STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1677

State of Minnesota,
Respondent,

vs.

Jennifer Lynn Baldwin,
Appellant.

Filed April 18, 2022
Affirmed in part, reversed in part, and remanded
Cochran, Judge

Hennepin County District Court
File No. 27-CR-18-23849

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Reyes, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

COCHRAN, Judge

A jury found appellant guilty of two counts of felony second-degree murder in connection with the death of a nine-month-old child. In this appeal, following postconviction proceedings, appellant argues that she is entitled to a new trial because the

district court abused its discretion by denying her request to postpone the scheduled trial due to the unavailability of an expert witness. In the alternative, she argues that a new trial is required because she received ineffective assistance of trial counsel. Relatedly, she contends that the district court erred by denying her postconviction request for funds to retain an expert witness to support her claim of ineffective assistance of counsel. Finally, appellant argues that her sentence must be reversed because the district court erred by imposing an upward sentencing departure based on factors related to the victim's age when age was an element of the offense.

We first conclude that the district court did not abuse its discretion by denying appellant's pretrial motion for a continuance of the trial. We next conclude that appellant did not meet her burden to demonstrate ineffective assistance of counsel and would not have met her burden even with the proposed expert testimony in postconviction proceedings. Given this conclusion, we decline to address whether the district court erred by denying appellant's request for funds to retain an expert for postconviction proceedings. Finally, we conclude that the district court abused its discretion when it imposed an upward sentencing departure based on the victim's particular vulnerability due to age, because the victim's age is an element of the underlying offense. Accordingly, we affirm in part, reverse in part, and remand to the district court for resentencing.

FACTS

Nine-month-old C.S. tragically died after sustaining a serious head injury on March 15, 2018. On that day, C.S. woke up early at home. C.S.'s father gave him a bottle and put C.S. in bed with his mother before leaving for work around 6:50 a.m. C.S.'s mother

woke up not too long after C.S.'s father left. She planned to drop off C.S. at appellant Jennifer Lynn Baldwin's house later that morning on her way to work. Baldwin regularly took care of C.S. while his parents were at work.

Before going to Baldwin's house, C.S.'s mother arranged to go to a friend's house and for the friend to watch C.S. while C.S.'s mother showered and got ready for work. C.S.'s mother drove to the friend's house, which was only a few minutes away, around 8:45 a.m. Right before leaving for the friend's house, while still in the driveway at home, C.S. vomited in the car—so much that it was dripping through the bottom of the car seat and C.S.'s clothes were wet. C.S.'s mother changed C.S. after arriving at the friend's house, and the friend watched C.S. while his mother showered.

After getting ready for work, C.S.'s mother took C.S. to Baldwin's house. They arrived around 10:25 a.m. C.S. started crying when his mother handed him to Baldwin, which was unusual. C.S.'s mother had to leave for work and left C.S. with Baldwin while he was still crying. Because of C.S.'s unusual response, C.S.'s mother asked his father to pick him up from Baldwin's house early that day.

At 11:39 a.m., Baldwin called C.S.'s mother, saying, "[Y]ou need to get here, [C.S.'s] eyes are rolling back in his head and he won't stop crying." C.S.'s mother told Baldwin to call 911 and that C.S.'s father could get there faster than she could. Baldwin then called C.S.'s father, who also told Baldwin to call 911. Baldwin called 911 at 11:46 a.m. and asked the operator to send an ambulance. Police officers, who were the first to arrive on the scene, saw that C.S. was having trouble breathing, could not hold his

head up, and appeared lethargic and unresponsive. An ambulance arrived at 11:58 a.m. and immediately took C.S. to the hospital.

At the hospital, a CT scan showed that C.S. had suffered a brain injury that caused a hemorrhage—bleeding in the brain. C.S. underwent two emergency surgeries to remove the hemorrhage and reduce the resulting swelling. But subsequent scans showed that C.S.'s chances of survival were "very low." C.S. ultimately passed away on March 20, 2018.

The Hennepin County Medical Examiner's office conducted an autopsy of C.S. following his death. The two doctors who conducted the autopsy found that C.S. had a very severe brain injury. The doctors also noted multiple bruises, including on the left side of C.S.'s head, the back of his right ear, his abdomen, the bicep of each arm, and his buttocks—injuries that were not likely caused by C.S.'s emergency surgeries. Based on the autopsy findings, the medical examiner's office certified the cause of death as blunt force trauma to the head and the manner of death as homicide.

