STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1357

State of Minnesota,
Respondent,

vs.

Adam Joseph Rodman,
Appellant.

Filed September 4, 2018
Affirmed
Hooten, Judge
Dissenting, Randall, Judge*

Anoka County District Court
File No. 02-CR-16-2956

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

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

Catheryn Middlebrook, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Schellhas, Judge; and Randall, 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

HOOTEN, Judge

Appellant challenges his conviction for criminal vehicular homicide, arguing that the prosecutor committed misconduct during closing argument and the district court erred in its reliance on five aggravating factors in imposing the sentence. We affirm.

FACTS

On May 5, 2016, appellant Adam Rodman was returning home after a night of drinking. Along the way, Rodman turned to enter his residential neighborhood, driving at least 48 miles per hour in a 30-mile-per-hour speed zone. As he was going around a bend, he swerved into the oncoming lane and side swiped R.C.'s car. Rodman did not stop and continued driving. A few seconds later, Rodman hit D.A., who was standing at his mailbox, causing D.A.'s body to travel 79 feet and hit a garage door. D.A. died as a result of his injuries.

Officers responded to the scene where D.A. had been struck and, after some investigation, were directed to Rodman's house. Officers placed Rodman under arrest and took him to the hospital for a blood test. Roughly one hour after the crash, Rodman's alcohol concentration was between 0.18 and 0.22. Rodman was charged with three counts of criminal vehicular homicide and one count of failure to stop for a traffic collision.

At trial, Rodman testified that after he went to a bar with his friend, S.M., the last thing he remembered was being in the passenger side of his car. Throughout the trial, Rodman and his defense counsel implied that S.M. was the driver of the vehicle. However

DNA evidence taken from the driver's side of the vehicle excluded S.M. as a possible driver.

During closing arguments, the prosecutor made statements regarding accountability and Rodman's prior unrelated bad acts. The jury found Rodman guilty on all four counts. Rodman waived his right to a jury trial on the *Blakely* sentencing factors.[1] The district court found five aggravating factors: 1) Rodman was extremely intoxicated at the time of the accident; 2) he was driving over the speed limit; 3) he fled the scene of the accident; 4) he operated his motor vehicle with extreme recklessness for the safety of others; and 5) he attempted to shift the blame to his friend, S.M. The district court sentenced Rodman to 120 months on count two, an upward durational departure from the guideline sentence range of 58 to 81 months.[2] Rodman appeals, arguing that the prosecutor engaged in misconduct and the district court improperly relied on invalid aggravating factors.

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[1] "[A]ny 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." *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004). However, a defendant may waive his right to a jury trial concerning those factors and submit them to the judge for decision. *Id*., 542 U.S. at 310, 124 S. Ct. at 2541.

[2] Rodman was convicted of three counts of criminal vehicular homicide in violation of Minn. Stat. § 609.2112, subds. 1(1), (2)(i), (7) (2014). Multiple convictions of the same offense are prohibited. Minn. Stat. § 609.04 (2014); *State v. Hackler*, 532 N.W.2d 559, 559 (Minn. 1995). However, because Rodman did not raise this issue in district court or before this court, we will not consider it. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

D E C I S I O N

Prosecutorial Misconduct

Rodman argues that the prosecutor committed misconduct by referencing other bad acts and urging accountability during his closing argument. "A prosecutor engages in prosecutorial misconduct when [the prosecutor] violates clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state's case law." *State v. Smith*, 876 N.W.2d 310, 334–35 (Minn. 2016) (quotations omitted). When reviewing closing arguments for possible prosecutorial misconduct, this court considers "the argument as a whole, rather than focusing on particular phrases or remarks that may be taken out of context or given undue prominence." *State v. Jones*, 753 N.W.2d 677, 691 (Minn. 2008) (quotation omitted).

Rodman did not object to the prosecutor's closing argument. Therefore, this court applies "a modified plain-error test." *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). Under this standard, Rodman must demonstrate that the alleged misconduct constituted error and that the error was plain. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). "An error is plain if it was clear or obvious. Usually this is shown if the error contravenes case law, a rule, or a standard of conduct." *Id*. (citation omitted). Then, if Rodman is able to show an error that is plain, "the burden would then shift to the state to demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights." *Id*. Thus, the state would have to show "that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id*. (quotations omitted).

