STATE OF MINNESOTA
IN COURT OF APPEALS
A10-264

State of Minnesota,
Respondent,

vs.

Randall Mark Spears,
Appellant.

Filed January 18, 2011
Affirmed
Larkin, Judge

Scott County District Court
File No. 1995-10941

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

Patrick J. Ciliberto, Scott County Attorney, Michael J. Groh, Assistant County Attorney, Shakopee, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Wright, Judge; and Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

LARKIN, Judge

Appellant challenges his executed prison sentence of 360 months for one count of criminal sexual conduct in the first degree, which is an aggravated departure from the presumptive guidelines sentence of 122 months under Minn. Stat. § 609.1352 (1994 & Supp. 1995), the patterned-sex-offender statute. Appellant claims that the district court violated his constitutional right against self-incrimination by ordering him to submit to an adverse psychosexual examination as a condition precedent to the court's receipt of testimony from appellant's expert at his trial on the patterned-sex-offender factors. Appellant also argues that the evidence produced at trial is insufficient to establish that he is a patterned sex offender. The state counters that because the departure is not based on the evidence presented at trial, appellant's claims of error are not grounds for reversal. Given the unique procedural posture of this case, because the district court limited the upward durational departure to the 30-year sentence prescribed by statute, a jury trial and proof beyond a reasonable doubt on the patterned-sex-offender factors was unnecessary. Accordingly, any trial error resulting from the claimed constitutional violation is harmless beyond a reasonable doubt, and it is irrelevant whether the trial evidence sustains a finding that appellant is a patterned sex offender. We therefore affirm.

D E C I S I O N

Procedural History

This appeal is the latest in a series that stems from appellant Randall Mark Spears's convictions of first-degree criminal sexual conduct and kidnapping.[1] This court previously summarized the circumstances of the offense as follows.

> Appellant Randall Spears met the victim, R.H., at a south Minneapolis bar in July 1995. R.H. and appellant drank, talked, and smoked a marijuana joint together. Later that evening, R.H. and appellant left the bar and went to a local fast food restaurant. After they ate, R.H. asked appellant to take her home. Appellant told R.H. that he wanted to show her a pretty spot where they could view the city. R.H. repeatedly asked to go home and said she did not want to see the city. After driving for approximately 20 minutes, appellant pulled off the main road and leaned over to kiss R.H. R.H. pushed him away and grabbed for the door, but she was stopped from leaving when appellant punched her in the face twice, and told her that this was "going to happen no matter what." Appellant choked R.H. while she was crying hysterically and forced her into the backseat. R.H. moved toward the sunroof, but appellant told her that she wouldn't get very far and that he would kill her if she did not cooperate. Appellant demanded that R.H. take off her shorts and told her that she could take this the "easy way or the hard way." Appellant then forced his penis into R.H's vagina while she screamed and cried. Even though R.H. was menstruating appellant made R.H. perform oral sex on him after he had vaginally penetrated her.
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> After appellant vaginally penetrated R.H. a second time, R.H. asked if she could go to the bathroom. R.H. was planning to escape, but appellant stood next to her while she squatted on the ground. The two went back into the car and appellant again told R.H. to get into the backseat. R.H. went into the backseat, took off her shorts, and started to cry. Appellant

[1] The district court observed that this is a rare case in that "the appellate courts have spent more time on this case than the trial court has."

> told R.H. "if you don't quit crying I am going to f-ing kill you." R.H. begged for her life as appellant vaginally penetrated her a third time.
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> After the third incident, appellant began to drive back to Minneapolis. Appellant pulled off the freeway, stating that he needed to urinate. As the car pulled to a stop R.H. fought her way out of the car. R.H. ran to a nearby house and pounded on the door while screaming "help me, help me." Appellant pulled away in his car. A resident called the police and allowed R.H. to enter the resident's home. Another neighborhood resident also heard R.H. screaming, saw a car speeding away, and called 911.

State v. Spears, No. CX-99-2092, 2000 WL 558162, at *1 (Minn. App. May 9, 2000), *review denied* (Minn. June 27, 2000) (*Spears III*).

