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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-1124**

State of Minnesota,  
Respondent,

vs.

Billy Joe Phillips,  
Appellant.

**Filed September 30, 2008  
Affirmed  
Shumaker, Judge**

Goodhue County District Court  
File No. K7-03-182

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, 445  
Minnesota Street, Suite 1800, St. Paul, MN 55101-2134; and

Stephen N. Betcher, Goodhue County Attorney, Goodhue County Justice Center, 454  
West Sixth Street, Red Wing, MN 55066-2475 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rachel F. Bond, Assistant  
Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for  
appellant)

Considered and decided by Toussaint, Chief Judge; Shumaker, Judge; and  
Stoneburner, Judge.

## UNPUBLISHED OPINION

**SHUMAKER**, Judge

Appellant challenges his sentence for criminal sexual conduct, arguing that the district court made numerous evidentiary errors, the prosecutor committed misconduct during closing arguments, and the bases for the sentencing departure are improper or not supported by the evidence. We affirm.

### FACTS

In 1996 and early 1997, appellant Billy Joe Phillips lived with R.A.H., his wife at the time, and her three children in a mobile home in Goodhue County. During this time, Phillips babysat R.A.H.'s children, including her daughter, B.H., when R.A.H. was working or doing errands.

In the summer of 1996, just before her sixth birthday, B.H. began complaining that her vagina hurt and R.A.H. noticed that it was red. Then on December 31, 1996, R.A.H. saw Phillips masturbating under a blanket on the living room couch while B.H. sat nearby. R.A.H. immediately took B.H. to another room.

About a week later, R.A.H. asked B.H. about the incident. B.H. indicated that Phillips had not touched her but had watched pornographic movies with her. R.A.H. confronted Phillips about the incident and reported it to social services. He moved out in February 1997; they divorced that same year.

Six years later, in December 2002, following a discussion in her sixth-grade health class, B.H. told a teacher and a school counselor that she had been sexually abused by Phillips.

After an investigation, Phillips was charged with three counts of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a), (g), (h)(iii) (2002); three counts of second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1(a), (g), (h)(iii) (2002); and two counts of fifth-degree criminal sexual conduct, in violation of Minn. Stat. § 609.3451, subd. 1(1), (2) (2002).

Following a five-day bench trial, the court found Phillips guilty as charged and sentenced him to 172 months executed on one count of first-degree criminal sexual conduct, which was a double upward durational departure from the presumptive 86-month sentence. The district court based the upward departure on the victim's vulnerability, the particular cruelty of the offense, the multiple incidents of abuse, and the high degree of sophistication, planning, and manipulation used in committing and concealing the offenses.

We affirmed Phillips's conviction on appeal, but reversed his sentence and remanded for resentencing in light of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). *State v. Phillips*, No. A04-170, 2006 WL 163375, at \*6-7 (Minn. App. Jan. 24, 2006), *review granted* (Minn. Apr. 18, 2006), *stay vacated* (Minn. July 19, 2006).

On remand, the state again moved for an upward sentencing departure. The district court allowed four factors to be submitted to the jury: multiple forms of penetration, use of planning and manipulation, particular cruelty, and particular vulnerability of the victim.

During the sentencing trial, the state presented several witnesses. B.H.'s mother, R.A.H., was the first to testify. She explained that she had been married to Phillips and that Phillips would watch B.H. and B.H.'s brothers while she was working or running errands. She said that, during the summer of 1996, B.H. began complaining that her vaginal area hurt and that it was red. She also told the jury about the time she caught Phillips masturbating in the living room near B.H.

B.H. testified next and described the abuse in detail to the sentencing jury. She explained that when she was five years old, Phillips locked her brothers outside the mobile home and masturbated on the living room couch in her presence. When she asked him what he was doing, he told her to go to the bedroom to "find out." He then took her into that room, locked the door, and began playing a videotape of the movie, "Bambi." After a while, he changed the children's movie to a pornographic movie, removed her clothes, and made B.H. perform with him whatever acts were depicted in the pornographic movie.

