STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0985

State of Minnesota,
Respondent,

vs.

Lee Edward Smith, Jr.,
Appellant.

Filed July 1, 2019
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge

Hennepin County District Court
File No. 27-CR-17-20415

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Rodenberg, Judge; and Reyes, Judge.

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

RODENBERG, Judge

In this direct appeal from his conviction of two counts of sex trafficking of an individual under Minn. Stat. § 609.322, subd. 1a(4) (2016), appellant Lee Edward Smith Jr.

argues that he was denied his constitutional right to confront a witness against him, that the evidence is insufficient to prove one of the counts of conviction, that numerous sentencing errors require resentencing, and that the evidence is insufficient to support an aggravated sentence for particular vulnerability of one of the victims. We hold that appellant's confrontation rights were not violated and that the evidence is sufficient to sustain both counts of the counts of conviction. The district court erred by imposing an aggravated sentence without the required *Blakely* findings and by amending appellant's sentence after the district court no longer had jurisdiction. We therefore affirm the convictions, reverse the district court's sentencing departure, and remand for resentencing.

FACTS

After a jury trial, appellant was convicted of two of three counts of sex trafficking of an individual under Minn. Stat. § 609.322, subd. 1a(4).

The Minneapolis Police Department had received a tip concerning possible prostitution from the relative of a 15-year-old girl. The reporter claimed that someone was using a photo of the girl from her Facebook page on a backpage.com advertisement in the "women looking for men dating section." Police submitted a legal demand to the backpage.com law enforcement support team, which responded with data concerning the ad. Sergeant Snyder identified the email address associated with the ad as tia--@gmail.com. The email address was associated with "a great number of ads." Sergeant Snyder linked the IP address associated with the ad to C.D., who lived at 3**5 Nicollet Avenue South. Using social media, the police record-management system, and official police reports, police were able to connect C.D. to appellant. Sergeant Snyder used

a police software program to exchange text messages with the phone number associated with the ad (target number). Sergeant Snyder testified that, posing as a potential patron, he reached an agreement with the person responding to his text messages for prostitution services. These text messages were later admitted into evidence at trial.

The person texting with Sergeant Snyder instructed him to go to 3**9 Nicollet Avenue South. Sergeant Snyder testified that providing prostitution patrons with an address different than the place of prostitution is a common practice referred to as "staging" to provide a measure of anonymity until the person can decide whether the encounter is a police sting. Sergeant Snyder testified that he drove to the address provided to him. While positioned outside of the house, Sergeant Snyder sent text messages pretending that he could not find the location. Sergeant Snyder observed a young African American female, later identified as J.B., exit the residence at 3**5 Nicollet Avenue and look around. Sergeant Snyder did not observe anyone else walking around the area. Sergeant Snyder texted that he was not sure where he was supposed to go and referred to the woman walking outside of 3**5 Nicollet Avenue. The target number texted back, "That's me." Sergeant Snyder testified that he "could tell that [J.B.] was not the person texting" because he could see that J.B. was not using a phone. According to Sergeant Snyder, it is common for a third party to text on behalf of the woman in these cases.

Sergeant Snyder did not meet with J.B. but instead went to obtain a search warrant and assemble a team to execute the warrant. Sergeant Stanton testified at trial that he assisted Sergeant Snyder. A warrant was obtained. Sergeant Stanton testified that officers observed a man, later identified as K.O., leaving 3**5 Nicollet Avenue. Sergeant Stanton

stopped K.O.'s vehicle at the request of another officer, and turned over K.O. to Sergeant Snyder to be interviewed. K.O. testified that he went to the home at 3**5 Nicollet Avenue for prostitution services. K.O. had visited the home on two prior occasions, paying money for sexual services both times. On that day, K.O. paid $100 to have vaginal sex with a "thin black lady" who appeared to be in her "middle 20s." K.O. recalled seeing another female in the house, who he described as white, possibly in her "upper 20s," with a reddish coloring in her hair. Sergeant Snyder testified that K.O. told him that Cassidy (J.B.) was the woman he paid for sex.