Spears was charged with, and convicted of, six counts of first-degree criminal-sexual conduct and two counts of kidnapping. Spears was subsequently sentenced to six concurrent life sentences for his six criminal-sexual-conduct convictions.

In his first appeal, Spears claimed that the district court erred by sustaining the state's *Batson* challenge, entering six convictions for three acts of criminal sexual conduct, and imposing multiple sentences, including a sentence of life imprisonment. *State v. Spears*, 560 N.W.2d 723, 725 (Minn. App. 1997), *review denied* (Minn. May 28, 1997) (*Spears I*). Spears further argued that the district court abused its discretion by admitting evidence of the victim's out-of-court statements describing the attack to police and a private citizen. *Id.* We vacated three of Spears's convictions as duplicative, reversed five of Spears's criminal-sexual-conduct sentences, and remanded for resentencing. *Id.* at 726-28. On remand, the district court sentenced Spears to 40 years in prison on one count of criminal sexual conduct and an additional 40 years, to be served

consecutively, on one count of kidnapping. *State v. Spears*, No. C8-98-2307, 1999 WL 319022, at *1 (Minn. App. May 18, 1999), *review denied* (Minn. July 28, 1999) (*Spears II*).

Spears appealed, and we again remanded for resentencing, concluding that the consecutive 40-year sentences were an impermissible expansion of the original sentence. *Id.* at *2. Following the second remand, the district court sentenced Spears to 40 years in prison on the criminal-sexual-conduct conviction. *Spears III*, 2000 WL 558162, at *2. The 40-year sentence was an enhancement of the statutory maximum 30-year sentence based on judicial fact-finding of aggravating factors under Minn. Stat. § 609.1352, the patterned-sex-offender statute. *Spears v. State*, 725 N.W.2d 696, 698 (Minn. 2006) (*Spears V*); *see also* Minn. Stat. § 609.342, subd. 2 (1994) (setting a 30-year statutory maximum for conviction of first-degree criminal sexual conduct); Minn. Stat. § 609.1352, subd. 1a (lengthening the statutory maximum for individuals sentenced under the patterned-sex-offender statute to 40 years). The district court also imposed a consecutive five-year sentence on the kidnapping conviction, after finding that there were severe aggravating factors. *Spears III*, 2000 WL 558162, at *2. This court affirmed the 540-month sentence. *Id.* at *2-*4.

After this court affirmed the sentence, Spears filed a petition for postconviction relief, raising a claim under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). The district court denied the petition, and this court affirmed, holding that Spears's claim was barred under *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976), because he did not challenge his sentence on Sixth Amendment grounds in

his direct appeal. *Spears v. State*, C0-01-76 (Minn. App. Aug. 1, 2001), *review granted and stayed* (Minn. Oct. 24, 2001), *review denied* (Minn. Jan. 29, 2002) (*Spears IV*). The Minnesota Supreme Court granted review and stayed proceedings pending its decision in *State v. Grossman*, 636 N.W.2d 545 (Minn. 2001) (holding that enhancement of the statutory maximum 30-year sentence for first-degree criminal sexual conduct based on judicial findings under the patterned-sex-offender statute is unconstitutional). *See Spears V*, 725 N.W.2d at 699. The supreme court ultimately vacated the stay and denied review. *Id.*

Spears again petitioned for postconviction relief, arguing that his 40-year sentence for criminal sexual conduct was unauthorized by the statutes in effect at the time of his offense; was unconstitutional under *Apprendi*, as applied in *Grossman*; and was unconstitutional under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). *Id.* The district court denied the petition, and this court affirmed. *Id.* Upon further review, the supreme court held that *Blakely* does not apply to Spears's collateral attack on his sentence because the sentence was final before *Blakely* was announced; but the court held that Spears is entitled to benefit from *Apprendi*. *Id.* at 699-700. The supreme court remanded to the district court for resentencing. *Id.* at 702.

