STATE OF MINNESOTA
IN COURT OF APPEALS
A11-547

Robert Lawrence Hosley, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 2, 2012
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 27-CR-05-73277

Ira W. Whitlock, Whitlock Law Office, LLC, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

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

KALITOWSKI, Judge

Appellant Robert Lawrence Hosley challenges the district court's denial of his petition for postconviction relief arising out of his 2006 convictions of first- and third-degree criminal sexual conduct and kidnapping. We affirm.

D E C I S I O N

Denial of a postconviction petition for relief is reviewed for an abuse of discretion. *Francis v. State*, 781 N.W.2d 892, 896 (Minn. 2010). The postconviction court will not be reversed unless it "exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Reed v. State*, 793 N.W.2d 725, 732 (Minn. 2010).

In 2006, a jury found appellant guilty of first-degree criminal sexual conduct, third-degree criminal sexual conduct, and kidnapping arising out of an August 1997 offense. The district court sentenced him to 306 months' imprisonment for first-degree criminal sexual conduct, an upward-durational departure from the guidelines sentence of 161 months, and 60 months for kidnapping, to run concurrently. This court affirmed the conviction. *State v. Hosley*, A07-1017, 2008 WL 4393312 (Minn. App. Sept. 30, 2008), *review denied* (Minn. Dec. 16, 2008).

Appellant petitioned for postconviction relief, requesting a new trial on the grounds that his trial and appellate counsel were ineffective, and requesting resentencing on the ground that the upward-durational departure was improper. The district court concluded that (1) appellant's ineffective-assistance-of-trial-counsel claim was barred under *State v. Knaffla* because it was known and not raised at the time of appellant's direct appeal; (2) appellant's ineffective-assistance-of-appellate-counsel claim failed because appellant did not show that trial counsel was ineffective; and (3) appellant's sentencing claim failed because the district court found valid aggravating factors to support its upward departure.

When a direct appeal has been taken, "all maters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). There are two exceptions to the *Knaffla* rule: the court may hear known-and-not-raised claims in postconviction proceedings if (1) a novel legal issue is presented, or (2) the interests of justice require review and the petitioner did not deliberately and inexcusably fail to raise the issue on direct appeal. *Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005).

I.

A claim of ineffective assistance of trial counsel is *Knaffla* barred if the claim is based solely on the trial record and the claim was known or should have been known on direct appeal. *Evans v. State*, 788 N.W.2d 38, 44 (Minn. 2010). Appellant argues that his trial counsel was ineffective because counsel failed to interview and call certain witnesses at trial, including T.L. We conclude that appellant's ineffective-assistance-of-trial-counsel claim is without merit because it relies on matters of trial strategy, and his claim is barred under *Knaffla* because he knew or should have known that counsel did not call the potential witness T.L. at the time he filed a direct appeal. *See State v. Miller*, 666 N.W.2d 703, 717 (Minn. 2003) (explaining that claims concerning trial counsel's failure to call certain witnesses involve trial strategy and "are of the type we have repeatedly declined to recognize as amounting to ineffective assistance of counsel").

Appellant's appellate counsel raised two issues on direct appeal, and appellant raised four additional issues in a pro se supplemental brief. *See Hosley*, 2008 WL

4393312, at *2-7 (addressing two arguments set forth by appellate counsel and four arguments set forth in a pro se supplemental brief). Moreover, appellant acknowledged that at the time of his direct appeal he brought the ineffective-assistance-of-trial-counsel claim to the attention of his appellate counsel. Therefore, appellant was aware of the ineffective-assistance-of-trial-counsel claim and had ample opportunity to raise it, but failed to do so. Appellant does not assert that a *Knaffla* exception applies and sets forth no facts from which we could conclude that novelty or principles of fairness require review. *See Roby v. State*, 531 N.W.2d 482, 484 (Minn. 1995) (refusing to consider claims that were known and not raised when the appellant failed to assert that the claims were novel and failed to present facts indicating that fairness required review).

Appellant also argues that appellate counsel "was aware of trial counsel's ineffectiveness, but refused to raise the ineffective-assistance-of-counsel issue in [a]ppellant's initial appeal" and so appellate counsel was also ineffective. This claim also fails on the merits. "When an ineffective assistance of appellate counsel claim is based on appellate counsel's failure to raise an ineffective assistance of trial counsel claim, the appellant must first show that trial counsel was ineffective." *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007). Appellant has failed to demonstrate that trial counsel was ineffective, and therefore cannot demonstrate that appellate counsel was ineffective.

Because appellant's ineffective-assistance-of-counsel claims are *Knaffla* barred, or otherwise fail on the merits, the postconviction court did not err by refusing to grant appellant a new trial on the grounds that his trial and appellate counsel were ineffective.

II.

Appellant argues that the district court erred by imposing an upward durational departure because the district court relied upon invalid aggravating factors.