B.H. testified that Phillips subjected her to multiple forms of penetration. He told her, "It won't hurt." Then, he put his fingers in her vagina, his penis in her vagina, and "his penis in [her] butt;" and he forced her to touch his penis and put it in her mouth. The abuse was ongoing and occurred on multiple occasions. Successive incidents were all similar to the first, in that Phillips would lock B.H.'s brothers outside the mobile home, take her into his bedroom, lock the door, make her take her clothes off, put on pornographic movies, and then "whatever the porn movie did, [she] had to do to him or he did to [her]." B.H. said that she did what Phillips told her to do because she was

scared, explaining that one time when Phillips forgot to lock the door “my brother opened the door when [Phillips] was going to hurt me, and he pushed my brother against the wall. So I was afraid that he was going to hurt me too.”

Amy Johnson, a child protection social worker who interviewed B.H. after she disclosed the abuse in 2002, also testified. Johnson’s interview with B.H. was videotaped, and a copy of the videotape was received into evidence and played for the jury. After the jury saw the videotaped interview, Johnson explained that B.H. had described four forms of penetration: oral penetration by her mouth on Phillips’s penis and vaginal penetration by Phillips’s penis, fingers, and tongue. Johnson testified that she has interviewed about 150 child victims of sexual abuse, but this case “was the most egregious case [she] ever worked.” She told the jury that the abuse “was certainly not typical,” citing the numerous and repeated ways in which B.H. had been violated and the length of time over which the abuse occurred.

Beth Ann Carter, a nurse case manager from the Midwest Children’s Resource Center, testified next. Carter conducted an interview and medical assessment of B.H. in December 2002. Carter’s interview with B.H. was also videotaped, and a copy of that interview was played for the jury. After the tape was played, Carter told the jury that B.H. had disclosed five types of penetration during the interview: penetration of her vagina with Phillips’s hand, penis, and tongue; penetration of her anus with his penis; and penetration of her mouth with his penis. Carter also explained that, unlike in the earlier interview, B.H. revealed that Phillips had engaged in anal intercourse with her by turning

her over, making her get on her hands and knees “like a dog” and then “put[ting] his penis in [her] butt.”

According to Carter, in her opinion it would have been particularly traumatic for a child to be forced to watch and act out pornography. She said that only five of the 600 children she had interviewed about sexual abuse had been forced to watch and then act out pornography. In terms of severity, Carter ranked the abuse that B.H. endured as a nine or ten on a scale from one to ten, explaining that this case was unusual because of the many forms of sexual penetration.

Lastly, the state called Goodhue County Investigator Peter Badker, who conducted the criminal investigation of Phillips. Badker told the jury that B.H. was between the ages of five and six when Phillips began abusing her; that Phillips would wait until B.H.’s mother left for work and then lock B.H.’s older brothers outside the mobile home and close the blinds; that Phillips would then take B.H. to the bedroom to watch a children’s movie and then, after a while, put in a pornographic movie; and that then Phillips and B.H. would act out whatever acts were shown on the pornographic movies.

Badker testified that he had investigated about 25 child sex abuse cases, but that “[t]his case stands out the most” because of the “many different forms and types of penetration and the age of the child.” He explained that this case was different from other cases he had investigated

[b]ecause of the betrayal of the child so young by someone that’s supposed to be in a stepfather role, the isolation of the child from her brothers, the use of the pornographic movies and having the child act out and making do the things that are going on in the movies; the fact that Mr. Phillips was

masturbating in front of [B.H.], even when [R.A.H.] was home at one point.

Badker said that the masturbation when R.A.H. was home was significant because it shows that B.H. “is not even safe with the mother present.” He also testified that he had never investigated another case that involved the child acting out pornography.

Phillips did not testify or offer any evidence in his defense.

The sentencing jury found that four aggravating factors were present: multiple forms of penetration, planning and manipulation, particular cruelty, and particular vulnerability of the victim. Based on these aggravating factors, the district court again sentenced Phillips to a 172-month prison term. This appeal followed.

## **D E C I S I O N**

In this sentencing appeal, Phillips alleges three categories of error, namely: (1) improper evidentiary rulings, (2) prosecutorial misconduct, and (3) insufficient evidence or improper reasons for a sentencing departure.

