STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1046

State of Minnesota,
Respondent,

vs.

Guy Robert Franklin Rabold,
Appellant.

Filed March 13, 2017
Affirmed in part, reversed in part, and remanded
Worke, Judge

St. Louis County District Court
File No. 69DU-CR-15-1884

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

Mark S. Rubin, St. Louis County Attorney, Kristen E. Swanson, Assistant County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Jesson, Judge.

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

WORKE, Judge

Appellant challenges his 240-month sentence for first-degree aggravated robbery, arguing that the district court abused its discretion by imposing an upward durational departure to the statutory maximum sentence. Appellant also argues that the district court

erred by imposing a sentence on his theft-of-a-motor-vehicle conviction. Because the district court did not abuse its discretion by sentencing appellant to 240 months for aggravated robbery based on its determination that appellant is a dangerous offender, we affirm in part. But because appellant's theft-of-a-motor-vehicle conviction arose out of the same behavioral incident as other offenses for which he was also sentenced, we reverse in part and remand for the district court to vacate that sentence. We also conclude that the issues raised in appellant's pro se supplemental brief are without merit.

FACTS

In the early morning hours of June 5, 2015, L.L. woke up to the sounds of appellant Guy Robert Franklin Rabold and his accomplice John Sorenson breaking into her home. L.L. woke M.F., who was sleeping next to her.

Rabold and Sorenson told L.L. and M.F. to open the bedroom door or they would shoot. M.F. opened the door. Rabold and Sorenson held firearms with flashlights taped to the barrels that were shining in the victims' eyes. Sorenson ordered the victims to take off their clothes. Rabold was standing next to Sorenson and did not object to the order.

When L.L. and M.F. were completely naked, Rabold and Sorenson, with their guns to the victims' heads, ordered them downstairs to a gun safe. The victims were initially ordered to lie down in a basement hallway, but M.F. was soon told to get up and open the safe. After opening the safe, M.F. was ordered to lie down in the hallway with L.L. Rabold then threw bathrobes over the victims.

As Rabold removed guns from the safe, Sorenson stood guard over the victims and pulled the robes off of them. Sorenson then began to sexually assault L.L. Rabold entered

the hallway, saw Sorenson sexually assaulting L.L., and said, "We're not doing that." Rabold and Sorenson then left, threatening to come back and kill the victims if they moved.

As Rabold and Sorenson left the property, they saw someone coming up the driveway with a flashlight. Rabold dropped the guns he was carrying and ran to a neighboring property. He found an unlocked vehicle with the key in the ignition. He drove away but was apprehended in the stolen vehicle before leaving the area.

In a police interview, Rabold admitted to taking part in the robbery. He said that he knew the victims and knew about the gun safe because he had previously dated L.L.'s daughter and had been to the home. He claimed that when he saw Sorenson sexually assaulting L.L., he slammed Sorenson into a wall and punched him multiple times. Neither victim saw or heard a physical confrontation between Rabold and Sorenson.

Rabold was charged with four counts: (1) aiding and abetting first-degree aggravated robbery; (2) first-degree burglary; (3) felon in possession of a firearm; and (4) theft of a motor vehicle. He pleaded guilty to all four counts and waived his right to a jury trial on aggravating sentencing factors.

After a sentencing court trial, the district court determined that the current offenses, Rabold's prior convictions, and his high frequency rate of criminal activity made him a danger to public safety, which qualified him as a "dangerous offender." *See* Minn. Stat. § 609.1095, subd. 2 (2014). The district court also determined that an upward departure was justified because the victims' nudity made them particularly vulnerable.

At Rabold's sentencing hearing, the state requested the statutory maximum sentence of 240 months in prison on count one. Minn. Stat. § 609.245, subd. 1 (2014). The state

asked the district court to impose the sentence solely based on the finding that Rabold was a "dangerous offender" and without regard to particular vulnerability. Before imposing sentence, the district court noted the severity of the crime, stating that it was "a hair's breath away from two murders" and "well planned out." The district court then noted Rabold's long criminal record and his repeated failures to turn his life around. The district court imposed the statutory maximum sentence on count one and concurrent prison terms on the remaining counts. This appeal followed.

D E C I S I O N

Upward departure

The Minnesota Sentencing Guidelines establish a presumptive sentencing range based on the offense and the offender's criminal history. Minn. Stat. § 244.09, subd. 5 (2014); Minn. Sent. Guidelines 2.C.1 (2014). This court reviews the district court's decision to depart from the presumptive sentencing range for an abuse of discretion. *Vickla v. State*, 793 N.W.2d 265, 269 (Minn. 2011). If the reasons for a departure are "legally permissible and factually supported in the record, then [this court] will affirm the departure." *Id.* (quotation omitted).