On remand, the state demanded a sentencing trial under Minn. Stat. § 244.10 (2008)[2] and requested sentencing under the patterned-sex-offender statute. *See* Minn.

[2] The amendments to section 244.10 authorizing such proceedings became effective June 4, 2005, and apply to "sentencing hearings, resentencing hearings, and sentencing departures sought on or after that date." Minn. Laws 2005, ch. 136, art. 16, §§ 3-6. The resentencing trial in this case occurred in 2009.

Stat. § 244.10, subd. 5(a) ("When the prosecutor provides reasonable notice under subdivision 4, the district court shall allow the state to prove beyond a reasonable doubt to a jury of 12 members the factors in support of the state's request for an aggravated departure from the Sentencing Guidelines or the state's request for an aggravated sentence under any sentencing enhancement statute or the state's request for a mandatory minimum under section 609.11 as provided in paragraph (b) or (c)."). The district court ordered that a jury would decide if Spears is a patterned sex offender under section 609.1352.

Prior to trial, the state moved the court to order Spears to undergo a psychological sex-offender evaluation by the state's expert to determine if Spears met the statutory criteria of a patterned sex offender. Spears opposed the motion, arguing that the order would violate his Fifth Amendment rights against self-incrimination. The district court denied the state's motion, concluding that "[i]nasmuch as a sex offender evaluation was completed at [the original sentencing] . . . it is not likely that a second evaluation would be relevant and admissible." Later, Spears notified the state that he had submitted to his own examination and intended to call the examiner as a witness at trial. The state moved to exclude the examiner's testimony unless Spears submitted to an adverse examination. The district court granted this motion, relying on dicta from *State v. Hennum*, 441 N.W.2d 793, 800 (Minn. 1989), which strongly suggested to the district court "that if a defendant refuses an adverse psychological examination he or she should be barred from presenting [his or her] own expert testimony on that issue."

Spears submitted to an examination by the state's expert. He also waived his right to a jury and agreed to a court trial on the patterned-sex-offender factors. At trial, the district court heard testimony from the state's expert and Spears's expert. Thereafter, the district court issued detailed, written findings of fact and found that Spears is a patterned sex offender as defined by statute. At a later sentencing hearing, the state asked the district court to sentence Spears to 40 years on his criminal-sexual-conduct conviction, as a patterned sex offender under section 609.1352. Spears argued that the district court should sentence him to 244 months, a double-upward durational departure. *See* Minn. Stat. § 609.1352, subd. 1 (stating that the court "shall" sentence a person under the patterned-sex-offender statute to no less than double the presumptive sentence upon a finding that he or she is a patterned sex offender). Spears argued that because severe aggravating circumstances do not exist, the district court could not impose more than a double-upward durational departure. *See State v. Weaver*, 474 N.W.2d 341, 343 (Minn. 1991) (stating that the general upward limit on durational departures is double the presumptive sentence, but in a limited number of cases, severe aggravating factors might justify a durational departure greater than two times the presumptive sentence).

The district court imposed a 360-month sentence on the criminal-sexual-conduct conviction and a consecutive five-year sentence on the kidnapping conviction. In this appeal, Spears challenges his sentence on the criminal-sexual-conduct conviction.

Spears's Claims and the State's Response

Spears asserts two claims in support of reversal. First, Spears claims that the district court compelled him to speak to the state's examiner, in violation of his Fifth

