STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1737

State of Minnesota,
Respondent,

vs.

John Bruce Steurer,
Appellant.

Filed October 29, 2018
Affirmed
Smith, John, Judge[*]

Ramsey County District Court
File No. 62-CR-16-8424

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Reilly, Judge; and Smith, John, 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

SMITH, JOHN, Judge

We affirm appellant John Bruce Steurer's conviction for attempted second-degree intentional murder because first-degree assault is not a lesser-included offense of attempted second-degree intentional murder and because aggravating factors support the district court's upward-departure sentence.

FACTS

D.L., appellant John Bruce Steurer's wife, obtained an order for protection against appellant in September 2016. In early November 2016, D.L. divorced appellant after 23 years of marriage.

On November 23, 2016, appellant parked his pickup truck in the parking lot outside D.L.'s office building in North St. Paul and walked inside. Appellant cradled a shotgun in his arm and asked D.L. whether she had "any last words." D.L. tried to get away from appellant. After a brief struggle, D.L. broke away from appellant and ran down the stairs of her office. Appellant chased her and shot her before she made it to the bottom of the stairs. D.L. sustained gunshot wounds to the back of her left arm and on her left side. In all, 28 shotgun BBs went into D.L.'s body.

D.L. continued down the stairs and exited through a door at the bottom of the stairway. She shut the door behind her and leaned against it, trying to keep it shut. Appellant broke through the door and attacked D.L. Appellant punched her in the face and hit her head against the floor. Appellant hit D.L. in the head with the butt of his shotgun. D.L. managed to escape and called 911. One of D.L.'s coworkers also called 911. He

reported the shooting. Police arrived at D.L.'s office building and found spent shotgun wads, a fired shotgun shell, and an unfired shell that "apparently malfunctioned."

Later that afternoon, appellant made two phone calls, one to his mother and the other to D.L. Appellant told his mother what had happened earlier that afternoon and explained that he did not intend to kill D.L., just make her feel "like he felt," a man who "had nothing left." He also said that he would kill himself once the police stopped him. Appellant's mother called 911 and reported that appellant had shot D.L. "[i]n the back of the head." She also told police that appellant was at Bunker Park and planned to kill himself. Appellant left a voicemail on D.L.'s phone, saying, "Hey [D.L.]. Sorry I had to do that to ya. But, [I] can't have ya being with some other guy, so that's what I had to do. Bye."

Police found appellant in Bunker Hills Park in the city of Coon Rapids. Appellant had shot himself in the head with a shotgun, which police found inside appellant's pickup truck. Police also found notes that appellant had written to the police and to his parents. Paramedics transported him to the hospital.

The state charged appellant with attempted second-degree intentional murder, in violation of Minn. Stat. § 609.19, subd. 1(1) (2016). The case was tried to a jury over four days in May 2017. The state called nine witnesses, including the 911 dispatcher, D.L., D.L.'s coworker who called 911, and four police officers who responded to the incident. Appellant testified and called three witnesses, his mother and father, and a police detective.

Appellant testified to the extent he could remember the incident. Appellant testified that he parked next to D.L.'s vehicle in the parking lot of her work, entered the building, and "put the gun right alongside of her shoulder." Appellant testified that he shot D.L.

when she ran down the stairs. Appellant testified that he was angry with D.L. for cheating on him before they "were even done be[ing] married" and that he "didn't want to hurt her whatsoever," just "make her pissed off" and "scare her." Appellant further testified that he "could have do[ne] a lot worse." He continued, "I didn't want to shoot her in the head or anything because she has two kids, granddaughter, so I didn't want to do that." Appellant also testified that, when he shot himself, he intended to end his life.

Appellant requested that the district court instruct the jury on first-degree assault as a lesser-included offense of attempted second-degree intentional murder. Appellant argued that the "elements are similar between attempted murder and first degree assault," that "the evidence would reasonably support a conviction of the lesser degree [offense]," and that "a finding of not guilty of the greater offense would be justified." The state opposed appellant's motion arguing that, although first-degree assault is a lesser offense, it is not a lesser-included offense of attempted second-degree intentional murder. The district court agreed with the state and denied appellant's motion. The district court only instructed the jury on the charged offense.