"The sentencing guidelines require compelling circumstances to justify a durational departure, and [Minnesota caselaw] requires the existence of severe aggravating circumstances before a court may impose a sentence greater than double the presumptive sentence." *Neal v. State*, 658 N.W.2d 536, 545 (Minn. 2003). But "[t]he dangerous-offender statute is a sentencing statute that permits durational departures not otherwise authorized by the sentencing guidelines." *Id.* The statute allows the district court to impose

an upward departure if the offender (1) was at least 18 years old at the time of the current offense; (2) the current offense is a felony and a violent crime; (3) the offender has two or more prior convictions for violent crimes; and (4) the fact-finder determines that the offender is a danger to public safety. Minn. Stat. § 609.1095, subd. 2. A finding that the offender is a danger to public safety may be based on the offender's past criminal behavior, such as the offender's high rate of criminal activity or juvenile adjudications, or the fact that the present offense involved an aggravating factor that would justify a durational departure. *Id.*, subd. 2(2).

Under the dangerous-offender statute, the offender's criminal history, rather than aggravating factors, justifies the departure. *Neal*, 658 N.W.2d at 545. The statute does not limit the length of a departure. *Id.* If the offender meets the statutory criteria, then a departure up to the statutory maximum sentence may be imposed. *Id.* No severe aggravating factors are necessary to impose a more than double departure. *Id.* at 546.

Rabold argues that in applying the dangerous-offender statute the district court erroneously determined that he has three prior violent-crime convictions. The district court found that Rabold has the following convictions: second-degree arson; felon in possession of a firearm; first-degree criminal damage to property; third-degree burglary (two convictions); theft; motor-vehicle theft (three convictions); and tampering with a motor vehicle. Only two of these convictions—second-degree arson and felon in possession of a firearm—qualify as violent crimes. *See* Minn. Stat. § 609.1095, subd. 1(d) (2014) (listing offenses defined as violent crimes). Nevertheless, the dangerous-offender statute requires only two prior convictions for violent crimes. *Id.*, subd. 2(1). Rabold concedes that he has

the necessary two prior convictions and does not challenge the district court's determinations that he is a danger to public safety and otherwise meets the dangerous-offender statutory criteria. Accordingly, the district court's erroneous determination that Rabold has a third prior conviction for a violent crime does not affect the validity of the departure. *See Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985) (stating that "[i]f the reasons given justify the departure, the departure will be allowed" and that even "[i]f the reasons given are improper or inadequate, but there is sufficient evidence in the record to justify departure, the departure will be affirmed").

Rabold also argues that his 240-month sentence "unfairly exaggerates the criminality of [his] conduct" and is "disproportionate, unreasonable, and unjustified by the circumstances of th[e] case." The supreme court explained in *Neal* that, although the dangerous-offender statute authorizes greater than double upward departures without the presence of severe aggravating circumstances, "to avoid disproportionate sentences, courts should use caution when imposing sentences that approach or reach the statutory maximum sentence." 658 N.W.2d at 546.

In *Neal*, the district court used the dangerous-offender statute to impose the statutory maximum sentence of 480 months for a kidnapping conviction. *Id.* at 541. The sentence was more than four times the presumptive term. *Id.* at 541-42. The supreme court compared the sentence to sentences in other kidnapping cases and concluded that the 480-month prison term was "excessive and unreasonable." *Id.* at 547-48. Because the dangerous-offender statute focuses on criminal history and criminal history is already accounted for in calculating the presumptive sentence, the supreme court warned that,

"when severe aggravating circumstances are not present, imposing more than a double durational departure under the dangerous-offender statute may artificially exaggerate the defendant's criminality because the defendant's criminal record is considered twice." *Id.* at 546.

Here, Rabold had a criminal-history score of ten. His first-degree aggravated robbery conviction had a presumptive sentencing range of 95 to 132 months, with a mid-point of 111 months. *See* Minn. Sent. Guidelines 2.B.2.c, 4.A (2014) (sentencing guidelines grid and description of custody-status point). The district court imposed the statutory maximum sentence of 240 months. Accordingly, the district court imposed a departure of more than double the middle of the presumptive range but significantly less than double the maximum presumptive sentence. This departure is significantly smaller than the more-than-quadruple departure in *Neal*. Moreover, because of Rabold's high criminal-history score, the presumptive sentence does not account for his entire criminal history. The presumptive sentencing range would have been the same had Rabold's criminal-history score been several points fewer. *See id.*

In any event, the district court used the requisite caution in imposing the statutory maximum sentence. The district court carefully considered Rabold's high rate of criminal activity. It found that Rabold had three felony adjudications (ten total) from the ages of 15 to 18. Since turning 18 in 2009, Rabold has been convicted of nine felony offenses, not including the four additional felonies stemming from the June 5, 2015 robbery. Rabold has been incarcerated for much of his adult life. At the time he committed the current

offenses, Rabold had been out of prison for only eight months and was still on parole. These facts support the district court's imposition of the statutory maximum sentence.