Amendment "right to remain silent," by ordering that his expert witness would not be allowed to testify at the trial on the patterned-sex-offender factors unless he submitted to an adverse psychological examination. *See* U.S. Const. amend. V ("No person shall … be compelled in any criminal case to be a witness against himself . . . ."); Minn. Const. art. I, § 7 (same). Spears argues that the trial evidence regarding the adverse examination was therefore tainted. Spears also argues that because the tainted evidence regarding the adverse examination was the "sum total" of the evidence offered by the state, there is a reasonable possibility that the error contributed to the sentence and that the error is therefore not harmless beyond a reasonable doubt. *See State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989) (stating that when a criminal defendant's constitutional right is violated, an appellate court will not reverse if the error is harmless beyond a reasonable doubt); *State v. Larson*, 389 N.W.2d 872, 875 (Minn. 1986) (stating that constitutional error is not harmless "if there is a reasonable possibility that the error complained of might have contributed to the conviction" (quotation omitted)). Second, Spears claims that the state did not prove, beyond a reasonable doubt, that he needs long-term treatment or supervision beyond the presumptive term of imprisonment or supervised release and that the state therefore failed to establish that he is a patterned sex offender. *See* Minn. Stat. § 609.1352, subd. 1(a)(3) (a finding "that the offender needs long-term treatment or supervision beyond the presumptive term of imprisonment and supervised release" is one of several findings that must be made in order to sentence as a patterned sex offender).

The state counters, in part, that any error in the admission of evidence regarding the adverse psychological examination was harmless beyond a reasonable doubt because the district court did not sentence Spears as a patterned sex offender.

Harmless Error

When reviewing a claim of constitutional error, the court must determine whether the error was harmless beyond a reasonable doubt. *State v. Richardson*, 670 N.W.2d 267, 277 (Minn. 2003). If, as the state argues, the district court did not rely on the evidence produced at the sentencing trial in sentencing Spears, any trial error resulting from the alleged constitutional violation would not be a basis for reversal, because there is no reasonable possibility that the evidence affected the sentence. *See id.* ("The error cannot be said to be harmless beyond a reasonable doubt, and is therefore reversible, where there is a reasonable possibility that the [error] complained of may have contributed to the conviction." (quotation omitted)).

While we disagree with the state's assertion that Spears was not sentenced as a patterned sex offender, we agree that the sentence was not based on the patterned-sex-offender trial finding on remand. Although the district court held a trial on the patterned-sex-offender factors and subsequently found that Spears is a patterned sex offender, the record reveals that the district court did not base Spears's sentence on this finding. Instead, the district court based the sentence on the previous judicial findings under the patterned-sex-offender statute. *See Spears V*, 725 N.W.2d at 698 (explaining that the previous sentence was enhanced "based on judicial fact-finding of aggravating factors under the patterned sex offender statute …").

At this point in the analysis, it is useful to review the supreme court's decision and remand instruction in the most recent appellate decision in this case. In *Spears V*, Spears challenged his 40-year sentence for one count of criminal sexual conduct, which was an enhancement of the statutory maximum 30-year sentence based on judicial fact-finding of aggravating factors under the patterned-sex-offender statute. *Id.* Spears argued that his sentence was unconstitutional under *Apprendi*, which holds that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* (citing *Apprendi*, 530 U.S. at 490, 120 S. Ct. at 2362-63). Spears also argued that his sentence was unconstitutional under *Blakely*, which holds that the "statutory maximum" sentence that can be imposed on the basis of the jury's guilty verdict is the presumptive sentence. *Id.* (citing *Blakely*, 542 U.S. at 303-05, 124 S. Ct. at 2537-38).

In *Spears V*, the supreme court held that Spears is not entitled to benefit from *Blakely* and therefore rejected his argument that he should be sentenced to the presumptive guidelines sentence of 122 months. *Id.* at 699. But the court held that Spears is entitled to benefit from *Apprendi*. *Id.* at 700. The court also held that under *Grossman*, Spears's 40-year sentence for first-degree criminal sexual conduct violated *Apprendi* and was unconstitutional. *Id.* at 702. *Grossman* holds that enhancement of the statutory maximum 30-year sentence for first-degree criminal sexual conduct to 40 years based on judicial findings under the patterned-sex-offender statute violates *Apprendi* and is unconstitutional. 636 N.W.2d at 551.