To establish error, Rodman argues that the prosecutor impermissibly referenced his prior bad acts and repeatedly urged the jury to hold Rodman accountable. A prosecutor may talk about accountability "in order to help persuade the jury not to return a verdict based on sympathy for the defendant." *State v. Montjoy*, 366 N.W.2d 103, 109 (Minn. 1985). However, "the prosecutor should not emphasize accountability to such an extent as to divert the jury's attention from its true role." *Id*. The jury's "role is limited to deciding dispassionately whether the state has met its burden in the case at hand of proving the defendant guilty beyond a reasonable doubt." *State v. Salitros*, 499 N.W.2d 815, 819 (Minn. 1993). A prosecutor's closing argument approaches misconduct when it encourages a jury to "enforce the law or teach defendants lessons or make statements to the public or to 'let the word go forth.'" *See id*.

When statements of accountability are tied directly to the crimes at hand, the supreme court has held that there is no prosecutorial misconduct because it does not divert the jury's attention from its role of deciding if the state has met its burden. *See State v. Morton*, 701 N.W.2d 225, 238 (Minn. 2005); *see also Montjoy*, 366 N.W.2d at 109; *see also State v. Ford*, 539 N.W.2d 214, 228 (Minn. 1995) (holding that the prosecutor's comments on accountability "seem less of an impassioned plea to send a message, but rather an inartful . . . method of merely stating that the law requires Ford be held responsible"). Here, Rodman argues that the prosecutor urged the jury to teach him a lesson by referencing past bad acts that did not relate to the charged offenses. The prosecutor stated within his closing argument:

> Every day we make choices. . . .You make the choice to go to a restaurant, order food, order drinks. You make the choice to hand a credit card that doesn't have any money on it and leave. There's a consequence to that. Bar's out money, people got free food, but when we make choices, there's not always accountability. You can make the choice to rent a room from a landlord, make the choice to not keep up on rent, and avoid conversation with that person. You may never have any accountability. You may never be forced to be moved out. That's a choice you make and there's consequences. Ladies and gentlemen, this case is about Adam Rodman's choices.

The prosecutor's mention of accountability was not constrained to the charged offenses. Earlier in the trial, the state had elicited testimony from Rodman's landlord and a bartender indicating that Rodman had avoided paying his rent and bar tab, and then incorporated those scenarios into the closing argument. By referencing these unrelated bad acts in relation to accountability, the prosecutor's statements enter the realm of a "plea to send a message." *Ford*, 539 N.W.2d at 228. The prosecutor also stated, "I told you at opening I was going to come back and ask you to make a simple choice, and that simple choice is accountability." His statements cross the line into prosecutorial misconduct by distracting the jury from its role of determining if the state has proved its case beyond a reasonable doubt. *See Montjoy*, 366 N.W.2d at 109.

To establish if the error asserted by Rodman was plain, this court looks to the law in existence at the time of appellate review. *State v. Kelley*, 855 N.W.2d 269, 277 (Minn. 2014). By referencing accountability in such a way to encourage the jury to step outside its role and consider Rodman's past unrelated bad acts, the prosecutor committed misconduct according to the law in existence at the time of review. Therefore, the first two

steps of the plain-error test have been met. The analysis now turns to whether that prosecutorial misconduct affected Rodman's substantial rights.

To determine if there is "a reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury's verdict, [this court] consider[s] the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to . . . rebut the improper suggestions." *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). After reviewing the record, we conclude that the evidence against Rodman was strong. S.M. testified that he was at a bar with Rodman and both left separately after drinking a large amount of alcohol. There was a camera outside of the bar showing Rodman walking to his car alone. A witness also testified that she saw a person driving a black car after it had collided with D.A. and that there was no passenger in the car. A neighbor, upon learning that there had been an accident in the neighborhood, notified police that he saw a heavily damaged black vehicle at Rodman's house. When officers apprehended Rodman, he had cuts on his face and was covered in dirt. Rodman had also called and messaged S.M. after the incident, stating that he had "f*cked up" and "had been in an accident." When law enforcement examined Rodman's car more closely, they found scrapes on the side, white fibers consistent with D.A.'s clothes on the front right tire, and significant damage to the front passenger side. A DNA analysis conducted of swabs taken on the driver's side of the car indicated that they were consistent with Rodman's DNA.