Police executed the search warrant. Sergeant Stanton testified that a "slender, black female, maybe 22 or 23 years old" answered the door and that he observed an older white female in the house. Sergeant Snyder arrested appellant behind the residence. Sergeant Snyder testified that he recognized appellant. Sergeant Snyder testified that he found an iPhone on the seat in the vehicle in which appellant had been sitting. Appellant acknowledged that the phone was his, but he later said that it belonged to someone else. Sergeant Snyder was able to read text messages on appellant's phone from K.O., asking "which one is Megan and which one is Cassidy." Police forensics personnel were unable to recover additional information from the phone found near appellant because of device encryption, and they were unable to verify the phone number associated with the phone.

Sergeant Snyder testified at trial that he found three women at the house—C.D., J.B., and R.J. C.D. was in the vehicle with appellant. The other two women were in the house. Sergeant Snyder described C.D. as an African American, in her early 20s; J.B. as a tall and skinny African American woman; and R.J. as white and probably in her late 30s.

Sergeant Snyder testified that he was able to review the contents of C.D.'s phone, and did not find any of the text messages that he sent to the target phone number. He likewise found no text messages sent from K.O.

Officer Zabel testified at trial that, during a previous prostitution sting operation, officers responded to an online ad, and two females arrived at a hotel room where the undercover officers were stationed and offered sex for money. Officer Zabel testified that appellant had driven the women to the hotel. Officers detained appellant, who arrived at the hotel in the same vehicle as the females.

At trial, the state played a recording of a phone call that appellant made from jail after his arrest but before trial, and provided the jury with a transcript of the call. In the call, appellant speaks to an unidentified female. Appellant refers to the person he is calling as "bro," and immediately says that he cannot have contact with C.D. or he will get charged. Appellant later refers to the other person as "babe" and ends the call with "love you too." Appellant twice says that "white dude got me the most f---ed up" so "you gonna have to tell her to go down there and try to like, like change her . . . you gonna have to tell her like, change her testimony or something. Cuz [sic] they got her like as a victim on my case." Appellant also says that "if them girls don't show up for court, or sh-t like that, it won't, I'm good." Neither C.D., J.B., nor R.J. testified at trial. The prosecutor argued that appellant's statements in this phone call were related to the witnesses' absence.

A forensic nurse examiner for the Sexual Assault Resource Service at Hennepin County Medical Center testified at trial. The nurse conducted an exam of J.B. and testified that, based on her experience and training, J.B. was not functioning at the level of an

ordinary 24-year-old. The nurse testified that J.B. did not know her address or phone number, and would giggle when asked questions. The nurse testified that J.B. said she has sex with older men for money. J.B. told the nurse that her roommate, and her roommate's boyfriend, "Lee," "pimp me out on backpages." J.B. said she had to give appellant all the money she received in exchange for sex. The nurse noticed redness and swelling on J.B.'s external genital region, and J.B. jumped back and said it was very painful when the nurse lightly swabbed her genital area.

The jury found appellant guilty of sex trafficking J.B. and R.J. The jury found appellant not guilty of sex trafficking C.D. The judge later asked the jury to render a *Blakely* verdict concerning J.B., and the jury found that the state proved beyond a reasonable doubt that J.B. lacks the cognitive functioning of a typical 24-year-old person. The district court subsequently found that J.B. was significantly and particularly vulnerable and imposed an upward durational sentence for the conviction resulting from the trafficking of J.B.

This appeal followed.

D E C I S I O N

I. The district court did not violate appellant's constitutional right to confront witnesses against him.

Appellant argues that the district court violated his constitutional right to confront witnesses against him by admitting at trial J.B.'s statements to the forensic nurse.

Whether the admission of evidence violates a criminal defendant's rights under the Confrontation Clause is a question of law that appellate courts review de novo. *Hawes v.*

State, 826 N.W.2d 775, 786 (Minn. 2013). A violation of the Confrontation Clause is subject to the constitutional harmless-error analysis and does not require reversal if the error is harmless beyond a reasonable doubt. *State v. Caulfield*, 722 N.W.2d 304, 314 (Minn. 2006).

