STATE OF MINNESOTA
IN COURT OF APPEALS
A11-278

State of Minnesota,
Respondent,

vs.

Daniel Lynn Conley,
Appellant.

Filed February 6, 2012
Affirmed
Stoneburner, Judge

Ramsey County District Court
File No. 62K803001055

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

John Choi, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Ross, Judge; and Stoneburner, Judge.

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

STONEBURNER, Judge

In this appeal following resentencing after remand, appellant argues that (1) the admissible evidence presented to the *Blakely* sentencing jury was insufficient to support

its findings; (2) the 300-month sentence imposed for his conviction of first-degree criminal sexual conduct is unsupported by evidence in the record; and (3) unduly exaggerates the criminality of his conduct. Because the evidence is sufficient to support the *Blakely* jury's findings, the findings support the upward sentencing departure, and the sentence does not unduly exaggerate the criminality of the offense, we affirm.

FACTS

In June 2003, appellant Daniel Lynn Conley was convicted of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subds. 1(e), 2 (2002), third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subds. 1(c), 2 (2002), solicitation, inducement, and promotion of prostitution in violation of Minn. Stat. § 609.322, subd. 1a(1) (2002), and second-degree assault in violation of Minn. Stat. § 609.222, subd. 1 (2002). The district court imposed 300 months in prison for first-degree criminal sexual conduct, representing an upward departure from the then-presumptive guideline sentence of 158 months, and consecutive sentences of 18 and 36 months for the prostitution and assault convictions. On direct appeal, this court affirmed the convictions but reversed and remanded for resentencing consistent with the requirements of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). *State v. Conley*, No. A03-1669, 2004 WL 2283421 (Minn. App. Oct. 12, 2004).

On remand, the district court convened a sentencing jury which found, in relevant part, that the children of the victim, C.J., were in the home when Conley sexually assaulted her. Based on the presence of the children in the home during the assault as an aggravating factor, the district court again sentenced Conley to 300 months in prison for

the conviction of first-degree criminal sexual conduct. Conley appealed and this court affirmed the sentence. *State v. Conley*, No. A07-1990, 2009 WL 233649 (Minn. App. Feb. 3, 2009). The supreme court granted review and stayed the proceedings pending its decision in *State v. Vance*, a case involving the "presence of children" as an aggravating sentencing factor. Subsequently, the supreme court held in *Vance* that "[t]he mere presence of children in the home, absent any evidence that they saw or heard the offense, is not a substantial and compelling circumstance demonstrating that a defendant's conduct was significantly more serious than that typically involved in the commission of the offense." *State v. Vance*, 765 N.W. 2d 390, 394 (Minn. 2009). To support an upward sentencing departure based on committing an offense in the presence of children, the state must prove "that the children saw, heard, or otherwise witnessed the offense." *Id.*

The supreme court then reversed and remanded Conley's case to this court for reconsideration in light of *Vance*. *State v. Conley*, No. A07-1990, June 30, 2009. This court, noting that there appeared to be sufficient evidence in the record to satisfy *Vance*, remanded for another sentencing trial to permit a jury to consider the issue. *State v. Conley*, No. A07-1990, 2009 WL 3172123 (Minn. App. Oct. 6, 2009), *review denied* (Dec. 15, 2009).

At the start of the second sentencing trial, the district court told the jury that Conley was convicted of first-degree criminal sexual conduct, but the district court limited testimony about the sexual assault and Conley's conduct during the assault to evidence related to the children's perception of the incident and C.J.'s ability to leave,

escape, or resist during the offense due to the presence of her children. The jury was presented with the following evidence.

In March 2003, Conley sexually assaulted his then girlfriend, C.J., in the living room of C.J.'s townhouse, where they lived with C.J.'s daughters who were four and five years old at that time. C.J. testified that the townhouse "echoed" and it was easy to clearly hear everything that was happening downstairs from the upstairs bathroom next to the girls' bedroom.

C.J. testified that the children, who had been playing outside, entered the townhouse as the assault was beginning, while C.J. was undressing in response to Conley's demands and threats. C.J. vomited into her hand when she saw the children. Conley called her a bad name and told her to keep undressing. He told the children that C.J. was naughty and he was going to spank her. He told the children to go to their bedroom and take a nap, and C.J. would be fine, even if they heard noises. C.J. was naked or nearly naked, crying, and asking Conley to stop as the children went upstairs. C.J. thought that the girls saw her when she was naked but was not sure.