Second, while the prosecutor committed misconduct by incorporating accountability into his closing argument, the misconduct was not pervasive. The

prosecutor argued accountability on three pages of his 28-page closing argument. Because it was not a significant part of the closing argument, the mention of accountability did not affect Rodman's substantial rights. *See State v. Peltier*, 874 N.W.2d 792, 806 (Minn. 2016) (holding that prosecutorial misconduct did not affect defendant's substantial rights when the evidence supporting conviction was overwhelming, the misconduct was isolated, and there was opportunity to rebut the erroneous statements).

Third, Rodman had the ability to refute the prosecutor's improper suggestions, but did not object to or address the state's accountability argument during his closing statement. Further, "[t]he trial court's instructions to the jury are also relevant in determining whether the jury was unduly influenced by the improper comments." *State v. Washington*, 521 N.W.2d 35, 39 (Minn. 1994). Here the district court instructed the jury that "the arguments or other remarks of the attorneys are not evidence in this case." These jury instructions were enough to cure the improper mention of accountability. *See In re Welfare of D.D.R.*, 713 N.W.2d 891, 900 (Minn. App. 2006) (holding that the jury instructions "were sufficient to negate any prejudice that may have occurred as a result of misconduct").

Although Rodman may have met the first two prongs of the modified plain-error test, the state has met its burden of establishing that any prosecutorial misconduct did not affect Rodman's substantial rights. Rodman is not entitled to reversal of his conviction.

Sentencing to Statutory Maximum

Rodman argues that the district court erred by sentencing him to the statutory maximum duration because three of the five aggravating factors were invalid. "If the

reasons given for an upward departure are legally permissible and factually supported in the record, the departure will be affirmed. But if the district court's reasons for departure are improper or inadequate, the departure will be reversed." *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015) (quotations and citations omitted). Further, "[i]f the record supports findings that substantial and compelling circumstances exist, this court will not modify the departure unless it has a 'strong feeling' that the sentence is disproportional to the offense." *State v. Anderson*, 356 N.W.2d 453, 454 (Minn. App. 1984). The validity of a particular reason for departure is a legal issue. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). But if the particular reason is valid, this court reviews the district court's decision whether to depart for an abuse of discretion. *Id*.

The district court found the following five aggravating factors: 1) Rodman was extremely intoxicated at the time of the accident; 2) he was driving over the speed limit; 3) he fled the scene of the accident; 4) he operated his motor vehicle with extreme recklessness for the safety of others; and 5) he attempted to shift the blame to his friend, S.M. Rodman argues that it was improper for the court to use his speed and extreme recklessness as aggravating factors as those are elements of the offense. He also argues that shifting the blame onto his friend is not an aggravating factor.

Rodman's speed is a valid aggravating factor. *See State v. Gebeck*, 635 N.W.2d 385, 390 (Minn. App. 2001). In *Gebeck*, this court affirmed an upward durational departure when the defendant was traveling 85 miles per hour while driving the wrong way on the interstate with a 0.25 alcohol concentration. *Id*. Similarly, in *State v. Anderson*, the defendant was convicted of criminal negligence resulting in death with aggravating factors

including excessive speed. 356 N.W.2d 453, 454–55 (Minn. App. 1984) (holding that defendant's excessive speed and intoxication "clearly represented a greater than normal danger to the safety of other people"). "The general issue that faces a sentencing court in deciding whether to depart durationally is whether the defendant's conduct was significantly more or less serious than that typically involved in the commission of the crime in question." *State v. Cox*, 343 N.W.2d 641, 643 (Minn. 1984). Here, Rodman was traveling at least 48 miles per hour in a 30-mile-per-hour zone in a residential area. Additional witnesses estimated his speed between 60 and 70 miles per hour. Excessive speed is a valid aggravating factor and the record supports the district court's finding.

Extreme recklessness is a valid aggravating factor. *See State v. Gartland*, 330 N.W.2d 881, 883 (Minn. 1983). Rodman argues that this is an element of his sentenced crime and therefore cannot be used as an aggravating factor. Rodman was sentenced under Minn. Stat. § 609.2112, subd. 1(2)(i) (2014). Under that subsection, "a person is guilty of criminal vehicular homicide. . . if the person causes the death of a human being . . . in a negligent manner while under the influence of alcohol." Rodman, equating extreme recklessness with negligence, argues that the district court erred in using this element of the crime as an aggravating factor. However, "[r]eckless conduct is treated as separate from negligence." *State v. Bolsinger*, 221 Minn. 154, 160, 21 N.W.2d 480, 486 (1946); *see also State v. Al-Naseer*, 690 N.W.2d 744, 752 (Minn. 2005). In the context of driving cases, "the difference between negligence, whether ordinary or gross, and conduct which is willful, wanton, in reckless disregard of the rights of others, is a difference in kind and not merely one of degree." *Bolsinger*, 221 Minn. at 160, 21 N.W.2d at 485. Here, as

Rodman was driving in a residential neighborhood late at night, he accelerated around a curve in the road and swerved into oncoming traffic. The district court's finding is supported by the record and excessive recklessness is a valid aggravating factor.