### I. Evidentiary Rulings

Phillips complains that certain evidentiary rulings by the trial court and the admission of other evidence to which he did not object violated the Minnesota Rules of Evidence. The state responds variously but points out that, under Minn. R. Evid. 1101(b)(3) and *State v. Rodriguez*, 738 N.W.2d 422, 432 (Minn. App. 2007), *review granted* (Minn. Nov. 21, 2007), the rules of evidence do not apply to sentencing procedures. Although that appeared to be the case at the time of the instant sentencing, the Minnesota Supreme Court has since decided *Rodriguez* and has held that the rules of

evidence are applicable to sentencing-jury proceedings. *State v. Rodriguez*, \_\_\_ N.W.2d \_\_\_, 2008 WL 3862857, at \*9 (Minn. Aug. 21, 2008). Thus, we must analyze Phillips's claims of evidentiary error by applying the codified rules of evidence.

*Videotaped interviews and testimonial evidence of victim's out-of-court statements*

Phillips first contends that the district court erred by admitting the two videotaped interviews and the testimonial evidence of B.H.'s out-of-court statements from Carter, Johnson, and Badker, because the evidence was needlessly cumulative and inadmissible hearsay. He did not object to the admission of the interviews or the testimonial evidence at trial.

By failing to object to an error at trial, a defendant forfeits appellate consideration of an issue. *State v. Martinez*, 725 N.W.2d 733, 738 (Minn. 2007). This court, however, has the discretion to review the unobjected-to admission of evidence if it amounts to plain error. *Id.*; see also Minn. R. Crim. P. 31.02 (providing for review of “[p]lain errors or defects affecting substantial rights” not brought to district court’s attention).

To establish the existence of plain error, a three-prong test must be met: (a) there must be error, (b) the error must be plain, and (c) the error must affect substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Error is plain if it is clear or obvious. *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002). And clear or obvious error is shown if the alleged “error contravenes case law, a rule, or a standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error affects a defendant’s substantial rights if the error was prejudicial and affected the outcome of the case. *Griller*, 583 N.W.2d at 741. If the appellate court concludes that all three prongs



are met, it “will consider whether a new trial is necessary to ensure fairness and the integrity of judicial proceedings.” *Id.* at 742.

Phillips contends that the videotaped interviews and testimonial evidence of B.H.’s statements were needlessly cumulative. Under the rules of evidence, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Minn. R. Evid. 403.

“Cumulative evidence” is “[t]hat which goes to prove what has already been established by other evidence.” *Black’s Law Dictionary* 343 (5th ed. 1979). Rule 403 does not prohibit cumulative evidence but rather permits the court to exclude relevant evidence that is needlessly cumulative. Cumulative evidence is inherently corroborative and may also serve the functions of providing context, clarity, or detail, or augmenting credibility, or of illuminating the same point in a variety of ways so as to increase the likelihood of the jury’s comprehension and appreciation of that point. Thus, the key to a proper assessment of the court’s exercise of discretion in admitting the evidence of which Phillips complains is the adjective “needless” in rule 403.

Keeping in mind that one of the departure grounds was that of particular cruelty, the jury needed evidence of what allegedly made Phillips’s conduct toward B.H. particularly cruel. The state offered such evidence from three different points of view, namely, those respectively of a child-protection social worker, a nurse, and a criminal investigator. The social worker had interviewed 150 children who had been sexually

abused, and she was able to testify that the nature and multiplicity of Phillips's penetrations of B.H. were atypical. The nurse had interviewed about 600 children, and she was able to explain that only five had been forced to watch and then to act out pornographic acts, again showing the atypicality of this abuse. And, finally, the police investigator testified that the scheme Phillips employed and the various types of penetration in which he engaged made the case stand out among the 25 child sex-abuse cases he had investigated.

Although each of these witnesses testified to the same subject matter, each did so from the perspective of a different background, collectively making a case for the proposition that Phillips's conduct was atypical and, therefore, particularly cruel. This cumulative evidence was not needless, and the court did not abuse its discretion in allowing it.

Phillips next argues that the videotaped interviews were inadmissible hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). But an out-of-court statement is not hearsay and is admissible as substantive evidence if (1) the declarant testifies at the trial or hearing; (2) the declarant is subject to cross-examination concerning the statement; (3) the statement is consistent with the declarant's testimony; and (4) the statement is helpful to the trier of fact in evaluating the declarant's credibility as a witness. Minn. R. Evid. 801(d)(1)(B).

