, failure to seek aid can be an indication that a crime was committed "in a particularly cruel way." *State v. Jones*, 328 N.W.2d 736, 738 (Minn. 1983); *Harwell*, 515 N.W.2d at 109-10 (affirming district court's consideration of appellant's failure to obtain medical aid an aggravating factor even though appellant did not know whether victim was injured).

Phaengsy alleges one of his co-defendants told someone to call 911. But Phaengsy did not direct anyone to call 911, nor did he call 911. He admitted he left the scene with the group and went to a friend's house to drink more alcohol. He

acknowledged witnessing the entire assault, in which four people punched, kicked, and stomped on N.B. and used a chair and a barbeque grill to beat N.B. into unconsciousness. The district court did not abuse its discretion in finding that Phaengsy should have sought medical aid for N.B. after the assault and in using Phaengsy's failure to do so as an aggravating factor.

(3) Group of Three or More

Phaengsy contends the district court abused its discretion in considering the active participation of the group an aggravating factor. An aggravating factor can be that "[t]he offender committed the crime as part of a group of three or more persons who all actively participated in the crime." Minn. Sent. Guidelines II.D.2.b.(10). The district court found that "[Phaengsy] admitted to committing the assault with three accomplices . . . . [T]he gang relationship between [Phaengsy] and his accomplices, combined with the mob mentality of the attack, prove beyond a reasonable doubt the aggravating factor."

Phaengsy contends the district court improperly considered this factor because he was charged with acting for the benefit of a gang. This aggravating factor "cannot be used when an offender has been *convicted* under Minn. Stat. § 609.229, Crime Committed for Benefit of a Gang." Minn. Sent. Guidelines cmt. II.D.205 (2008) (emphasis added). Phaengsy was not convicted of first-degree assault for the benefit of a gang. The for-the-benefit-of-a-gang charge was dropped prior to his guilty plea. The district court thus properly considered this aggravating factor.

The group participation must make the crime "significantly more . . . serious than that typically involved in the commission of the crime in question." *Misquadace*, 644

N.W.2d at 69. Phaengsy repeatedly admitted to police officers he thought it was "stupid" the assault went as far as it did; he was frustrated that the argument between N.B. and Daniels was not progressing further, so he threw the first punch and the others then joined in; and he did "not know why or how the assault had gone as far as it did." All of these admissions support the district court's conclusion that the "mob mentality" took over after Phaengsy's first punch and "that maybe [Phaengsy's] specific acts invoked or initiated the mob mentality that took over." There is substantial evidence in the record to support the district court's conclusion.

In *Losh*, the supreme court affirmed an upward departure based in part on this aggravating factor, reasoning the factor was proved simply because three people actively participated in the crime. 721 N.W.2d at 896 (citing *State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998) (finding the existence of this aggravating factor where group of four went in car to victim's home, defendant shot out of car's window at victim's home, and all four departed in the car). Because three or more people actively assaulted N.B., the district court did not abuse its discretion in its conclusion.

(4) Particular Vulnerability

Phaengsy contends the district court abused its discretion in considering N.B. vulnerable under the sentencing guidelines, which require that "[t]he victim [be] particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, which was known or should have been known to the offender." Minn. Sent. Guidelines II.D.2.b.(1). The district court found:

> While the Minnesota Sentencing Guidelines generally describe vulnerability as a product of age, infirmity, or reduced capacity, courts have also determined that vulnerability may arise during the course of criminal conduct. *See e.g., State v. Bock*, 490 N.W.2d 116, 121 (Minn. App. 1992) . . . . [Phaengsy's] first blow brought [N.B.] to his knees. Thereafter, [Phaengsy] and his accomplices continued to assault [N.B.] while he was lying helpless on the ground. [N.B.] was particularly vulnerable as [Phaengsy] continued to strike him as he lay unconscious on the ground.

Phaengsy promotes a strict interpretation of the description of vulnerability, which the district court does not follow. Phaengsy contends "this was not a case where [N.B.] was vulnerable before the fight started. He was not elderly and not in a wheelchair. [N.B.] only became vulnerable after he fell to the ground." In contrast, the state contends the sentencing guidelines create a type of vulnerability that may arise during the course of an assault, because the guidelines refer to vulnerability due to "reduced physical or mental capacity, which was known or should have been known to the offender." Minn. Sent. Guidelines II.D.2.b.(1). Phaengsy cites *State v. Bock*, 490 N.W.2d 116, 121 (Minn. App. 1992), *review denied* (Minn. Aug. 27, 1992), where we affirmed the district court's upward departure because Bock hit the victim with a baseball bat after hitting him once and causing him to fall to the ground.

Further, the supreme court affirmed an upward departure for an appellant who shot a victim twice, once while the victim was struggling for control of a gun, and once after the victim had been wounded and was lying on the floor, which put the victim in a "particularly vulnerable position." *State v. Mitjans*, 408 N.W.2d 824, 826, 834 (Minn. 1987). In *Harwell*, we affirmed the district court's consideration of the victim's young

age and her "reduced physical capacity" while appellant held her down to support a finding of particular vulnerability. 515 N.W.2d at 110. In *Dillon*, we held that the victim became more vulnerable as the attack progressed and that the attack itself rendered the victim particularly vulnerable. 781 N.W.2d at 600. We have also recognized a victim's sleeping state as particular vulnerability. *State v. Skinner*, 450 N.W.2d 648, 654 (Minn. App. 1990) (concluding victim's vulnerability was increased because offender began touching her while she was asleep), *review denied* (Minn. Feb. 28, 1990); *see also State v. Bingham*, 406 N.W.2d 567, 570 (Minn. App. 1987) (concluding victim was in vulnerable position when offender began assaulting her while she slept).

Phaengsy highlights, in contrast, *State v. Volk*, 421 N.W.2d 360, 366 (Minn. App. 1988), *review denied* (Minn. May 18, 1988). There, we found that the victim was not particularly vulnerable simply because he was bound and gagged, as this did not constitute a physical or mental incapacitation according to the guidelines. *Id.* Phaengsy asks us to follow the "holding" in *Volk*. However, in *Volk* we affirmed the district court's upward departure on other grounds. *Id.*

The majority of caselaw indicates the district court was correct in using a broader interpretation of vulnerability. Phaengsy admitted that he stomped on N.B. after the other assailants had joined in on the assault, even after N.B. fell to the ground and was pleading with the assailants to stop. Another assailant corroborated that N.B. fell to the ground after the first punches and was trapped between the group and the stairs. The district court properly found N.B. particularly vulnerable as a result of the attack.

(5) Length of Departure

"We have 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." *Dillon*, 781 N.W.2d at 596. The presumptive sentence of first-degree assault for a defendant with a criminal-history score of 3 is 122 months. Phaengsy was sentenced to 234 months, which is 1.92 times the presumptive sentence. Phaengsy's co-assailant who hit N.B. with the barbeque grill during the assault, was sentenced to 172 months in prison—a double departure from his presumptive sentence of 86 months. *State v. Chanthapanya*, No. A10-1236 (Minn. App. May 23, 2011). The district court did not abuse its discretion in its upward departure from Phaengsy's presumptive sentence.

Affirmed.