The Confrontation Clause provides a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; *see* Minn. Const. art. I, § 6 (containing nearly identical language as the United State Constitution); *see also State v. Hull*, 788 N.W.2d 91, 100 (Minn. 2010) ("We apply an identical analysis under both the state and federal Confrontation Clauses."). In *Crawford v. Washington*, the United States Supreme Court held that the Confrontation Clause prohibits the introduction of out-of-court statements that are testimonial, unless the witness is both unavailable and the defendant had a prior opportunity to cross-examine the witness. 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004). The Supreme Court decided to "leave for another day any effort to spell out a comprehensive definition of 'testimonial'" but explained that, testimonial includes, "at a minimum," prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and police interrogations. *Id.*

The threshold question under *Crawford* is whether the statements at issue are testimonial. *State v. Vang*, 774 N.W.2d 566, 577 (Minn. 2009). A number of decisions from the United States Supreme Court and the Minnesota Supreme Court have expounded on the question of when a statement is testimonial.

In *Michigan v. Bryant*, the Supreme Court explained that the inquiry must consider all of the relevant circumstances to determine whether the primary purpose of the

conversation was to create an out-of-court substitute for trial testimony. 562 U.S. 344, 358, 131 S. Ct. 1143, 1155 (2011). "A statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial." *Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015). Where the primary purpose is not testimonial, the admissibility of a statement is the concern of rules of evidence, not the Confrontation Clause. *Id.* In *Clark*, the Supreme Court considered whether statements to persons other than law enforcement officers are subject to the Confrontation Clause. *Id.* at 2181. The Court stated that, because some statements to persons other than law enforcement could "conceivably raise confrontation concerns," it declined to adopt a categorical rule excluding such statements from the Confrontation Clause's reach. *Id.* But the Court explained that such statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior "are much less likely to be testimonial." *Id.*

The Minnesota Supreme Court has explained that the critical factor in assessing whether a statement is testimonial is whether it was prepared for litigation. *Caulfield*, 722 N.W.2d at 309; *see State v. Scacchetti*, 711 N.W.2d 508, 513 (Minn. 2006) (explaining that whether evidence is testimonial depends largely on "whether either a declarant or government questioner is acting, to a substantial degree, in order to produce a statement for trial" (quotation omitted)). The supreme court has twice considered whether a victim's statements to a medical provider (nurse) were testimonial. *State v. Krasky*, 736 N.W.2d 636 (Minn. 2007); *Scacchetti*, 711 N.W.2d at 514. In both cases, the supreme court considered whether the nurse was a government actor or was instead acting as a proxy for law enforcement. *Krasky*, 736 N.W.2d at 641; *Scacchetti*, 711 N.W.2d at 514.

In *Scacchetti*, the supreme court determined that the nurse was not a government actor, but explained that, even if the nurse was a government actor, the victim's statements to the nurse were not testimonial because the nurse's primary purpose in interviewing and examining the victim was to assess the victim's medical condition. 711 N.W.2d at 514-15 (noting that the record established that the primary purpose in evaluating victims is to determine whether the child has been abused, and if necessary, to connect the child to appropriate services). Moreover, the mere fact that a nurse may testify regarding sexual abuse cases does not transform the medical purpose of an assessment into a prosecutorial purpose. *Id.* at 515. Likewise, in *Krasky*, the supreme court determined that the nurse who conducted an assessment of the victim upon the referral of social services and law enforcement was not acting as a proxy for law enforcement. 736 N.W.2d at 641. It concluded that the primary purpose of the examination was to assess and protect the victim's health and welfare. *Id.* These cases analyze the purpose of the nurse examining a victim as of the time of the examination.

Here, the nurse testified in detail about the examination process. She testified that a specific protocol is employed to ensure that a patient's safety needs are met, and to address psychological trauma, when the nurse suspects sexual exploitation. The nurse testified that the process begins when a nurse gets paged, identifying that someone needs an exam. The patient is asked for consent for the nurse to look at her body and is told she can withhold consent. The nurse then explains that her role as a nurse is to help ensure that the patient's body is safe and healthy, in addition to ensuring that the patient has a safe place to go when she leaves the hospital. The nurse testified that it is important that the