Conley sexually assaulted C.J. for approximately one hour, during which time C.J. continued to cry and ask him to stop. C.J. testified that she did not fight back or try to escape because she feared for the children's safety and believed that Conley's earlier threats to kill her family if she did not do what he said included the children.

The children left their room after the assault ended and went back outside. C.J. testified that she knew that the girls heard the assault because they "cried for days" and she knew it affected them because they "[woke] up in the middle of the night crying" for

months after the assault, which they had not done before the assault. C.J. testified that she did not think the girls were napping during the assault because they normally slept for two or three hours and the assault did not take that long. She testified that, when the girls came downstairs, they saw that she had been crying and was only wearing pants and a bra, which was unusual at that time of day.

Later, on the same day, C.J. went to the neighbor's to borrow sugar. She testified that she did not alert the neighbor to what happened because Conley watched her from the door of the townhouse the entire time, and the children were in the house with him. The next day, Conley allowed C.J. to leave the house without the children because, C.J. testified, he believed that she was "behaving" and would do what he told her to do. C.J. took a bus to downtown St. Paul, called an acquaintance for help in getting her family out of St. Paul, and then went to a police station and reported the assault. C.J. testified that she left the children with Conley because she believed that he would not hurt them so long as he believed that she was following his orders. Police went back to the townhouse with C.J. and arrested Conley.

Conley testified at the sentencing trial that he did not have sex with C.J. that day, although they had planned to have consensual sex. He testified that the girls saw C.J. partially undressed and saw him and C.J. kissing and touching. He denied threatening C.J., the girls, or her family, and denied that C.J. was crying, hyperventilating, or vomiting when the girls saw her.

The jury answered the following questions in the affirmative:

1. Did one or more of [C.J.]'s children see any part of the offense?
2. Did one or more of [C.J.]'s children hear any part of the offense?
3. Did one or more of [C.J.]'s children otherwise witness any part of the offense?
4. Did the presence of [C.J.]'s children limit her ability to leave the residence during the offense?
5. Did the presence of [C.J.]'s children limit her ability to otherwise escape during the offense?
6. Did the presence of [C.J.]'s children limit her ability to resist during the offense?

Based on the findings of the sentencing jury, the district court again sentenced Conley to 300 months in prison for his conviction of first-degree criminal sexual conduct, and this appeal followed.

D E C I S I O N

I. The district court did not abuse its discretion by permitting C.J.'s testimony about what the children heard and saw, and the evidence is sufficient to support the jury's findings that the children saw, heard, or otherwise witnessed "any part of the offense."

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court

must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

Conley argues that C.J.'s testimony about what the children heard was speculative and was improperly admitted under Minn. R. Evid. 602. Minn. R. Evid. 602 prohibits a witness from testifying to a particular fact "unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The rule functions as a specific application of Minn. R. Evid. 104 (b), because a witness's testimony is not relevant unless that witness testifies from firsthand knowledge. Minn. R. Evid. 602 cmt. Minn. R. Evid. 104(b) "does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility" of a witness's testimony. Minn. R. Evid. 104(e).

Conley argues that C.J. does not have personal knowledge as to whether the children heard any part of the sexual assault. Conley objected to the testimony at trial and cites three reasons why it was inadmissible. First, C.J. did not testify that she had spoken to the children and confirmed that they heard anything. Second, the children did not testify at the *Blakely* trial, so there is no evidence in the record to support the conclusion that they heard anything. Third, the only evidence in the record that purportedly supports a finding that C.J. had personal knowledge that the children heard

anything was her testimony that noises echoed in the townhome. Conley asserts that C.J.'s testimony was "belied by the record" because the children were napping, the bedroom door was closed, and C.J. "cried quietly and asked [Conley] to stop the assault." We disagree.

Minn. R. Evid. 701 allows a non-expert witness to testify in the form of opinion or inference as long as such testimony is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." C.J. testified that she "believed" that her children heard her based on her personal knowledge of the acoustics in the townhouse; the fact that the children came downstairs sooner than they would have had they been napping, based on her personal knowledge of their napping habits; and the fact that they cried for days after the assault and woke up crying for months after the assault. Conley was given the opportunity to cross-examine C.J. four times during the *Blakely* trial, and he also testified, giving his version of events to the jury.

C.J.'s testimony was relevant and admissible and was sufficient for the jury to make the reasonable inference beyond a reasonable doubt that the children heard, saw, or otherwise witnessed some part of Conley's attack on their mother. *See State v. Gatson*, 801 N.W.2d 134, 143 (Minn. 2011) (stating that the court reviews the evidence to determine "whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted."). Conley's argument that, at most, the children witnessed an attempted assault, is without merit. Here, the assault was

completed, so if the children witnessed Conley attempting the assault, they witnessed a part of the assault. And Conley ignores the jury's finding that the children heard the actual assault.