B.H. did testify at the trial and was subject to cross-examination about her prior statement, which was consistent with her trial testimony. But Phillips contends that the

videotaped interviews were not helpful in evaluating B.H.'s credibility, and thus not admissible as prior consistent statements, because B.H. was not cross-examined during the sentencing-jury trial and her credibility was never challenged. *See State v. Farrah*, 735 N.W.2d 336, 344 (Minn. 2007) (requiring that the statement be helpful to the trier of fact and explaining that “[t]o be helpful . . . , the witness’s credibility must have been challenged”); *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997) (“[B]efore the [prior consistent] statement can be admitted, the witness’[s] credibility must have been challenged, and the statement must bolster the witness’[s] credibility with respect to that aspect of the witness’[s] credibility that was challenged.”).

Although Phillips did not blatantly attack B.H.'s credibility, the court reasonably could have surmised an implicit challenge that allowed the court to determine that the prior consistent statements were admissible in accordance with the plain language of rule 801(d)(1)(B). There was a five-year delay in the reporting, which itself can raise a credibility issue. B.H.'s recounting of some details was vague and occasionally she could not recall particular acts by Phillips. Stale reporting, generalities instead of sharp and precise details, and problems with recall are all components of a credibility issue and all existed here to some extent. Furthermore, because the trial judge was present for the presentation of the evidence, he was in the best position to glean a credibility challenge that might not be readily apparent from the sterile pages of a transcript on appeal, and the judge is entitled to considerable deference in this discretionary ruling.

Neither *Nunn* nor *Farrah* provides a clue as to when credibility should be deemed to be “challenged.” It is unlikely that the court in each of those cases intended to limit

credibility challenges to instances in which there are express and direct claims of untruthfulness. The committee comment to rule 801(d)(1)(B) is helpful on this point. Noting that Minnesota rejects the federal counterpart to rule 801(d)(1)(B)—which allows prior consistent statements only to rebut express or implied charges of recent fabrication, or improper influence or motive—the committee comment states:

[E]vidence of a prior consistent statement should be received as substantive evidence to rebut an inference of unintentional inaccuracy, even in absence of any charge of fabrication or impropriety. Also, evidence of prompt complaint in sexual assault cases should be received as substantive evidence in the prosecution's case in chief, without the need for any showing that the evidence is being used to rebut a charge of "recent fabrication or improper influence or motive."

Minn. R. Evid. 801 1989 comm. cmt.

There is clearly no challenge to credibility if a defendant admits that the testimony of a witness who made a prior statement is true. And there clearly is a challenge when the defendant states or suggests that the witness is lying. Between these two opposite ends of a spectrum can be found any number of credibility challenges, both express and implied. It is in this gray area that the discretion of the trial judge is paramount. Demeanor, context, manner of interrogation, testimony of opposing witnesses, and points made in opening statements, final arguments, or arguments of motions are some of the factors the trial judge might consider in deciding whether or not credibility has been challenged for purposes of the application of rule 801(d)(1)(B). The videotaped interviews were not inadmissible hearsay, and the court did not abuse its discretion in allowing the tapes.

*Other claimed evidentiary errors*

Before the videotape of Johnson's interview with B.H. was received into evidence, Phillips's defense counsel objected to the admission of a portion of the tape that referred to an incident in which Phillips threatened R.A.H. with a butcher knife. The district court overruled the objection and admitted the unredacted interview, determining that the evidence might be used to show the victim's vulnerability and that any prejudice was outweighed by its probative value. On appeal, Phillips claims that the court erred by admitting the unredacted videotape, which included the butcher-knife references.

In addition, although he did not object at the time of trial, Phillips claims that certain other evidence from the unredacted videotapes was erroneously admitted. Specifically, he claims that the district court erred by failing to sua sponte exclude statements in the videotaped interviews from B.H. that Phillips had threatened to kill her and her other family members and that she wanted Phillips to go to jail; statements from Johnson that Phillips's conduct was wrong and that she believed B.H.; and statements from B.H. referring to possible abuse of another child by Phillips.

The district court has considerable discretion in admitting evidence, and we review an evidentiary ruling for abuse of that discretion. *Martinez*, 725 N.W.2d at 737. "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). An error is prejudicial only if "there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994).