Relying on *Grossman*, the supreme court reversed Spears's sentence and remanded for resentencing consistent with its opinion. *Spears V*, 725 N.W.2d at 702. The supreme court recognized that in *Grossman*, it had remanded for imposition of the statutory maximum sentence of 30 years. *Id.* at 699; *Grossman*, 636 N.W.2d at 551. But unlike *Grossman***,** the supreme court did not limit its remand instructions in this case to imposition of the statutory maximum sentence. *Spears V*, 725 N.W.2d at 702. The supreme court noted that the parties disagreed regarding whether the district court could impanel a jury to determine the patterned-sex-offender factors on remand, but it declined to decide that issue. *Id*. (stating that "because the parties did not fully brief these issues, we express no opinion about the applicability to this case of the 2005 legislative changes, authorizing sentencing juries").

In summary, because *Apprendi* applies to Spears's sentence but *Blakely* does not, it is constitutionally permissible to impose a sentence under section 609.1352 that exceeds the presumptive sentence, but not the 30-year sentence prescribed by statute, based on a judicial finding that Spears is a patterned sex offender. Thus, on remand after *Spears V*, the district court could have imposed a sentence of up to 30 years based on the prior judicial findings under the patterned-sex-offender statute; but the district court could not have imposed a longer sentence under the patterned-sex-offender statute unless the necessary factors were found by a jury based on proof beyond a reasonable doubt. *Id.*; *Grossman*, 636 N.W.2d at 551. The district court recognized the parameters of its sentencing authority at the sentencing hearing, stating that "the remand dealt with the 40-year sentence and that if there were a finding that Mr. Spears was a patterned sex

offender under the statute following a [trial], then that would—may be a justification for imposing the 40-year sentence." The district court therefore framed the sentencing issue as whether it should impose a sentence of 30 or 40 years.

Having recognized that it could impose a sentence of up to 30 years based on judicial findings under *Spears V* and that jury findings on the patterned-sex-offender factors based on proof beyond a reasonable doubt were only necessary if a sentence of 40 years were to be imposed, the district court imposed a sentence of 30 years instead of 40. This sentence reflects the district court's implicit decision to base the patterned-sex-offender sentence on the prior judicial findings under the patterned-sex-offender statute—which were not challenged or set aside in *Spears V*—instead of relying on the evidence presented at trial on remand.

Our conclusion that the sentence is not based on the trial findings is supported by the district court's explanation of its sentencing decision as follows.

> And now [this case is] back for the fourth time. The Supreme Court . . . reversed [the] third sentence and returned it to the [district] court for sentencing consistent with their opinion. And that of course was when *Apprendi* was used as the basis for reversing the decision in that the aggravating factors, namely finding Mr. Spears to be a patterned sex offender, needed to be done by a jury and not a judge. Ironically, the jury was waived in this case and a judge ended up deciding the issue.
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> The way I understand the most recent remand from the Minnesota Supreme Court . . . is that the remand dealt with the 40-year sentence and that if there were a finding that Mr. Spears was a patterned sex offender under the statute following a hearing [i.e., jury trial], then that would—may be a justification for imposing the 40-year sentence.

. . .

> And this morning I reread the opinion in *State v. Grossman*, which is almost the same set of circumstances that we have here in the *Spears* case . . . [The supreme court's remand instruction in *Grossman*] was that [the case would] be sent back to the district court and that the district court would impose a sentence of 30 years. [The supreme court] didn't give [the state] the option of going to 40 years. And apparently . . . there was no procedure in place at that time for a jury to consider aggravating factors, although conceivably there was some discussion maybe in the *Spears* case . . . that the [c]ourt has the inherent authority to do those sorts of things if it chooses to.
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> I've been troubled by this case [.] . . . [B]ecause *Grossman* and this particular case are so close, I could see an argument being made to the Supreme Court or the Court of Appeals that . . . Mr. Spears [should not be denied] the benefit of the *Grossman* outcome, which was to be sentenced for 30 years.

The district court also stated that it assumed that Spears probably would appeal the recent bench-trial finding that he is a patterned sex offender and noted that this finding would have been the basis for a 40-year sentence instead of 30. The district court expressed its concern with the "potential for this case returning to the [district court] for yet another fifth sentencing" based on the trial finding that Spears is a patterned sex offender. "So for that reason, to avoid that outcome," the district court imposed a 30-year sentence.