II. The evidence is sufficient to support the jury's findings that the presence of the children limited C.J.'s ability to leave, escape, or resist the assault.

Conley asserts that the last three questions on the special-verdict form are essentially the same question, but he does not argue that he was prejudiced by separation of the inquiry into three questions. Conley's challenge to the sufficiency of the evidence to support the jury's answers to these questions is based on the fact that, after the assault, C.J. left the townhome twice, leaving the children with him, and told her acquaintance that she knew Conley would not harm the children. And Conley challenges the sufficiency of evidence to support the jury's finding that the presence of the children limited her ability to resist, arguing that C.J. claims that she, in fact, resisted by repeatedly telling him to stop. We find no merit to either argument. C.J. testified in detail about how the presence of the children affected her ability to resist at the time of the assault. And her testimony about how the children's presence affected her during the assault is not negated by the fact that, after the assault, she considered the children not to be in danger so long as Conley believed that she was obeying him. C.J.'s testimony amply supports the jury's findings on these questions.

III. The jury's findings support the upward departure and the departure does not unduly exaggerate the criminality of Conley's conduct.

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. (2010). "'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). The question of whether a stated reason for departure is "proper" is a legal one. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). A district court's decision to depart from the sentencing guidelines based on permissible grounds is reviewed for an abuse of discretion. *Id.* at 595–96; *see also State v. Anderson*, 356 N.W.2d 453, 454 (Minn. App. 1984) ("If the record supports findings that substantial and compelling circumstances exist, this court will not modify the departure unless it has a 'strong feeling' that the sentence is disproportional to the offense.").

Case law recognizes the presence of children as an aggravating sentencing factor when children witness an assault. *Vance*, 765 N.W.2d at 394 (citing *State v. Profit*, 323 N.W.2d 34, 36 (Minn. 1982), in which the supreme court recognized that "it is particularly outrageous to commit a sexual assault in the actual presence of children because it victimizes children in a broad sense"). The presence of children that limits a victim's ability to flee is also an aggravating factor. *See State v. Johnson*, 450 N.W.2d 134, 135 (Minn. 1990) (noting among other aggravating factors supporting a double-upward departure "the fact that [the victim] was not free to try to flee because she had a responsibility to the infants who were present").

Conley argues that the district court impermissibly relied on the fact that the children suffered emotional harm, the victim impact statement from the 2007 *Blakely* trial, and the fact that the children were kept away from C.J. and unable to "process" the incident until after his arrest, to support the departure. We disagree. The record reflects that the upward departure is based on the jury's findings, which adequately support the departure.

Conley argues that his sentence unduly exaggerates the criminality of his conduct because this was "not a case where [Conley] made the children watch or otherwise observe the assault, he did not make the children participate in the assault or harm the children during the assault." But the record reflects that Conley carried on with the assault in the presence and hearing of the children. Case law informs us that children are, in fact, harmed by witnessing any part of such conduct, and the record reflects that these children were harmed by what they witnessed. *See Profit*, 323 N.W. 2d at 36. We find no merit to Conley's claims that his sentence unduly exaggerates the criminality of his conduct.[1]

IV. Conley's pro se supplemental brief does not raise any arguments of merit.

Conley's pro se supplemental brief appears to assert that the district court abused its discretion under *Blakely* by finding that multiple offenses arose from a single behavioral incident; by determining that exigent circumstances justified a warrantless entry into the townhome to arrest him; and by requiring him to submit to an

[1] We note that under the current guidelines, the presumptive sentence for first-degree criminal sexual assault with a criminal history of six or more is 306–360 months.

"unconstitutional" presentence investigation. He also appears to assert that the district court violated his rights by (1) retroactively applying *Blakely* to his case (and he asserts that he did not receive proper notice that the state intended to seek an upward departure); (2) denying him his constitutional right to an impartial judge and a fair trial; and (3) subjecting him to double jeopardy by convening a second *Blakely* jury and prosecuting him again for the same offense. Because none of these issues was raised in the district court, all are waived on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (holding that an appellate court will not consider matters not argued to and considered by the district court). Furthermore, most of Conley's arguments are incomprehensible, making analysis impossible. We note however that his attacks on the integrity and fairness of the sentencing judge are entirely without merit: the record reflects the sentencing judge's impartiality, exemplified by limiting the evidence presented to the sentencing jury.

Affirmed.