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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1835**

State of Minnesota,
Respondent,

vs.

Emery James Jenkins,
Appellant.

**Filed September 5, 2017
Affirmed
Halbrooks, Judge**

Itasca County District Court
File No. 31-CR-14-3043

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

John J. Muhar, Itasca County Attorney, Todd S. Webb, Chief Assistant County Attorney, Grand Rapids, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Peterson, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges the district court's imposition of a sentence with an upward durational departure, arguing that there are no substantial and compelling circumstances

demonstrating that his conduct was significantly more serious than that typically involved in the commission of first-degree manslaughter. We affirm.

FACTS

On October 16, 2014, Investigator A.J. Morse responded to a report that appellant Emery James Jenkins's 12-week-old son, J.J.J., was unresponsive in Jenkins's home. Jenkins told Investigator Morse that, within the last week, J.J.J. had been bitten by a neighbor's dog, fallen out of a swing, and been dropped on his head in the shower by Jenkins. Emergency personnel transported J.J.J. to the hospital where he died two days later. The autopsy revealed that J.J.J. had severe blunt-force trauma to his body, including a skull fracture and multiple rib fractures, and multiple abrasions and injuries to his chest, abdomen, hands, fingers, feet, and toes.

One week after the incident, S.R.B.—J.J.J.'s mother—told Investigator Mike Bliss that on multiple occasions, Jenkins had bitten J.J.J. so hard that he bled; that Jenkins would not allow J.J.J. to go to a scheduled medical appointment because he did not want them to see J.J.J.'s injuries; and that she and Jenkins lied about the neighbor's dog biting J.J.J. Jenkins was arrested.

Pursuant to an *Alford* plea, Jenkins pleaded guilty to first-degree manslaughter (malicious punishment of a child) in violation of Minn. Stat. § 609.20(5) (2014). *See North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970). He also admitted to two aggravating factors: a particularly vulnerable victim and a prior felony conviction with an injured victim. Minn. Sent. Guidelines 2.D.3.b.(1), (3) (2014). The district court convicted Jenkins of first-degree manslaughter, durationally departed from the presumptive sentence

based on the two aggravating factors that Jenkins admitted, and sentenced Jenkins to 180 months in prison.¹ This appeal follows.

DECISION

Jenkins first contends that the district court failed to explain why his conduct justified a durational departure. “Whether a stated reason for departure is proper is a legal determination that we review de novo.”² *State v. Alvarez*, 820 N.W.2d 601, 622 (Minn. App. 2012), *aff’d*, 836 N.W.2d 527 (Minn. 2013).

Before imposing an upward durational departure, the district court must be satisfied that one or more factual circumstances exist to support a departure that is not embodied in the guilty plea, and must explain why those circumstances create a substantial and compelling reason to impose a sentence outside the presumptive range.

State v. Robideau, 817 N.W.2d 180, 185 (Minn. App. 2012) (quotation omitted); *see* Minn. Sent. Guidelines 2.D.1 (2014). “[A]bsent a statement of the reasons for the sentencing departure placed on the record at the time of sentencing, no departure will be allowed.” *State v. Geller*, 665 N.W.2d 514, 517 (Minn. 2003). But “an aggravating factor is a reason that explains why the additional facts . . . provide the district court a substantial and compelling basis [to depart from the sentencing guidelines] grid.” *State v. Yaritz*, 791

¹ The presumptive range for this conviction with Jenkins’s three criminal-history points was 104 to 146 months.

² The parties agree that the standard of review for the issues in this case is abuse of discretion. This court reviews “a district court’s decision to depart from the presumptive guidelines sentence for an abuse of discretion.” *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015). But here, although Jenkins frames it as an issue of whether his conduct is “significantly more serious than a typical first-degree manslaughter offense,” the dispute is over whether the aggravating factors are proper reasons for departure.

N.W.2d 138, 144 (Minn. App. 2010) (alteration in original) (quotations omitted), *review denied* (Minn. Feb. 23, 2011). “[T]he record is adequate if the district court clearly identifies the aggravating factors on which it relies and thereby explains why the facts provide a substantial and compelling reason to depart.” *Id.* (citing *State v. Rourke*, 773 N.W.2d 913, 920 (Minn. 2009)).

At the sentencing hearing, the district court stated:

At the plea hearing, you waived your right to have a jury trial on the aggravated sentence, admitting that there were two aggravating factors that exist in this case.

The first being that the victim, [J.J.J.], was particularly vulnerable . . . due to his age, and that you knew or should have known about his vulnerability due to his age, and the second aggravating factor being that the current conviction is for an offense . . . in which the victim is injured, and that you have a prior felony conviction for an offense in which the victim was otherwise injured.

....

By your own admission, there are two aggravating factors that exist, and so I am finding that the aggravated sentence is warranted in this matter.