patient understands that the nurse is not an arm of law enforcement and does not work with law enforcement. The examination begins with the nurse obtaining basic demographic information and medical history. The nurse then gets basic vital signs such as blood pressure and heart rate. The nurse next inquires into what happened during the incident and asks follow-up questions to help guide the rest of the exam and inform the nurse as to where on or in the body evidence might be collected. If the victim was exploited, the nurse asks questions specific to exploitation and mandated reporting requirements for the state. After the interview portion of the exam, the nurse has the patient change into a hospital gown for a head-to-toe physical exam. After the complete physical exam, the nurse swabs for any potential evidence on the body where there might be saliva, semen, or sweat based on what the patient reported. The use of a blue light identifies such materials. The process concludes with the nurse advising the patient of follow-up medical concerns, and by involving a social worker to create a safety plan. The nurse testified that each and every step is important for the diagnosis and treatment for the patient.

Appellant argues that the primary purpose of the nurse's work with J.B. was to produce a statement for future prosecution and was therefore testimonial. Appellant asserts that it is particularly significant that there was no ongoing emergency, the interview was initiated by law enforcement, and the nurse elicited statements that were not directly related to medical treatment.

We take these assertions in turn. First, an emergency is not necessary to make an out-of-court statement non-testimonial. Aiding an ongoing emergency may be but one of several circumstances in which statements to law enforcement have a primary purpose that

is not testimonial. *Krasky*, 736 N.W.2d at 643; *accord Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266 (2006). Here, the statements in question were to a nurse in her capacity as such, and whether the situation was emergent is of no consequence.

Second, the fact that the medical examination was initiated by law enforcement delivering the patient to the nurse does not make the patient's statements testimonial. The medical examination was initiated in part by law enforcement in *Krasky*, but the supreme court determined that the primary purpose of the examination was medical. 736 N.W.2d at 642 (holding that, despite a police officer and a child protection worker having "jointly concluded" how best to proceed with the investigation, that fact "does not change our conclusions"). That the nurse in this case may have had a duty to report certain things to police does not change this conclusion. *Cf. Clark*, 135 S. Ct. at 2182-83 (stating that Ohio's mandatory reporting obligations for teachers do not equate teachers to law enforcement).

Third, even if the nurse was eliciting statements not directly related to medical treatment, this does not change the primary purpose of the evaluation. *See Scacchetti*, 711 N.W.2d at 515 ("[E]ven if we were to conclude that [the nurse's] assessments of [the victim] had, as a secondary purpose, the preservation of testimony for trial, [the vicitim's] statement would still not be testimonial."). Moreover, it is evident from the record that the protocol employed by the nurse here was more global in orientation, and not limited to strictly "medical" concerns. The nurse was acting to protect the overall health and welfare of the victim. *See id.* at 515 (noting that the testimony established that the primary purpose in evaluating victims is to determine whether the child has been abused, and, if necessary, to connect the child to appropriate services); *cf. Krasky*, 736 N.W.2d at 642 (recognizing

that the harms of child abuse are not limited to the abused child's physical well-being). The nurse testified that it is important to know the identity of any person taking advantage of the patient to devise a safety plan. If the offender is an intimate partner, the victim may not have a safe environment to which to return and the identity of the offender could change the effect of the injuries and psychological trauma.

Appellant cites to a federal habeas corpus decision holding that it was objectively unreasonable for the Minnesota Supreme Court to conclude that a child's recorded interview by a social worker at the police station was not a testimonial police interrogation. *Bobadilla v. Carlson*, 570 F. Supp. 2d 1098, 1107 (D. Minn. 2008). In affirming the district court, the Eighth Circuit concluded that the child's interview was no different than any other police interrogation. *Bobadilla v. Carlson*, 575 F.3d 785, 791 (8th Cir. 2009).

This case is distinguishable from that one in every important respect—the interview in *Bobadilla* was conducted at the police station, not at a hospital; the purpose of the interview in *Bobadilla* was to confirm allegations of abuse, not to provide medical treatment; and the social worker asked to assist with questioning of the criminal investigation in *Bobadilla* was a surrogate for law enforcement. *Id.* at 791-92. Not so here. This nurse acted independently and was not part of a police investigation.

The primary purpose of the medical examination here was just that—medical. Therefore, the admission of J.B.'s statements to the forensic nurse did not violate appellant's constitutional right to confront witnesses.