Law enforcement officers interviewed Baldwin on the day C.S. was hospitalized and again on the following day. They conducted a third interview in July. During the third interview, Baldwin admitted for the first time that she had handled C.S. "roughly." And she admitted that she had never handled a child as roughly as she handled C.S. on the day in question. She explained that she had been under significant stress because of issues involving her own children, financial concerns, and a family member's recent attempted suicide. Baldwin also said that she was sleep-deprived and had not taken her ADHD medication that morning. But she denied physically shaking C.S.

In September, respondent State of Minnesota charged Baldwin with two counts of second-degree unintentional murder: one count of second-degree murder while committing third-degree assault involving substantial bodily harm, and one count of second-degree murder while committing third-degree assault of a victim under four. *See* Minn. Stat. §§ 609.19, subd. 2(1), .223, subds. 1, 3 (2016). Baldwin pleaded not guilty, and the district court set a trial date for June 2019.

Pretrial Proceedings

After the district court denied a motion from Baldwin to dismiss the case for lack of probable cause, Baldwin sought an expert witness from the National Autopsy Assay Group (NAA Group) to testify at trial. The NAA Group accepted the case in March 2019, and the district court approved funding for the group's services. On May 24, 2019, Baldwin requested a continuance because an NAA Group forensic expert whom Baldwin expected to call at trial had "recently" been hospitalized. As a result, the expert was unable to complete his forensic analysis and would be unable to testify at trial. Baldwin argued that without the expert's testimony she would not be able to present a complete defense. The state objected to the continuance request. After hearing from the parties, the district court denied the request.

Following the denial, Baldwin took additional steps related to expert testimony before the trial started. On May 30, she filed a *Frye-Mack* motion to challenge one of the state's proposed expert witnesses, which the district court denied. On June 3, Baldwin requested funding and a continuance to procure expert assistance from a biomechanical

engineer. The district court denied her request for a continuance but authorized compensation for the expert's services.

Jury Trial and Sentencing

On June 10, 2019, the jury trial began. The state presented testimony from C.S.'s parents, the friend who watched C.S. before his mother dropped him off at Baldwin's home, and four medical professionals: a paramedic who responded to Baldwin's 911 call, the neurosurgeon who operated on C.S., and two doctors from the Hennepin County Medical Examiner's Office who conducted C.S.'s autopsy.

Both of C.S.'s parents and the friend testified that they knew of no incident that could have caused C.S.'s injury before he arrived at Baldwin's house. And they denied noticing any injury to C.S. in their interactions with him on that morning or the night before.

The medical-professional witnesses provided testimony about C.S.'s medical condition, the severity of C.S.'s injuries, and his cause of death. The paramedic who responded to Baldwin's 911 call testified that it was immediately clear that C.S. needed to be taken to the hospital because he was "very pale, limp, and did not appear to be responding appropriately." The paramedic also noted that C.S. suffered from a seizure on the way to the hospital. The neurosurgeon testified that a CT scan done at the hospital showed that C.S. had a very large brain hemorrhage. The two doctors who conducted C.S.'s autopsy testified about the autopsy results.

The medical-professional witnesses also testified about the possible timing of C.S.'s injuries—the main issue disputed at trial—and the medical concept of "compensation."

The paramedic who responded to Baldwin's 911 call testified that she could not tell when C.S. had been injured. She also testified that children will "compensate," or not show symptoms, after they have been injured for longer periods of time than adults will—"meaning you won't really know they're sick until . . . there is something obviously wrong . . . [so] the time that you have before they are in a fatalistic place is short." One of the doctors who conducted C.S.'s autopsy also testified that individuals can "compensate" for a period of time following a brain injury before they show symptoms. The other testified that C.S.'s injury likely occurred "hours" before C.S. was admitted to the hospital. Finally, the neurosurgeon who performed C.S.'s surgeries testified that the trauma that caused C.S.'s brain injury must have happened "within a few hours of [C.S.] presenting to the hospital." The neurosurgeon confirmed that "children[] can accommodate certain areas of bleeding . . . in their brain for a certain amount of time" before "everything reaches a point where they can't accommodate those anymore and that's where they start becoming symptomatic." He testified that a child with C.S.'s injury would not be able to crawl, grab toys, or otherwise act like a normal nine-month-old. On cross-examination, he testified that it was "possible but unlikely" that it could have taken up to three hours for C.S. to show symptoms of his injury. He thought it more likely that the injury had occurred sooner than three hours before C.S. showed symptoms.