The jury found appellant guilty of attempted second-degree intentional murder. The jury also found aggravating facts by answering four *Blakely* questions on a special verdict form. The jury found that appellant violated an existing harassment restraining order (HRO), struck D.L. in the face with the butt of the shotgun after shooting her, punched D.L. in the face after shooting her, and did not show remorse.

At sentencing, the state moved for an upward-durational-departure sentence. The state argued that violation of an HRO is an independent aggravating factor supporting a

departure and that the remaining facts "indicate particular cruelty" and support a departure. Appellant requested that the district court adopt only the first *Blakely* finding and impose a guidelines sentence. The district court found substantial and compelling reasons for an upward departure and imposed a 240-month sentence.

D E C I S I O N

I. Lesser-included-offense instruction

Appellant argues that the district court's failure to give the jury a lesser-included-offense instruction on first-degree assault prejudiced his defense because he could not fully present his theory of the case.

It is "the trial court's duty to instruct when necessary" and to determine "whether a lesser-included offense instruction should be given." *State v. Dahlin*, 695 N.W.2d 588, 594 (Minn. 2005). To do so, district courts "view the evidence in the light most favorable to the party requesting the instruction," *id.* at 595, 597, and determine whether "(1) the lesser offense is included in the charged offense, (2) the evidence provides a rational basis for acquitting the defendant of the offense charged, and (3) the evidence provides a rational basis for convicting the defendant of the lesser-included offense," *State v. Zumberge*, 888 N.W.2d 688, 697 (Minn. 2017).

We apply an abuse-of-discretion standard of review to a district court's denial of a request for a lesser-included-offense instruction. *Dahlin*, 695 N.W.2d at 597. A trial court abuses its discretion if it denies an instruction "when evidence exists to support the giving of the instruction." *State v. Hannon*, 703 N.W.2d 498, 510 (Minn. 2005) (quoting *Dahlin*, 695 N.W.2d at 598). Even if a district court abuses its discretion by failing to give an

instruction, this court will not reverse a conviction unless the defendant was prejudiced. *Dahlin*, 695 N.W.2d at 598-99. "A defendant is prejudiced when the jury may have convicted the defendant of only the lesser offense had the lesser-included-offense instruction been given." *Zumberge*, 888 N.W.2d at 697 (quoting *Troxel v. State*, 875 N.W.2d 302, 310 (Minn. 2016)).

"An included offense includes a lesser degree of the same crime." *Dahlin* at 695 N.W.2d at 597; *see* Minn. Stat. § 609.04, subd. 1 (2016) (allowing defendant to be "convicted of either the crime charged or an included offense, but not both"). A lesser-included offense also is "an attempt to commit a lesser degree of the same crime" or "a crime necessarily proved if the crime charged were proved." *State v. Gisege*, 561 N.W.2d 152, 156 (Minn. 1997) (quoting Minn. Stat. § 609.04, subd. 1 (1996)).

To determine whether one offense necessarily is proved by the proof of the charged offense, we look at the statutory definitions of the offenses. *Id.* Here, the charged offense was attempted second-degree murder. When a person, "with intent to commit [murder], does an act which is a substantial step toward, and more than preparation for, the commission of [murder]," the person commits attempted second-degree murder. Minn. Stat. § 609.17, subd. 1 (2016). The necessary mens rea for attempted second-degree intentional murder is "intent to effect the death of that person . . . without premeditation." Minn. Stat. § 609.19, subd. 1(1).

Appellant argues that the district court erred by failing to instruct the jury on the lesser offense of first-degree assault. A conviction of first-degree assault requires a showing that a defendant assaulted another person and inflicted great bodily harm. Minn.