Shifting the blame is a valid aggravating factor. Rodman cites to *State v. Chaklos*, and argues that attempting to pin the blame on another person may constitute an aggravating factor, but only when it occurs during the initial investigation of a criminal act. 528 N.W.2d 225, 228 (Minn. 1995) (stating that "the sentencing court may take into consideration the offense-related conduct of trying to pin the blame for the offense on someone else"). In *Chaklos*, the defendant had lied to investigators about seeing a different car pass him and strike the victim's car. *Id*. at 226. Contrary to Rodman's argument, a defendant does not have to shift the blame during the investigation for it to be considered an aggravating factor. In *Dillon*, this court found that shifting the blame during testimony supports a sentencing departure. 781 N.W.2d at 593, 602 (Minn. App. 2010). Here, Rodman tried to shift the blame throughout his testimony. He stated at trial:

> After I received the food, I was kind of stumbling out to my car. When I got in the passenger side, [S.M.] was in the driver's side smoking some pot already. As I handed him a burger, he handed me the pipe. I took – took a pretty big hit of it, started eating some fries. A couple minutes later, I felt really lightheaded, really dizzy, sick. My eyes were heavy. Leaned my head against the window. I passed out.

Rodman implied that S.M. was the driver of the vehicle that night. The district court's finding that Rodman attempted to shift the blame is supported by the record.

The aggravating factors and the totality of the circumstances support an upward departure. *See State v. Van Gorden*, 326 N.W.2d 633, 635 (Minn. 1982). Because the

reasons given by the district court for an upward departure of Rodman's sentence are legally valid, and the record supports the district court's findings that there were substantial and compelling circumstances justifying an upward departure, we conclude that the district court did not abuse its discretion in sentencing Rodman to the statutory maximum sentence.

Affirmed.

RANDALL, Judge (dissenting)

Rodman was charged with three counts of criminal vehicular homicide for causing the death of D.A. and one count of failing to stop after a collision with an attended vehicle. Count one alleged that Rodman caused D.A.'s death while operating a motor vehicle in a grossly negligent manner, count two alleged that Rodman caused D.A.'s death while operating a motor vehicle in a negligent manner while under the influence of alcohol, and count three alleged that Rodman caused D.A.'s death after causing a collision and leaving the scene. Rodman was found guilty of all charges. According to the warrant of commitment, the district court entered judgments of conviction on all four counts. The district court imposed an upward durational departure of 120 months in prison, the statutory maximum sentence, for count two involving operating a motor vehicle in a negligent manner while under the influence of alcohol. The presumptive sentencing range for this offense is 58 to 81 months in prison. Minn. Sent. Guidelines 4.A (2014). The district court also imposed a 90-day sentence for count four, failing to stop after a collision with an attended vehicle. No sentences were imposed for counts one and three.

Rodman waived his right to have the jury make findings of fact on the aggravating factors. The district court judge made factual findings in a written order. At sentencing, the district court judge imposed the statutory-maximum 120-month sentence based on the factors found in its order: appellant's extreme intoxication; speeding; fleeing the scene; "extreme recklessness for the safety of others"; and shifting the blame. Rodman argues that three of these reasons are invalid. The majority believes that the reasons are valid and supported by the record and they affirm the sentence. I would reverse and remand for

resentencing. Two of the district court's reasons—extreme recklessness and blame shifting—are invalid. The district court cited all five factors without specifically indicating which of the five had the most weight and were to be relied upon.