II. The evidence is sufficient to establish that appellant engaged in the sex trafficking of R.J.

Appellant argues that the evidence is insufficient to prove beyond a reasonable doubt that appellant engaged in sex trafficking R.J. R.J. did not testify at trial. There was no medical examination testimony concerning R.J. And, unlike the charge relating to J.B., there was no testimony of any person who engaged in sex acts with R.J. for money. The evidence of appellant's trafficking of R.J. is therefore circumstantial.

In a criminal prosecution, the state must prove every element of the crime charged beyond a reasonable doubt. *State v. Jones*, 347 N.W.2d 796, 800 (Minn. 1984). When reviewing a claim of insufficient evidence, we carefully review the record "to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict." *Lapenotiere v. State*, 916 N.W.2d 351, 360 (Minn. 2018) (quotation omitted). When the direct evidence of guilt on a particular element is not alone sufficient to sustain the verdict, appellate courts apply the circumstantial-evidence standard of review.[1] *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). The circumstantial-evidence standard of review entails a two-step analysis. *Harris*, 895 N.W.2d at 598-601. We first identify the circumstances proved, disregarding evidence that is inconsistent with the jury's verdict. *Id.* at 600. Second, we independently consider whether a reasonable inference of non-guilt can be drawn from the

[1] The supreme court has defined circumstantial evidence as "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). "[C]ircumstantial evidence always requires an inferential step to prove a fact that is not required with direct evidence." *Id.*

circumstances proved, viewed as a whole. *Id.* The circumstances proved, "must be consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Id.* at 601.

To convict appellant, the state was required to prove that appellant, acting other than as a prostitute or patron,[2] intentionally engaged in the sex trafficking of an individual. Minn. Stat. § 609.322, subd. 1a(4). "Sex trafficking" is defined by statute as: "(1) receiving, recruiting, enticing, harboring, providing, or obtaining by any means an individual to aid in the prostitution of the individual; or (2) receiving profit or anything of value, knowing or having reason to know it is derived from an act described in clause (1)."[3] Minn. Stat. § 609.321, subd. 7a (2016).

Appellant argues that the state did not provide any direct evidence to prove the offense—R.J. did not testify to facts that would establish the elements—and the state produced no other direct evidence that appellant received, recruited, enticed, harbored, provided, or obtained by any means, an individual to aid in prostitution of R.J. or that he

[2] "Prostitute" is defined as "an individual who engages in prostitution by being hired, offering to be hired, or agreeing to be hired by another individual to engage in sexual penetration or sexual contact." Minn. Stat. § 609.321, subd. 8 (2016). "Patron" is "an individual who engages in prostitution by hiring, offering to hire, or agreeing to hire another individual to engage in sexual penetration or sexual contact." Minn. Stat. § 609.321, subd. 4 (2016).

[3] "Prostitution," also defined by statute, means "hiring, offering to hire, or agreeing to hire another individual to engage in sexual penetration or sexual contact, or being hired, offering to be hired, or agreeing to be hired by another individual to engage in sexual penetration or sexual contact." Minn. Stat. § 609.321, subd. 9 (2016).

received profit or anything of value knowing or having reason to know it was derived from the just-described acts.

We first determine the circumstances proved that are consistent with the jury's verdict. *Harris*, 895 N.W.2d at 598-601. The state proved through the testimony of police officers and K.O. that R.J. was present at the house where sex trafficking was taking place. Sergeant Snyder testified that he read text messages from K.O. on appellant's phone, referring to "Cassidy" and "Megan." Evidence at trial showed that "Cassidy" is J.B., with whom K.O. had sex for money. Under these circumstances, the jury could infer that "Megan" referred to R.J. because she was the only other person in the house when K.O. arrived as a patron. Appellant's recorded jail phone conversation provides additional evidence that appellant engaged in trafficking R.J. The jury could reasonably conclude that appellant was talking to C.D. during that phone conversation (from our reading of the transcript, it seems very likely that appellant was talking to C.D.), was referring to R.J. as "white dude," and was referring to J.B. as "black dude." On the day appellant was provided a copy of the criminal complaint, he said on the recorded phone call that "I just seen everything . . . what both dudes said." Appellant said that "white dude got me the most f---ed up." Appellant told the person on the other end of the phone call to try to get "white dude" to "change *her* testimony. . . . Cuz [sic] they got her like as a victim on my case." (Emphasis added.) Appellant said he would be "good" as long as those "girls" do not show up for court.