The state contends that appellant's sentencing-departure claims are also *Knaffla* barred. Appellant was present at the sentencing hearing when the district court announced the aggravating factors it was relying upon and imposed a 306-month sentence. Appellant was orally advised of his right to appeal the convictions and sentence. Accordingly, appellant had the opportunity to challenge his sentence in his direct appeal but failed to do so, and appellant advances no argument that a *Knaffla* exception applies. *See State v. Johnson*, 653 N.W.2d 646, 649-50 (Minn. App. 2002) (concluding that a challenge to a double-upward departure was *Knaffla* barred because "[a]ppellant knew or should have known about each of his current sentencing departure arguments at the time of his direct appeal").

But arguably *Knaffla* does not apply because courts have authority to correct an illegal sentence at any time under Minn. R. Crim. P. 27.03, subd. 9. The postconviction court addressed the merits of this claim. Therefore, without deciding whether appellant's claim is *Knaffla* barred, we address the merits of his arguments.

Whether a particular ground for an upward departure is permissible is a question of law, which is subject to de novo review. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). Assuming permissible grounds for departure, the district court's decision to depart from the sentencing guidelines will not be

reversed absent an abuse of discretion. *Taylor v. State*, 670 N.W.2d 584, 588 (Minn. 2003).

A district court must order the presumptive sentence specified in the sentencing guidelines unless there are "substantial and compelling circumstances" warranting a departure. Minn. Sent. Guidelines II.D (1997). "'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). One or two aggravating factors may be sufficient to uphold a departure. *See State v. Losh*, 721 N.W.2d 886, 897 (Minn. 2006) (upholding an upward-durational departure based on the presence of two aggravating factors); *State v. O'Brien*, 369 N.W.2d 525, 527 (Minn. 1985) (holding that a double-upward departure based on a single aggravating factor was permissible). But the district court may not rely on an aggravating factor that is an element of the underlying offense or lesser-included offenses, and may not rely on conduct comprising uncharged, dismissed, or acquitted charges. *State v. Jones*, 745 N.W.2d 845, 849 (Minn. 2008).

Force or coercion

Appellant argues that the district court improperly relied on the use of force or coercion as an aggravating factor. We disagree, because in its postconviction order, the district court explained that it did not consider force or coercion as an aggravating factor at sentencing.

Multiple forms of penetration

The district court concluded that appellant engaged in multiple forms of penetration based on the victim M.M.'s testimony that appellant "first forced his penis into her mouth" and subsequently "flipped M.M. onto her stomach and forcibly penetrated her vaginally with his penis." Appellant contends that penetration is an element of first-degree criminal sexual conduct, and therefore is an invalid aggravating factor. But the statute does not include *multiple forms* of penetration as an element of the crime. *See* Minn. Stat. § 609.342, subd. 1 (1996) (requiring "sexual penetration"). Appellant also argues that his conduct did not diverge from the way the offense "is typically committed." But this argument was squarely rejected by this court in *State v. Adell*, 755 N.W.2d 767, 775-76 (Minn. App. 2008) (holding that "multiple forms of penetration is not 'typical' of" first-degree criminal sexual conduct), *review denied* (Minn. Nov. 25, 2008). Therefore, "[t]he fact that a defendant has subjected a victim to multiple forms of penetration is a valid aggravating factor in first-degree criminal sexual conduct cases." *Id.* at 774; *see also State v. Mesich*, 396 N.W.2d 46, 52-53 (Minn. App. 1986) (affirming a more-than-double-upward departure based, in part, on penetration of the victim's vagina and mouth), *review denied* (Minn. Jan. 2, 1987). We conclude that multiple forms of penetration is a valid aggravating factor and that the record supports the district court's reliance on this factor.

Bodily injury

The district court considered testimony of a nurse who examined M.M. hours after the sexual assault, the testimony of a police officer at the scene, and photographs taken

shortly after the assault, and concluded that M.M. "suffered bodily injuries to each of her shoulders, her neck, her knee, and her interior lip" as well as vaginal tenderness. Appellant argues that bodily injury to the victim is "contemplated" in the definitions of first-degree and third-degree criminal sexual conduct and kidnapping. We disagree. Bodily injury is not an element of any of the offenses of which appellant was convicted. *See* Minn. Stat. § 609.342, subd. 1(c) (defining criminal sexual conduct in the first degree as "engag[ing] in sexual penetration with another person" if "circumstances existing at the time of the act cause the complainant to have a reasonable fear of imminent great bodily harm"); Minn. Stat. § 609.344, subd. 1(c) (1996) (defining criminal sexual conduct in the third degree as "engag[ing] in sexual penetration with another person" if "the actor uses force or coercion to accomplish the penetration"); Minn. Stat. § 609.25, subd. 1(2) (1996) (defining kidnapping as "confin[ing] or remov[ing] from one place to another, any person without the person's consent . . . [t]o facilitate commission of any felony or flight thereafter").