Stat. § 609.221, subd. 1 (2016). Because first-degree assault "includes 'great bodily harm' as a necessary element[,] . . . the state does not necessarily prove first-degree assault by proving . . . attempted second-degree murder because these two crimes do not require proof of bodily harm." *Gisege*, 561 N.W.2d at 156 (quoting Minn. Stat. § 609.221 (1996)). Indeed, "first-degree assault is not a lesser degree of attempted murder," or is it a lesser-included offense of attempted second-degree murder. *Id.*

Here, the district court denied appellant's motion for a lesser-included-offense instruction on first-degree assault and instructed the jury only on attempted second-degree intentional murder. *See* Minn. Stat. § 609.04, subd. 1. The district court correctly found that, although first-degree assault is a lesser offense than attempted second-degree intentional murder, it is not a lesser-included offense. *See Gisege*, 561 N.W.2d at 156.

Appellant cites *State v. Flowers*, 788 N.W.2d 120 (Minn. 2010), for the proposition that a district court should instruct the jury on a lesser, non-included offense if it is the defendant's theory of the case. In *Flowers*, however, the supreme court declined to decide "whether the prohibition on lesser-but-nonincluded-offense instructions articulated in *Gisege* bars a defendant from instructing the jury on his theory of defense when his defense is a lesser but nonincluded crime." *Id.* at 133. Even if appellant's theory of the case is inconsistent with the state's theory, the state did not charge appellant with the lesser, non-included offense of assault. Therefore, even if appellant could have discussed his theory with the jury, the district court did not have authority to instruct the jury on a lesser but non-included offense. *See id.*

Because first-degree assault is not a lesser-included offense of attempted second-degree murder, the district court did not abuse its discretion in denying appellant's motion for a lesser-but non-included-offense instruction.

II. Upward-durational-departure sentence

Appellant argues that the district court abused its discretion by upwardly departing from the guidelines sentence and by relying on the four aggravating facts found by the jury.

A district court "can exercise its discretion [in sentencing] to depart from the guidelines *only if* aggravating or mitigating circumstances are present, and those circumstances provide a substantial and compelling reason not to impose a guidelines sentence." *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotations omitted); *see* Minn. Sent. Guidelines 2.D.1 (2016). "Substantial and compelling" circumstances are those that demonstrate "that the defendant's conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question." *Tucker v. State*, 799 N.W.2d 583, 586 (Minn. 2011) (emphasis omitted) (quotation omitted).

Whether such reasons or aggravating factors exist are questions of fact for the sentencing jury. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). "The reasons used for departing must not themselves be elements of the underlying crime." *State v. Blanche*, 696 N.W.2d 351, 378-79 (Minn. 2005). In relying on aggravating factors, the district court must provide written reasons that specify the substantial and compelling nature of the circumstances that justify the departure. *Id.* at 379. "We review a district court's decision to depart from the presumptive guidelines

sentence for an abuse of discretion." *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). "A district court abuses its discretion when its reasons for departure are legally impermissible and insufficient evidence in the record justifies the departure." *Id*.

Here, the district court upwardly departed from a presumptive sentence in the range of 130-183 months and imposed a 240-month sentence. Minn. Sent. Guidelines 2.G.2 & 4.A (2016). The district court relied on the jury's findings of aggravating facts. The district court's reasons for departing can be divided into three: appellant violated an HRO, he committed the charged offense with particular cruelty, and he lacked remorse. Although "a single aggravating factor may justify a departure," *Dillon*, 781 N.W.2d at 599, we address each of these reasons in turn.

A. HRO violation

Appellant argues that his violation of a restraining order, by itself, cannot support the scope of the district court's departure. The state argues that this ground supports the upward departure for two reasons: (1) the violation of an existing HRO, by itself, is sufficient to justify a departure; and (2) the district court acted within its discretion to upwardly depart to a sentence less than double the presumptive term.

The "[v]iolation of a restraining order is a valid reason for an upward departure." *State v. Coley*, 468 N.W.2d 552, 556 (Minn. App. 1991). Here, the jury found that appellant violated an existing HRO at the time he committed the charged offense. The district court adopted this finding and noted that appellant "totally ignored court orders to

leave [D.L] alone." The district court did not abuse its discretion by adopting this finding and upwardly departing on this ground.