We review the admission of evidence to which no objection was made for plain error. *Martinez*, 725 N.W.2d at 738. To establish plain error, the defendant must show that his substantial rights were affected—that is, that the error was prejudicial and affected the outcome of the case. *Griller*, 583 N.W.2d at 741.

Evidence of other possible abuse and of post-abuse threats was of questionable admissibility and was likely erroneously admitted. Nevertheless, Phillips has failed to show that the error in admitting that evidence was sufficiently prejudicial as to have affected the outcome of the sentencing trial. *Id.*

The evidence from B.H.'s testimony revealed multiple forms of penetration; Carter, Johnson, and Badker testified that the case was unusual given these multiple forms of penetration; and B.H.'s testimony also established that Phillips waited until her mother left the mobile home, locked the brothers outside the home, locked B.H. in the bedroom, and then had her watch children's movies before transitioning to the pornographic movies, which he ultimately required her to act out. This evidence supports the sentencing jury's finding of two of the aggravating factors: multiple forms of penetration and a high degree of sophistication, planning, or manipulation. As explained below, the existence of these aggravating factors is sufficient to justify the upward durational departure in this case. Thus, even considering the cumulative effect of all of the claimed evidentiary errors, the evidence that remains is independently sufficient to support the two aggravating factors noted.

## II. Prosecutorial Misconduct

Phillips next claims that he is entitled to a new sentencing trial because the prosecutor mischaracterized evidence and inflamed the passions of the sentencing jury during closing arguments. Although he claims error on appeal, Phillips did not object to the prosecutor's closing argument during the sentencing trial or seek a curative instruction. He has therefore waived his right to appellate review of the prosecutor's argument. *State v. Ives*, 568 N.W.2d 710, 713 (Minn. 1997).

However, we may exercise our discretion to review prosecutorial misconduct to which no objection was made if it amounts to plain error. *Ramey*, 721 N.W.2d at 297. The plain error analysis asks whether (1) the prosecutor's argument was error; (2) the error was plain; and (3) it affected the defendant's substantial rights. *Id.* at 298. If the defendant demonstrates that a prosecutor's conduct constitutes plain error, the burden shifts to the state to show that the misconduct did not affect the defendant's substantial rights. *Id.* at 302.

"A closing argument must be proper, not perfect. Unartful statements inevitably occur in the midst of a heated and impassioned closing argument, even among the best of orators." *State v. Atkins*, 543 N.W.2d 642, 648 (Minn. 1996). But that does not mean that the prosecutor must make a colorless closing argument. *State v. Williams*, 586 N.W.2d 123, 127 (Minn. 1998). Rather, the prosecutor "has the right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom." *Id.* (quotation omitted). The closing argument must be based on the evidence produced at trial or the reasonable

inferences from that evidence. *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). And a prosecutor must avoid inflaming the jury's passions and prejudices against the defendant. *State v. Duncan*, 608 N.W.2d 551, 556 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). On review, we must "consider the closing argument as a whole rather than focus on particular phrases or remarks that may be taken out of context or given undue prominence." *State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000) (quotation omitted).

#### *Alleged mischaracterization of the evidence*

Phillips first asserts that the prosecutor mischaracterized evidence during closing argument by referring to the state's "experts," even though only one witness, Carter, was qualified by the court as an expert witness. Phillips cites no authority indicating that a prosecutor's allegedly incorrect reference to a witness as an expert constitutes prosecutorial misconduct and is a ground for a new trial. Thus, it is unlikely that Phillips has supported his claim of prosecutorial error.

During the sentencing trial, Johnson, Badker, and Carter explained in detail their respective backgrounds and experiences in child sexual-abuse issues. Each had training and experience that provided knowledge and information beyond that likely possessed by lay jurors. In other words, each witness brought some expertise to the proceeding, and it was not prosecutorial error to refer to the witnesses collectively as "experts."

Phillips next argues that the prosecutor's closing argument mischaracterized Badker's and Johnson's testimony. We disagree.



During her closing, the prosecutor summarized the testimony of Badker and Johnson as it related to particular cruelty. She explained that Badker said that

[t]his [case] stands out. This case stands alone in terms of cruelty, the isolation of the [child], the use of pornography, not only the double—the double acts of cruelty. Forcing a young child to watch pornography is one act of cruelty. But requiring her to act that out is doubly cruel[], particularly cruel.