Generally, we review a sentencing departure for an abuse of discretion. *See Dillon v. State*, 781 N.W.2d 588, 594 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). The question of whether the district court's reasons for departure are permissible is a question of law that we review de novo. *Id*. at 595. After we determine that the district court identified proper grounds justifying a departure, we review the district court's decision to depart for an abuse of discretion. *Id.*

One of the aggravating factors the district court relied on to support the upward departure was "extreme recklessness for the safety of others." Rodman argues that this is not a valid departure reason because it is an element of count one, criminal vehicular homicide involving gross negligence, and the district court cannot use offense elements as departure reasons. *See State v. Jones*, 745 N.W.2d 845, 849 (Minn. 2008) (stating that conduct underlying one conviction cannot be relied on to support upward departure for separate conviction); *but see State v. Fleming*, 883 N.W.2d 790, 796 (Minn. 2016) (concluding that, under Minn. Stat. § 244.10, subd. 5a(b), district court may consider any aggravating factor that renders the sentenced offense significantly more serious, even if the aggravating factor relates to another offense committed during same course of conduct). The majority concludes that, because recklessness is more serious than negligence, recklessness is a valid departure reason. The majority also concludes that there are facts supporting that reason because Rodman drove at excessive speeds in a residential

neighborhood with an alcohol concentration well over the legal limit. The problem with the majority's reasoning is that the facts that support the aggravating factor of extreme recklessness—driving 18 miles over the speed limit with a blood alcohol concentration of 0.159 four hours after the accident—were also relied on by the district court as independent aggravating factors supporting the upward departure. Even if recklessness is a valid departure reason, the majority cites no authority that allows a court to rely on the same facts to support multiple departure reasons. *See State v. Rourke*, 773 N.W.2d 913, 921 (Minn. 2009) (noting that aggravating factors are reasons explaining why facts of the case provide a substantial and compelling reason to depart).

For example, the cases the majority relies on do not support the proposition that excessive speed and extreme alcohol concentration can be independent aggravating factors *and* also support the aggravating factor of extreme recklessness. In *State v. Gebeck*, the defendant's excessive speed—driving 85 miles per hour the wrong way on I-94—and his extreme alcohol concentration—blood alcohol concentration of 0.25—each constituted aggravating factors supporting the upward durational departure from 48 months to 72 months, because these factors made the offense more serious than a "typical" criminal vehicular homicide. 635 N.W.2d 385, 390 (Minn. App. 2001). In *State v. Anderson*, the supreme court affirmed the six-month aggravated departure from 18 to 24 months where the defendant's conduct—driving 70-80 miles per hour through a closed construction zone and his extreme intoxication—"represented a greater than normal danger to the safety of other people." 356 N.W.2d 453, 454-55 (Minn. App. 1984).

The district court could consider appellant's excessive speeding and extreme alcohol concentration as facts that would support the aggravating factor of recklessness. The problem is that the district court relied on each of these factors individually as reasons for the departure and collectively to support the aggravating factor of "extreme recklessness for the safety of others." *See Rourke*, 773 N.W.2d at 919 (explaining that substantial and compelling circumstances for sentencing departure requires factual findings and an explanation as to why those facts create a substantial and compelling reason to depart). The district court cannot rely on the same facts to support *multiple* departure reasons.

The majority cites *Dillon* for the proposition that "blame shifting" can be an aggravating factor and concludes that blame shifting is a valid reason for a departure in this case. The facts of this case do not support that reason. The facts in *Dillon* are as far from this case as the far side of the moon.

In *Dillon,* "Richard Dillon's wife [K.P.] spent three weeks in intensive care following life-saving surgery and another month hospitalized after Dillon struck and kicked her while she lay on the floor." 781 N.W.2d at 592. Dillon's wife suffered: broken ribs; bruising of her head, face, arm and torso; "massive contusion of the vaginal and inner-thigh region"; severe liver laceration; damage to her large-intestine requiring an ileostomy and a colectomy; "swollen or fractured larynx requiring a tracheostomy"; significant blood loss requiring transfusions; temporary dependence on a respirator and a colostomy bag; and disfiguring scars from surgeries. *Id.* At trial, Dillon had an answer for those injuries. Dillon testified and minimized the force of this attack. *Id.* at 593. He testified that K.P.'s

injuries might have been caused by the police, paramedics or surgeons. *Id.* The district court was not persuaded—and found him guilty of first-degree assault. *Id.*

By contrast, the majority cites Rodman's so-called blame shifting from his testimony:

> After I received the food, I was kind of stumbling out to my car. When I got in the passenger side, [S.M.] was in the driver's side smoking some pot already. As I handed him a burger, he handed me the pipe. I took—took a pretty big hit of it, started eating some fries. A couple minutes later, I felt really lightheaded, really dizzy, sick. My eyes were heavy. Leaned my head against the window. I passed out.

