STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0224

State of Minnesota,
Respondent,

vs.

Cyrus Noel Trevino,
Appellant.

Filed December 10, 2018
Affirmed
Larkin, Judge

Steele County District Court
File No. 74-CR-16-1392

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Daniel McIntosh, Steele County Attorney, Owatonna, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Amy Lawler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Reyes, Judge.

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

LARKIN, Judge

Appellant challenges his sentence for intentional second-degree murder, arguing that it should be reduced because he was less culpable than his codefendant, who was convicted of a lesser offense and received a lower sentence. Because the district court did not abuse its discretion by imposing a presumptive sentence, we affirm.

FACTS

On June 25, 2016, R.J. was driven to a remote area, his hands were bound, and he was shot multiple times at close range. The shooting was motivated by the mistaken belief that R.J. was a "snitch."

The state accused appellant Cyrus Noel Trevino and G.B. of committing the murder and charged them with multiple offenses, including premeditated first-degree murder, first-degree murder while committing a felony, intentional second-degree murder, unintentional second-degree murder while committing a felony, and possession of a firearm by a prohibited person.

G.B. and Trevino resolved their cases pursuant to plea agreements with the state. G.B. pleaded guilty to unintentional second-degree murder, and the district court sentenced him to serve a 150-month prison term.[1]

Trevino pleaded guilty to intentional second-degree murder and agreed to serve a presumptive prison sentence of 350 to 391 months. At sentencing, Trevino argued for a

[1] Although the length of G.B.'s sentence is not of record in this appeal, it is undisputed that he received a 150-month prison sentence.

sentence of 350 months. The state argued for a sentence of 390 months. The district court considered the arguments of counsel, a presentence investigation report, and victim-impact statements, and ordered Trevino to serve 391 months in prison.

This appeal follows, in which Trevino challenges his sentence.

D E C I S I O N

The Minnesota Sentencing Guidelines prescribe "a sentence or range of sentences that is 'presumed to be appropriate.'" *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quoting Minn. Sent. Guidelines 2.D.1). The sentencing guidelines grid "denote[s] the discretionary range within which a court may sentence without the sentence being deemed a departure." Minn. Sent. Guidelines 4.A (Supp. 2015). The district court is not required to provide reasons supporting any decision to impose a sentence within the presumptive range. *State v. Curtiss*, 353 N.W.2d 262, 263 (Minn. App. 1984).

> Sentences imposed by the district court are reviewed for abuse of discretion. This court will not generally review a district court's exercise of its discretion to sentence a defendant when the sentence imposed is within the presumptive guidelines range. Presumptive sentences are seldom overturned. Only in a rare case will a reviewing court reverse imposition of a presumptive sentence. This court will generally not exercise its authority to modify a sentence within the presumptive range absent compelling circumstances.

State v. Delk, 781 N.W.2d 426, 428 (Minn. App. 2010) (quotations and citations omitted), *review denied* (Minn. July 20, 2010).

Trevino contends that his "sentence should be reduced because he was less culpable than his codefendant, but [he] received a much higher sentence." He acknowledges that an appellate court generally will not interfere with sentences that are within the

presumptive sentencing range, but he notes that an appellate court may review a sentence to "determine whether the sentence is . . . unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact." Minn. Stat. § 244.11, subd. 2(b) (2016). Trevino argues that "compelling circumstances may render a sentence within the presumptive range unreasonable or inappropriate" and concludes that his sentence is unreasonable or inappropriate because it is more than twice as long as G.B.'s.

The state argues that this court should not consider Trevino's sentencing argument because he did not provide a record to support his claim that he is no more culpable than G.B. The state's argument has merit. As support for his argument, Trevino relies on purported witness statements that are not of record in this appeal. *See* Minn. R. Civ. App. P. 110.01 ("The documents filed in the [district] court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases."). Because Trevino pleaded guilty, the case was not tried, and a fulsome evidentiary record regarding each man's level of culpability was not developed. Moreover, Trevino recognizes that the evidence regarding who fired the lethal shots was disputed.

The district court would have been the appropriate place to develop a factual record regarding Trevino's and G.B.'s relative culpability. *See Michaels v. First USA Title, LLC*, 844 N.W.2d 528, 532 (Minn. App. 2014) ("Because we are not a fact-finding court, issues brought to us on review must have been identified, argued fully, and entered into the record at the district court level."); *see also State v. Colvin*, 645 N.W.2d 449, 453 (Minn. 2002) (stating that appellate courts "have no . . . business finding facts"). Yet, Trevino did not raise the sentencing-disparity issue in district court. Nonetheless, in the interest of

thorough review, we will assume that Trevino and G.B. are equally culpable—even though they were convicted of different offenses—for the purpose of our legal analysis and address Trevino's argument on the merits.

Although caselaw indicates that a sentencing disparity among similarly situated co-offenders may be a basis for sentence reduction, we are aware of only one case in which the supreme court has reduced a sentence on that basis: *State v. McClay*, which Trevino cites.[2] 310 N.W.2d 683, 685-86 (Minn. 1981). However, in that case, the co-offenders were separately convicted of the same offense and each received an upward durational sentencing departure. *Id.* at 684. The supreme court upheld the departures but reduced one of the sentences so that each offender received the same upward departure. *Id.* at 684-85. The supreme court held, "Where two separately tried codefendants with identical criminal history scores are convicted of the same offense based on the same behavioral incident and the basis for departure in the two cases is identical, the extent of the departure should be identical in both cases." *Id.* at 684.