The prosecutor then examined Johnson’s testimony, noting that “[t]his case stuck out in [Johnson’s] mind” and that Johnson “believed that [B.H.] was treated with particular cruelty, in a way that she was shown pornography, had to act it out over a long period of time at such a young age.”

These statements are consistent with Badker’s and Johnson’s testimony. Badker testified that he had investigated about 25 child sex abuse cases but that “[t]his case stands out the most” because of the “many different forms and types of penetration and the age of child.” He told the jury that this case was different from other cases he had investigated, noting specifically B.H.’s isolation and the use of pornography. Similarly, Johnson testified that this case “was the most egregious case [she] ever worked,” telling the jury that the abuse “was certainly not typical,” noting the length of time over which the abuse occurred, and calling the forced reenactment of the pornographic scenes “huge[ly] significan[t].”

*Alleged appeal to passions of the jury*

Phillips next argues that the prosecutor committed misconduct by making an emotional appeal to the jury and inflaming their passions during closing arguments. He

claims that the prosecutor's remarks are similar to remarks criticized in *State v. McNeil*, 658 N.W.2d 228, 234-35 (Minn. App. 2003). In that case, which also involved sexual abuse of a child, the prosecutor referred to the victim's lost virginity, telling the jury that they could not give the child back her virginity but could "give her justice." *Id.* at 235. We disapproved of those remarks, explaining that the prosecutor's argument had nothing to do with the facts of the case or the elements of the crime charged. *Id.* Nonetheless, we concluded that the remarks did not deprive the defendant of a fair trial, "given the extraordinary weight of the evidence" against the defendant. *Id.* at 236.

Unlike the remarks in *McNeil*, the prosecutor's statements here focused on the facts of the case. Although the prosecutor referred to children as "gifts" and noted that parents, including stepparents, have the "responsibility" to care for and nurture their children, the prosecutor also explained how Phillips had "failed miserably in his" role as a stepfather. She explained that instead of caring for B.H., Phillips

taught her how to be sexual; he taught her how acts of sexual intercourse [feels]. How it feels when her vagina is penetrated and how it feels to [be] having sex, how to pleasure him with her mouth. How it feels when a tongue is in her mouth and in her vagina. This is what he [taught] her.

Instead of keeping her safe and protecting her and helping her grow and develop and bloom, he [chose] this opportunity to demean, to threaten, isolate. "This won't hurt a bit." "This will be fun." This is what he told this child. How he violated, penetrated, demeaned and punished her.

It is undisputed that Phillips was B.H.'s stepfather and that B.H. was a child when the sexual abuse occurred. The evidence showed that Phillips penetrated B.H.'s vagina with his mouth and penis, engaged in anal intercourse with her, forced her to perform oral sex

on him, and told her that the acts would not hurt. The prosecutor's remarks taken as a whole accurately described the facts based on the evidence presented. They were not inflammatory. Phillips has failed to demonstrate that the prosecutor's conduct constituted plain error.

### III. Sentencing Departure

The sentencing jury found, beyond a reasonable doubt, that four aggravating factors existed: multiple forms of penetration, use of planning and manipulation, particular cruelty, and particular vulnerability of the victim. Based on those findings, the district court imposed a sentence of 172 months—a double upward durational departure from the presumptive sentence under the Minnesota Sentencing Guidelines. On appeal, Phillips raises several arguments challenging the district court's decision to depart from the presumptive sentence. We review departures from the presumptive sentence for an abuse of discretion. *State v. Thompson*, 720 N.W.2d 820, 828 (Minn. 2006).

A defendant has a right to have a jury determine beyond a reasonable doubt the existence of any aggravating factors which permit the district court to upwardly depart from the presumptive sentence in the sentencing guidelines. Minn. Sent. Guidelines II.D; *Blakely*, 542 U.S. at 303, 124 S. Ct. at 2537; *State v. Shattuck*, 704 N.W.2d 131, 142 (Minn. 2005). If a jury finds facts supporting a departure, a district court may exercise its discretion to depart from the presumptive sentence in the sentencing guidelines, but departure is not required. Minn. Sent. Guidelines II.D. A departure is justified only if substantial and compelling circumstances exist. *Id.*; *Shattuck*, 704 N.W.2d at 141.