B. Particular cruelty

Appellant argues that the jury's second and third special-verdict answers—that he punched D.L. in the face and hit D.L. in the face with the butt of his shotgun after already shooting her—related to whether he intended to kill D.L., an element of the offense of conviction that cannot be relied upon as a ground for departure.

A district court may impose an upward-departure sentence if "[t]he victim was treated with particular cruelty for which the individual offender should be held responsible." Minn. Sent. Guidelines 2.D.3.b.(2) (2016). Particular cruelty "involves the gratuitous infliction of pain and cruelty of a kind not usually associated with the commission of the offense in question." *State v. Rourke*, 773 N.W.2d 913, 922 (Minn. 2009) (quotations omitted).

Here, the district court asked the jury two specific factual questions in determining that appellant committed the charged offense with particular cruelty. The jury answered both affirmatively. The district court adopted the jury's findings and the district court relied on them in sentencing.

The jury's findings that appellant punched D.L. with his fist and beat D.L. with the butt of his shotgun after shooting her are not themselves elements of the charged crime but demonstrate appellant's particular cruelty toward D.L. After shooting D.L., as she ran down the stairway, appellant pursued her and found her trying to barricade herself behind a door at the end of the stairs. Once appellant broke down the door, he repeatedly beat

D.L. in the face with his fist and the butt of his shotgun. Appellant's conduct after breaking down the door demonstrates particular cruelty because he gratuitously inflicted pain and injury on D.L. to make her feel "like he felt." *See Rourke*, 773 N.W.2d at 922. We note that if D.L. had not managed to escape from appellant and run back inside the building, she "could very well have been killed." *See State v. Joslin*, 406 N.W.2d 99, 100 (Minn. App. 1987), *review denied* (Minn. Jun. 30, 1987) (affirming district court's upward-departure sentence on conviction of attempted second-degree murder, in part, because defendant pursued victim after throwing victim to the ground, choking her, and stabbing her).

Record evidence supports the jury's findings that appellant punched D.L. in the face with his fist, and hit her in the face with the butt of his shotgun. These facts support the district court's determination that appellant acted with particular cruelty and the district court did not abuse its discretion in upwardly departing on this ground.

C. Lack of remorse

Appellant argues that, in departing from the sentencing guidelines, the district court improperly relied on appellant's exercise of his constitutional right to testify by asking the jury whether appellant's testimony showed a lack of remorse.

A defendant's lack of remorse may be a reason to depart from the presumptive sentence. *See State v. Griller*, 583 N.W.2d 736, 744 (Minn. 1998); *State v. Folkers*, 581 N.W.2d 321, 327 (Minn. 1998). A defendant's lack of remorse can "relate back and be considered as evidence bearing on a determination of the cruelty or seriousness of the

conduct on which the conviction was based." *Solberg*, 882 N.W.2d at 625 (quotation omitted), *see Dillon*, 781 N.W.2d at 599-600.

The district court did not determine the severity of appellant's sentence based on whether he "exercised constitutional rights during the adjudication process." Minn. Sent. Guidelines cmt 2.D.202 (2016); *see* Minn. Sent. Guidelines 2.D.2.e. (2016). Rather, the district court asked the jury to consider appellant's testimony and determine whether it reflected a lack of remorse. The district court adopted the jury's finding that appellant's testimony reflected a lack of remorse and considered appellant's lack of remorse as relating back to the cruelty of his conduct.

Record evidence supports the district court's explanation that appellant lacked remorse because he "left her to bleed to death alone in a warehouse" and "caused this woman lasting harm." Appellant did not help D.L. by trying to stop the bleeding or calling 911. Instead, appellant called D.L. to say, "Sorry I had to do that to ya," and fled to a park where he attempted suicide. The record supports a finding that appellant's lack of remorse related back to the cruelty of his conduct. The district court did not abuse its discretion in adopting the jury's finding that appellant lacked remorse and upwardly departing on this ground.

In sum, the district court did not err in denying appellant's motion for a lesser-included-offense instruction or abuse its discretion in imposing an upward-durational-departure sentence.

Affirmed.