Appellant argues that M.M.'s injuries do not indicate that he committed the offense in a particularly serious way. But precedent establishes that bodily injury to the victim is an aggravating factor in criminal-sexual-conduct offenses. *See State v. Van Gorden*, 326 N.W.2d 633, 634 (Minn. 1982) (holding that the injury inflicted on the victim can be considered as an aggravating factor, even when infliction of injury is an element of the underlying offense); *State v. Patterson*, 511 N.W.2d 476, 478 (Minn. App. 1994) (affirming the district court's imposition of an upward departure based, in part, on the defendant's infliction of bodily injury, which included bruises on the victim's

shoulder, triceps, neck and lower extremities, and blood in her eye), *review denied* (Minn. Mar. 31, 1994). Finally, even if we accepted appellant's argument that the injuries do not demonstrate that the offense was committed in a particularly serious way, the district court's reliance on valid aggravating factors remains justified. *O'Brien*, 369 N.W.2d at 527 (stating that a double-upward departure is justified if a legally valid ground for departure exists, even if the facts do not demonstrate that the defendant committed the offense in a particularly serious way).

Zone of privacy

The district court found that appellant entered M.M.'s residence in the early morning hours while she was asleep on the couch in her living room. The district court determined that appellant invaded M.M.'s zone of privacy based on her testimony that

> as a result of the rape, she lost everything, including her sense of security. She moved out of the duplex and never returned. She dropped out of school. She moved out of Minneapolis and now resides in another state. She did not sleep at night for over three years following the events.

Appellant argues that invasion of the zone of privacy is an impermissible aggravating factor because the commission of the crime in M.M.'s home does not make his conduct more serious. There is precedent establishing that invasion of the zone of privacy is an aggravating factor, particularly in sexual-assault cases. *See Van Gorden*, 326 N.W.2d at 635 (listing as an aggravating factor the fact that the defendant "invaded the zone of privacy surrounding and including her home," and "[a]s a result, the victim has to contend psychologically not only with the fact that she was sexually assaulted in a brutal way but also with the fact that her home is no longer the island of security that she

perhaps thought it was"); *State v. Copeland*, 656 N.W.2d 599, 603-04 (Minn. App. 2003) (affirming imposition of an upward departure based on invasion of the zone of privacy); *State v. Coley*, 468 N.W.2d 552, 555 (Minn. App. 1991) ("Invasion of the 'zone of privacy' is an aggravating factor, because being victim of a crime occurring in one's home imposes an additional psychological shock.").

Appellant further argues that the circumstances of his entrance into M.M.'s home to commit the offense constitute burglary, a separate and uncharged offense. *See* Minn. Stat. § 609.582, subd. 1(a) (1996) (defining burglary in the first degree as "enter[ing] a building without consent and with intent to commit a crime, or enter[ing] a building without consent and commit[ting] a crime while in the building . . . if: the building is a dwelling and another person . . . is present in it when the burglar enters or at any time while the burglar is in the building"), subd. 1(c) (1996) (defining burglary in the first degree as "enter[ing] a building without consent and with intent to commit a crime, or enter[ing] a building without consent and commit[ting] a crime while in the building . . . if: . . . the burglar assaults a person within the building").

Appellant relies on *State v. Jackson*, in which the supreme court held that invasion of the zone of privacy was an impermissible departure factor when the defendant was convicted of two counts of first-degree aggravated robbery and one count of second-degree aggravated robbery, because the circumstances underlying the departure factor constituted the uncharged crime of burglary. 749 N.W.2d 353, 357-58 (Minn. 2008). Here, the district court determined that *Jackson* was not applicable to criminal-sexual-conduct cases. We agree that *Jackson*'s facts are distinguishable. But we are constrained

by the supreme court's holding to conclude that following *Jackson*, invasion of the zone of privacy may no longer be a valid factor when a defendant is not charged with burglary. Thus, *Jackson* appears to preclude reliance on zone of privacy as an aggravating factor.

But the district court relied on other valid factors. *See State v. Vance*, 765 N.W.2d 390, 395-96 (Minn. 2009) (holding that if certain factors fail to provide a legally sufficient basis for an upward departure, an appellate court may affirm if we determine that "the district court would have imposed the same sentence absent reliance on the invalid factors" (quotation omitted)). And in its order, the district court stated that "the presence of a single aggravating factor is sufficient to uphold an upward departure." On this record, we conclude that the district court would have imposed a 306-month sentence absent reliance on invasion of the zone of privacy. *See id*. And we conclude that the district court's imposition of a less-than-double upward departure based on the aggravating factors of multiple forms of penetration and bodily injury is supported by the record. Therefore, we affirm the postconviction court and conclude that the district court did not abuse its discretion by sentencing appellant to 306 months.

Affirmed.