Appellant agrees that these circumstances proved are consistent with guilt concerning R.J.'s trafficking, but argues that they are also consistent with a rational

hypothesis other than guilt. A challenge to a verdict "may not rely on mere conjecture" or speculation. *State v. Tscheu*, 758 N.W.2d 849, 858 (Minn. 2008). When the circumstances proved are consistent with guilt, a criminal defendant must point to evidence in the record that is consistent with a rational theory other than guilt for circumstantial evidence to be insufficient to support the verdict. *Id.* Appellant has not done so here. Any alternative hypothesis that R.J. was present for some non-criminal purpose at the home where sex trafficking was occurring would have to be based on speculation and not on any evidence in the record. As discussed, R.J. did not testify. And no witness testified that R.J. was at the address for some social or other reason unrelated to prostitution. To reverse the jury's verdict on this record would require us to postulate as to some other theory that the jury did not find existed. The circumstantial evidence supports the jury's verdict.

III. The jury's *Blakely* findings are insufficient to support an aggravated sentence, and resentencing is necessary.

Appellant and the state agree that the case must be remanded for resentencing.

The sentencing record reflects conflicting information about whether these sentences are concurrent or consecutive and whether the jail credit applies to one or both sentences. The district court also amended the sentence twice after appellant filed a notice of appeal with this court. The filing of a timely and proper appeal suspends the district court's authority to make any order that affects the order or judgment appealed from, although the district court retains jurisdiction as to matters independent of, supplemental to, or collateral to the order or judgment appealed from. Minn. R. Civ. App. P. 108.01, subd. 2; *see Spaeth v. City of Plymouth*, 344 N.W.2d 815, 824 (Minn. 1984). Here,

appellant is challenging his sentence, and the district court no longer had jurisdiction to amend the sentence after appellant appealed.

The parties also agree that the jury's *Blakely* finding is insufficient to support an aggravated sentence. An upward or downward departure must be supported by "substantial and compelling circumstances" showing the offense to be significantly more or less serious than a typical offense. Minn. Sent. Guidelines 2.D.1.c (2016).[4] The sentencing guidelines provide a list of aggravating factors that may properly support an upward departure. Minn. Sent. Guidelines 2.D.3.b (2016). One such aggravating factor is that "[t]he victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, and the offender knew or should have known of this vulnerability." *Id.* The facts necessary to support an upward departure from the presumptive guidelines sentence must be found by a jury or court unless admitted by a defendant. *State v. Shattuck*, 704 N.W.2d 131, 141-42 (Minn. 2005); *see Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 2537 (2004).

Here, the only determination that the jury made was that the state had proved beyond a reasonable doubt that J.B. "lacks the cognitive functioning of a typical 24-year-old person." This finding does not support that appellant knew or should have known of any

[4] It is not clear to us whether the continuing offenses occurred while both the 2016 and 2017 guidelines were applicable, or only 2016. The provisions to which we cite were left unchanged. We cite to the 2016 Sentencing Guidelines, which is when these offenses began.

such vulnerability, and the state concedes as much.[5] Therefore, we reverse the sentence for count II and remand to the district court for further proceedings consistent with *Blakely*.

Affirmed in part, reversed in part, and remanded.

[5] We do not reverse appellant's sentence on the ground that the evidence was insufficient to support the departure. The district court gave proper reasons for appellant's departure. And the jury *could* have found the necessary facts to support the departure on this record. The error here was that the jury was not provided with interrogatories sufficient to find both that the victim was particularly vulnerable and that appellant knew or should have known of the victim's particular vulnerability. Minn. Sent. Guidelines 2.D.3.b.(1) (2016); s*ee Carse v. State*, 778 N.W.2d 361, 372-73 (Minn. App. 2010) (explaining that, because jury did not make specific factual findings, an aggravated sentenced could not be imposed), *review denied* (Minn. Apr. 20, 2010).