These statements indicate that although the district court had found that the trial evidence established that Spears is a patterned sex offender, the district court did not rely

on that finding in sentencing Spears.[3] Instead, the district court sentenced Spears consistent with *Grossman*: the district court limited the sentence to the maximum that is permitted when sentencing based on judicial findings under the patterned-sex-offender statute. In this sense, the district court imposed a "*Grossman*" sentence—*Grossman* being an application of the patterned-sex-offender statute and not an independent ground for departure as the state's arguments on appeal might suggest. Once again, under *Spears V*, a jury trial and proof beyond a reasonable doubt on the patterned-sex-offender factors were only necessary if the district court imposed a sentence greater than 30 years. Because the district court limited the sentence to 30 years, it was not necessary to rely on the recent bench-trial findings.

We also note that if we were to reverse and remand for a new trial based on the alleged constitutional violation, as Spears requests, the state could forgo its request for a 40-year sentence and the requisite jury trial.[4] In which case, there would be no need for a new jury trial on the patterned-sex-offender factors—under *Spears V*, the district court could simply impose a 30-year sentence based on the prior judicial findings. Moreover, in *Spears V*, Spears argued that under *Apprendi*, he should be given the prescribed

[3] We note that the caselaw, as well as the supreme court's remand in *Spears V*, allowed the district court to ignore its own patterned-sex-offender trial findings. The supreme court has interpreted *Blakely* to require the sentencing jury to make sentencing fact determinations, but to leave to the district court whether a particular aggravating factor provides a reason to depart. *State v. Rourke*, 773 N.W.2d 913, 921 (Minn. 2009). Thus, the district court was not bound to depart up to 40 years based on its own trial findings any more than it would have been bound by a jury's findings.

[4] The state indicated, at oral argument, that it is satisfied with the 30-year sentence and would seek the same result on remand.

statutory maximum sentence of 30 years, *Spears V*, 725 N.W.2d at 699, which is exactly what he received on remand. Finally, contrary to Spears's argument, severe aggravating circumstances are not necessary to support a sentence greater than twice the presumptive term when an offender is sentenced under the patterned-sex-offender statute. *See State v. Halvorson*, 506 N.W.2d 331, 339 (Minn. App. 1993) ("The plain language of [the patterned-sex-offender statute] does not require severe aggravating circumstances to be present before a [district] court may sentence an offender to a term longer than twice the presumptive sentence under the statute.").

For these reasons, we conclude that Spears was not prejudiced by the district court's decision to base his sentence on the prior judicial findings under the patterned-sex-offender statute and thereby limit his sentence to 30 years instead of imposing 40 years as requested by the state. And because the district court did not need to rely on the recent bench-trial evidence or findings to support the 30-year sentence, there is no reasonable possibility that the alleged constitutional error contributed to the sentence. The alleged error is therefore harmless beyond a reasonable doubt. Similarly, because the district court did not rely on the recent bench-trial evidence in sentencing Spears as a patterned sex offender, we need not determine whether the evidence from that trial sustains a finding that Spears is a patterned sex offender.

In conclusion, Spears has raised a significant constitutional issue, which appears to be one of first impression in Minnesota. Yet the resulting error, if any, is harmless beyond a reasonable doubt. Because neither of Spears's claims, if successfully established, would require reversal, we affirm Spears's sentence without reviewing the

substantive merits of his claims. *See State v. Sanders*, 775 N.W.2d 883, 889 n.5 (Minn. 2009) ("When an alleged evidentiary error is harmless, an appellate court need not address the merits of the claimed error."); *State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007) ("If a defendant fails to establish that the claimed error affected his substantial rights, we need not consider the other [plain error] factors."); *see also State v. Lessley*, 779 N.W.2d 825, 840-41 n.1 (Minn. 2010) (Gildea, J., dissenting) (stating that "the proper exercise of judicial restraint counsels that constitutional issues not be resolved if the case can be decided on alternative grounds").

Affirmed.

Dated:

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Judge Michelle A. Larkin