Basically, Rodman said he got into the passenger's side of the car, that he was loaded, passed out and could not remember much. There is some DNA evidence that Rodman was on the driver's side. But, there is no conclusive evidence that he never sat on the passenger's side. DNA evidence cannot prove a negative. The jury's guilty verdict reflects that the jury found his testimony flimsy. So what! A criminal defendant has a constitutional due-process right, as part of a fair trial, to take the stand and testify to his recollection of the events and explain his conduct, even if it does not amount to a complete defense. *See* U.S. Const. amends. V, VI; *see also State v. Reese*, 692 N.W.2d 736, 740 (Minn. 2005). This needs no explanation. In addition, defendants have an absolute right to have penal statutes construed strictly against the state and resolved in favor of the defendant. *State v. Morin*, 736 N.W.2d 691, 697 (Minn. App. 2007), *review denied* (Minn. June 26, 2007); *State v. Estrella*, 700 N.W.2d 496, 501 (Minn. App. 2005), *review denied* (Minn. Nov. 15, 2005); *State v. Edwards*, 589 N.W.2d 807, 811 (Minn. App. 1999), *review*

denied (Minn. May 18, 1999); *State v. Wagner*, 555 N.W.2d 752, 754 (Minn. App. 1996). Here the majority strains interpretation against the defendant and in favor of the state.

Any criminal defense attorney and prosecutor who has had a criminal case load understands the SODDI defense—"some other dude did it." A defendant has an absolute right to take the stand and give his testimony. One of the big-time sacred cows of the Bill of Rights is the Fifth Amendment, U.S. Const. amend. V., a defendant cannot be coerced to testify against himself. This ranges through all federal and state court trials ever since its passage. Here, Rodman is being penalized a substantial number of years in prison—an additional 30 to 40 months—for testifying that he got in the passenger's side of a car while totally wasted and passed out. To me, there is no other word for that but a constitutional violation of the Fifth Amendment. Rodman is being implicitly coerced to testify against himself. His testimony is being used against him to increase his punishment simply because the district court judge did not like his recollection of the facts. Thus, the district court judge is imposing an extra three years in prison because Rodman exercised his right to testify on his own behalf—that he did not do it but someone else might have. Relying on a defendant's testimony as an aggravating factor to increase his sentence is dangerous precedent, further, it puts the courts awash in a sea of constitutional insanity. The Sixth Amendment to the Bill of Rights gives a defendant a right to a fair trial and the assistance of counsel and the right to take the stand on his own behalf. The Fifth Amendment, the coercion amendment, means to me, and I will so categorically state, that the state cannot coerce a defendant into testifying against himself by using his defense to increase his

sentence over and above the presumed sentence if the judge chooses not to believe his testimony.

You cannot compare Rodman's weak, drunken statement about getting into the passenger's side of the car with Dillon's vicious and premediated assault on his wife and his attempt to shift the blame to the medical personnel who saved her life. Rodman has a constitutional right to testify at his own trial on what he recalls. That it may be construed as flimsy, that it may not be believed, is not the test. The same holds true for the prosecution and law enforcement working the case. The state is entitled to charge what they want to charge and what they think they can prove. Even if the charge seems misguided in hindsight—leading to a quick verdict on all counts of not guilty—they still have the right to so charge. Likewise, a defendant has a constitutional right to state his own case. Here, the right to testify on his own behalf was unlawfully chilled by an upward departure because, at sentencing, the judge did not think his defense was worthy. So what! Neither did the jury and for that he will suffer the consequences, properly so, of the *presumed sentence*. Most importantly, Rodman had a right to try.[3]

Let the prosecution assemble their version of the facts and charge what they want to charge. Let the defendant (the Fifth and Sixth Amendments to the Bill of Rights mandate this) assemble his facts and testify to that.

[3] I question the entire rationale behind *Dillon* and "blame shifting" as a legitimate aggravating factor. Even with Dillon's conduct, and his nauseating attempt to shift the blame toward medical personnel, he was on the stand under oath and had an undeniable right to see it his way, no matter how misguided and vicious it turned out to be.

I would reverse and remand for resentencing. Two of the district court's reasons are improper. *See State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003) (reasserting that if "reasons are improper or inadequate and there is insufficient evidence of record to justify the departure, the departure will be reversed"). The district court should examine its own record and declare which of the five aggravating factors it specifically relied upon for the upward departure. If the court states it specifically relied upon all five, so be it. There are appellate courts.