Our review of whether Rabold's sentence unfairly exaggerates his criminality is also "guided by past sentences imposed on other offenders." *State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007). "But for a sentence to be comparable, the sentencing departure must be based upon the same or similar reasons." *Vickla*, 793 N.W.2d at 270.

Rabold compares his sentence to the sentence imposed in *State v. Evans*. *See* 347 N.W.2d 813 (Minn. App. 1984), *review denied* (Minn. July 26, 1984). *Evans* is not comparable. It involved a 116-month sentence for felony murder and two concurrent 54-month sentences for attempted aggravated robbery and burglary with a dangerous weapon. *Id.* at 817-18. *Evans* not only did not involve a departure based on the dangerous-offender statute but does not appear to have involved a departure of any kind. Rabold also cites to an unpublished opinion of this court and compares his sentence to the sentence imposed in that case. Unpublished opinions are not precedential, Minn. Stat. § 480A.08, subd. 3 (2016), and the case cited is inapposite and unpersuasive.

The Minnesota Supreme Court has affirmed a statutory maximum sentence based on the dangerous-offender statute for an offense similar to the aggravated robbery involved here. In *State v. Smallwood*, the supreme court affirmed a 240-month statutory maximum sentence for first-degree burglary. 594 N.W.2d 144, 149-50, 158 (Minn. 1999). Smallwood broke into a sleeping woman's home in the early morning hours. *Id.* at 147. When the victim woke up, Smallwood was shirtless and standing over her, adjusting the button on his pants, and rubbing her thigh. *Id.* When she protested, Smallwood threatened

to "cut" her. *Id.* The victim screamed, and Smallwood fled. *Id.* Smallwood's sentence was more than a quadruple departure based on the dangerous-offender statute and his touching and rubbing the victim's body. *Id.* at 157-58. The supreme court concluded that the sentence was not disproportionate to other similar offenders. *Id.* at 158.

Even setting aside Sorenson's sexual assault of L.L., Rabold's actions are similar to Smallwood's. Although Rabold did not sexually touch the victims, he and his accomplice broke into a home in the middle of the night, confronted the victims in their bedroom, ordered the victims to undress, and threatened the victims with weapons. Our review of similar cases indicates that Rabold's 240-month sentence does not exaggerate his criminality and is not otherwise disproportionate, unreasonable, or unjustified by the circumstances of the case.

Rabold claims that the upward departure was not warranted because he was remorseful and he intervened to stop Sorenson from further sexually assaulting L.L. But these factors have no bearing on the dangerous-offender statute, which Rabold concedes was the sole ground for departure. Moreover, Rabold was not charged with criminal sexual conduct, and his efforts to stop the sexual assault do not lessen his culpability for aggravated robbery. While Rabold stopped Sorenson from further sexually assaulting L.L., his participation in the robbery and his acceptance of Sorenson's order that the victims undress created the conditions that allowed the sexual assault to happen in the first place.

The district court properly departed based on the dangerous-offender statute, and Rabold's 240-month sentence does not exaggerate his criminality. The district court did not abuse its discretion by imposing the statutory maximum sentence.

Theft-of-a-motor-vehicle sentence

Rabold argues, and the state concedes, that the district court erred by imposing a sentence for motor-vehicle theft because the offense arose out of the same behavioral incident as the other three counts. We agree. "[I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them." Minn. Stat. § 609.035, subd. 1 (2014). "[M]ultiple sentences may not be used for two offenses if the defendant, substantially contemporaneously committed the second offense in order to avoid apprehension for the first offense." *State v. Gibson*, 478 N.W.2d 496, 497 (Minn. 1991). Rabold committed motor-vehicle theft immediately following the aggravated robbery and in an effort to avoid apprehension. Accordingly, we reverse the district court's imposition of sentence on the theft-of-a-motor-vehicle conviction and remand with instructions to vacate that sentence.

Rabold's pro se supplemental brief

In his pro se supplemental brief, Rabold claims ineffective assistance of counsel and argues that the district court abused its discretion by imposing an upward departure on count one. In claiming that his attorney was ineffective, Rabold fails to assert either that his attorney's performance fell below an objective standard of reasonableness or that the result of the proceeding would have been different if not for his attorney's alleged errors. *See Nissalke v. State*, 861 N.W.2d 88, 94 (Minn. 2015) (explaining the standard for an

ineffective-assistance-of-counsel claim). Rabold's sentencing claim mirrors the claims raised in his principal brief. After thoroughly reviewing these claims, we conclude that they are without merit.

In sum, we affirm Rabold's 240-month sentence for aggravated robbery, and we reverse Rabold's theft-of-a-motor-vehicle sentence and direct the district court to vacate that sentence on remand.

Affirmed in part, reversed in part, and remanded.