Because the district court identified the aggravating factors, we conclude that the district court properly explained why the facts provided a substantial and compelling reason to depart. *See id.*

Jenkins contends that the district court erred when it based its upward durational departure on the two aggravating factors because his conduct was not significantly more serious than any other first-degree manslaughter offense. He argues that the victim’s

vulnerability and injuries are already contained within the elements of first-degree manslaughter, and that therefore, no justification for departure exists.

A district court may only depart from the sentencing guidelines if “identifiable, substantial, and compelling circumstances” exist. *Rourke*, 773 N.W.2d at 919 (quotation omitted). A single aggravating factor is sufficient to uphold an upward departure. *State v. Solberg*, 882 N.W.2d 618, 624 (Minn. 2016). But conduct that constitutes proof of the criminal offense may not be used to justify an upward departure. *State v. Williams*, 608 N.W.2d 837, 840 (Minn. 2000). Here, the district court based its departure on the presence of two aggravating factors: (1) particular vulnerability due to age and (2) injury to the victim and a prior felony conviction for an offense that injured a victim.

The first aggravating factor exists when the victim is “particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, and the offender knew or should have known of this vulnerability.” Minn. Sent. Guidelines 2.D.3.b.(1). The first-degree manslaughter statute requires the victim to be under 18 years old. Minn. Stat. §§ 609.20(5), .376, subd. 2, .377, subd. 1 (2014).

We addressed whether this aggravating factor is a proper reason for a departure in *State v. Mohamed*. 779 N.W.2d 93, 96-100 (Minn. App. 2010), *review denied* (Minn. May 18, 2010). Mohamed pleaded guilty to malicious punishment of a child and stipulated to the existence of three aggravating factors, which included a stipulation that Mohamed’s four-month-old son was particularly vulnerable because of his age. *Id.* at 95-96. On appeal, Mohamed argued that vulnerability due to age was not a proper aggravating factor because “the legislature ha[d] already taken into account . . . that the victims of th[e]

offense would necessarily be children.” *Id.* at 97-98. We stated that, “given the broad spectrum of physical development captured in [the statute’s] 18-year time span, the legislature’s recognition does not preclude consideration of the victim’s infancy as an aggravating factor.” *Id.* at 98. We concluded that Mohamed’s son was “particularly vulnerable among the broad class of child victims who are covered by the statute” because the victim was four months old, was at an early stage of development, and was “incapable of perceiving danger, fleeing or shielding himself from harm, seeking help, or reporting the abuse.” *Id.*

Here, J.J.J. was three months old at the time of the incident. Because he was particularly vulnerable among the class of child victims in the statute, we conclude that the district court’s reliance on the first aggravating factor was proper.

The second aggravating factor exists when “[t]he current conviction is for a criminal sexual conduct offense, or an offense in which the victim was otherwise injured, and [if] the offender has a prior felony conviction for a criminal sexual conduct offense or an offense in which the victim was otherwise injured.” Minn. Sent. Guidelines 2.D.3.b.(3). The malicious-punishment-of-a-child statute prohibits “unreasonable force or cruel discipline.” Minn. Stat. § 609.377, subd. 1.

The supreme court addressed whether this aggravating factor is a proper reason for departure in *State v. Meyers*. 869 N.W.2d 893, 896-900 (Minn. 2015). Meyers was convicted of assaulting a woman in a parking ramp and received an aggravated sentence because he had a prior felony conviction in which the victim was injured. *Id.* at 894-95; *see* Minn. Sent. Guidelines 2.D.3.b.(3). Meyers argued that the “repeat offender

aggravating factor cannot be applied because it duplicates the injury element of his first-degree assault conviction.” *Meyers*, 869 N.W.2d at 896. The supreme court noted that the aggravating factor “includes facts other than those needed to prove the offense of conviction” because “[t]he prior conviction is not an element of first-degree assault.” *Id.* at 899. The supreme court concluded that “the Legislature, through the repeat offender aggravating factor, has expressly determined that recidivism for particular felonies is a valid basis for an upward sentencing departure” and held that the district court did not err in giving *Meyers* an upward durational departure. *Id.* at 900.

Jenkins admitted that he had a prior felony conviction in which a victim was injured. Because the prior conviction was not an element of Jenkins’s manslaughter charge, we conclude that the district court’s application of the second aggravating factor was proper. *See id.* at 899-900.

Jenkins contends that the aggravated sentence does not further the purpose of the sentencing guidelines. “We review a district court’s decision to depart from the presumptive guidelines sentence for an abuse of discretion. If the reasons given for an upward departure are legally permissible and factually supported in the record, the departure will be affirmed.” *Hicks*, 864 N.W.2d at 156 (quotation and citations omitted).

A single aggravating factor is sufficient to uphold an upward departure. *Solberg*, 882 N.W.2d at 624. In sentencing Jenkins, the district court relied on two admitted aggravating factors. Because those aggravating factors are proper reasons for departure,

we conclude that the district court properly exercised its discretion when it departed from the presumptive sentence.

Affirmed.