The sentencing guidelines provide a nonexclusive list of aggravating factors that may constitute substantial and compelling circumstances to justify an upward sentencing departure. Minn. Sent. Guidelines II.D.2(b). The existence of two or more factors, when considered together, may justify a departure. *See, e.g., State v. Losh*, 721 N.W.2d 886, 897 (Minn. 2006) (holding two aggravating factors provided sufficient evidence justifying the departure). But even the existence of a single aggravating factor can justify departure. *See, e.g., State v. O'Brien*, 369 N.W.2d 525, 527 (Minn. 1985) (upholding double durational departure when only one aggravating factor was present).

#### *Multiple penetrations*

Multiple forms of sexual penetration can constitute an aggravating factor. *Taylor v. State*, 670 N.W.2d 584, 588 (Minn. 2003); *State v. Morales-Mulato*, 744 N.W.2d 679, 691 (Minn. App. 2008), *review denied* (Minn. Apr. 29, 2008). Phillips does not challenge the sufficiency of the evidence to support the sentencing jury's finding of multiple forms of penetration. Instead, he argues that multiple forms of penetration cannot justify a departure in his case because the district court only said that particular cruelty, standing alone, would justify a departure. While resentencing Phillips, the district court stated that particular cruelty "is noted by this Court to be sufficient alone to support a finding of substantial and compelling circumstances leading to a departure upward from the standard guidelines sentence." But the district court did not indicate whether the aggravating factor of multiple forms of penetration was also sufficient, standing alone, to justify the departure in this case.

We have held that multiple forms of penetration can support a double departure, even if no other aggravating factors exist. *State v. Butterfield*, 555 N.W.2d 526, 531 (Minn. App. 1996), *review denied* (Minn. Dec. 17, 1996); *State v. Mesich*, 396 N.W.2d 46, 52 (Minn. App. 1986), *review denied* (Minn. Jan. 2, 1987). And, in this case, the record unquestionably establishes that Phillips’s criminal sexual conduct against B.H. involved multiple forms of sexual penetration, including vaginal intercourse, anal intercourse, digital penetration of B.H.’s vagina, fellatio, and cunnilingus.

#### *Planning and manipulation*

Minnesota caselaw also recognizes planning and manipulation as aggravating factors. *See, e.g., State v. Kindem*, 338 N.W.2d 9, 17-18 (Minn. 1983); *State v. Sebasky*, 547 N.W.2d 93, 101 (Minn. App. 1996), *review denied* (Minn. June 19, 1996). But Phillips contends that the prosecution failed to prove this aggravating factor beyond a reasonable doubt. His argument is without merit, as the evidence clearly establishes that Phillips engaged in planning, sophistication, or manipulation when he committed the offenses against B.H.

During the sentencing trial, B.H. testified in detail about the sexual assaults. She told the sentencing jury that the first assault began with Phillips masturbating in the living room in her presence. When B.H. asked Phillips what he was doing, he told her to go to the bedroom to “find out.” Once inside the bedroom with B.H., Phillips locked the door and put on a children’s movie for B.H. to watch. After awhile, he replaced that movie with a pornographic movie, and then he forced B.H. to perform whatever acts were depicted on that movie. During the subsequent assaults, Phillips would wait until B.H.’s

mother left. He would then lock B.H.'s brothers outside the mobile home and take her to the bedroom, lock the door, play a pornographic movie, and instruct B.H. to perform whatever acts she saw the female characters in those movies do. This level of planning supports the jury's finding.

The presence of these two aggravating factors—multiple penetrations and planning and manipulation—supports the sentencing departure in this case. We therefore decline to address in detail Phillips's arguments relating to the two other aggravating factors, particular cruelty and particular vulnerability.

We note, however, that the district court did not instruct the jury on the definition of "particular cruelty." A district court must instruct on the meaning of the term "particular cruelty" if that factor is submitted to the jury. *State v. Weaver*, 733 N.W.2d 793, 802 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007). The court erred by failing to do so in this case. However, because the other aggravating factors justified the double upward departure, the district court's failure to define or explain the term "particular cruelty" for the jury does not constitute reversible error in this case.

**Affirmed.**