Unlike *McClay*, Trevino and G.B. were not convicted of the same offense: Trevino was convicted of intentional second-degree murder and G.B. was convicted of unintentional second-degree murder. Moreover, Trevino received a presumptive guidelines sentence and there is nothing in the record indicating that G.B. received a

[2] We also note that we are not aware of any case in which this court reduced a sentence based on a sentencing disparity between co-offenders. Indeed, this court has repeatedly stated that "a defendant is not entitled to a reduction in his sentence merely because a codefendant received a lesser sentence." *State v. Olson*, 765 N.W.2d 662, 665 (Minn. App. 2009); *see also State v. Krebsbach*, 524 N.W.2d 17, 19 (Minn. App. 1994), *review denied* (Minn. Jan. 13, 1995); *State v. Starnes*, 396 N.W.2d 676, 681 (Minn. App. 1986).

departure. *See* Minn. Sent. Guidelines 4.A. Under these circumstances, we discern no basis to reduce Trevino's sentence under *McClay*.

Trevino also cites *State v. Vazquez*, in which the supreme court considered an argument that the defendant's sentence "should be reduced to that received by one of his two accomplices" because "one of the purposes of the Sentencing Guidelines is to achieve equity and uniformity in sentencing." 330 N.W.2d 110, 111 (Minn. 1983). Specifically, the defendant argued that he was "no more culpable than his accomplice, who [had] the same criminal history score, and that therefore it [was] unfair and inequitable for him to have to serve a term that [was] twice as long." *Id.*

Although the supreme court recognized that "[it] has discretion in individual cases to modify the sentence of an appealing defendant if that appears to be in the interests of fairness and uniformity," it also stated that "one must bear in mind that equality and fairness in sentencing involve more than comparing the sentence the appealing defendant received with the sentence his accomplices received. It also involves comparing the sentence of the defendant with those of other offenders." *Id.* at 112. The supreme court ultimately refused to exercise its discretion to reduce the defendant's sentence, reasoning as follows:

> Defendant argues that he is no more culpable than his accomplice who, although having the same criminal history score, received a 45-month prison term. We agree with defendant that the conduct of the accomplice was at least as aggravated as defendant's conduct and, if anything, more aggravated than defendant's conduct. But we cannot accept the argument that it necessarily follows that defendant's sentence must be reduced to that of his accomplice. Comparing the sentence of defendant with those of other offenders, we believe that, given his conduct, defendant was not treated relatively harshly. If both defendant's sentence and

> that of his accomplice were before us, the appropriate remedy to the inequity would not be to reduce defendant's sentence but to increase his accomplice's sentence. However, defendant's accomplice pleaded guilty to an amended complaint charging him with aiding defendant and defendant's other accomplice . . . and part of the plea agreement was that the state would not move for aggravation of sentence. Thus, because of the plea agreement, the state was implicitly barred from appealing the [district] court's failure to aggravate the accomplice's sentence. . . . [W]e are left with a choice between affirming defendant's sentence, which is not a relatively harsh sentence when compared with those given other offenders who have committed similar misconduct, and reducing defendant's sentence to that given his equally culpable accomplice, who received a sentence that we believe was too lenient. Reducing defendant's sentence would be to compound the error rather than to limit it.

Id. at 112-13.

Assuming, without deciding, that Trevino's conduct was no more serious than that of G.B., it does not necessarily follow that Trevino's sentence must be reduced just because G.B. received a lower sentence. We must also compare Trevino's sentence with those of other offenders convicted of intentional second-degree murder. *See id*. at 112. Trevino was not treated too harshly compared to such offenders. *See*, *e.g.*, *State v. Parker*, 901 N.W.2d 917, 920 (Minn. 2017) (defendant received sentence of 480 months for intentional second-degree murder); *Miller v. State*, 816 N.W.2d 547, 547-48 (Minn. 2012) (defendant received sentence of 406 months for intentional second-degree murder); *State v. Cross*, 771 N.W.2d 879, 880-81 (Minn. App. 2009) (defendant received sentence of 391 months for intentional second-degree murder), *review denied* (Minn. Nov. 24, 2009).

Trevino complains that the district court "pointed to no reason why [he] should receive a sentence more than double the length of his codefendant, save for the plea

agreements themselves." We do not fault the district court's limited consideration of this issue because Trevino did not raise it in district court. Moreover, in *Vazquez*, the supreme court indicated that disparate sentences for codefendants may be based on a plea agreement. *See* 330 N.W.2d at 112-13 (stating that "because of the plea agreement," the supreme court was "left with a choice between affirming [a] defendant's sentence . . . and reducing [the] defendant's sentence to that given his equally culpable accomplice").

In sum, the caselaw regarding sentencing disparities between co-offenders does not indicate that this is a rare case in which compelling circumstances warrant reversal of the district court's imposition of a presumptive sentence.

Affirmed.