The state also presented the expert testimony of a child-abuse pediatrician. The child-abuse pediatrician had not treated C.S. personally but reviewed C.S.'s medical records and talked to investigators. He testified that C.S.'s injuries were caused by abusive head trauma, also known as shaken baby syndrome. He explained that his opinion was

based on the evidence of severe trauma to C.S.'s brain, bruising on the head, and the fact that no history of trauma or accident could explain C.S.'s injuries. He further testified that, given the severity of the injuries, C.S. would have shown symptoms within "minutes" of sustaining them—"the trauma and the onset of symptoms would be expected to be very tightly tied together." And it was "[h]ighly likely, most likely," that C.S. was injured by the person who was with him during the hour and 20 minutes before he became unresponsive. On cross-examination, the child-abuse pediatrician did confirm that vomiting, lethargy, and agitation can be early symptoms of mild bleeding in the brain.

The defense rested without calling any witnesses. During closing arguments, Baldwin's attorney argued that C.S. could have been injured a few hours before his symptoms started and could have been compensating—not yet showing symptoms. Baldwin's attorney noted that C.S. vomited in the morning before arriving at Baldwin's house and that vomiting is a sign of a head injury. He also emphasized that the only medical witness who completely ruled out a longer possible timeline, the child-abuse pediatrician, did not actually treat C.S.

The jury found Baldwin guilty on both counts of second-degree unintentional felony murder. Following *Blakely* proceedings, the jury returned special-verdict forms finding that the state proved the following beyond a reasonable doubt: C.S. was nine months old at the time he was injured, he was unable to defend himself as a result of his age, he was unable to call for help, and he was unable to flee from the assault. The jury further found that Baldwin was aware of each of these circumstances, that she was C.S.'s caregiver at the time of the assault, and that she failed to call 911 immediately after assaulting C.S.

The district court imposed an executed sentence of 255 months, an upward durational departure, on count two—second-degree unintentional murder while committing third-degree felony assault of a victim under four. *See* Minn. Stat. §§ 609.19, subd. 2(1), .223, subd. 3. The district court explained that the upward departure was based on the jury's *Blakely* findings.

Baldwin filed a timely notice of appeal. She then filed a motion, which this court granted, to stay the appeal and remand to the district court for postconviction proceedings.

Postconviction Proceedings

Following the stay of the appeal, Baldwin petitioned for postconviction relief on the ground of ineffective assistance of counsel. She argued that "her attorneys' failure to call an expert witness to refute key aspects of the state's theory" constituted deficient performance because "[t]he case against [her] relied almost entirely on expert testimony." She also argued that this deficient performance prejudiced her because a defense expert could have effectively refuted the child-abuse pediatrician's damaging testimony that C.S.'s injuries could only have occurred right before he became symptomatic.

Baldwin also filed an ex parte application for funding under Minn. Stat. § 611.21 (2020) to consult with a forensic pathologist who could support Baldwin's postconviction petition as an expert witness. The district court denied Baldwin's request, concluding that the services requested did not "meet the statutory standard."

Following an evidentiary hearing, the district court denied Baldwin's postconviction petition on the basis that Baldwin failed to demonstrate ineffective assistance of counsel. We then reinstated this appeal.

DECISION

I. The district court did not abuse its discretion by denying Baldwin's motion for a continuance.

Baldwin first argues that the district court abused its discretion by denying her pretrial motion for a continuance due to the unavailability of a key expert witness. "The granting of a continuance is a matter within the discretion of the district court and its ruling will not be reversed absent a showing of clear abuse of discretion." *State v. Smith*, 932 N.W.2d 257, 268 (Minn. 2019) (quotation omitted). "We, therefore, must determine whether the defendant was so prejudiced in preparing or presenting a defense as to materially affect the outcome of the trial." *Id.* In making this determination, we consider the circumstances surrounding the requested continuance. *State v. Miller*, 488 N.W.2d 235, 239 (Minn. 1992). Relevant considerations include the reason for the request, any potential prejudice to the state a continuance would cause, the number of continuances already granted to the moving party, and the timing of the request. *See State v. Lloyd*, 345 N.W.2d 240, 247 (Minn. 1984) (concluding that district court properly denied request when defendant explained that unnamed witnesses might be willing to testify but provided no information about their testimony or assurances that they would testify); *State v. Beveridge*, 277 N.W.2d 198, 199 (Minn. 1979) (concluding that district court properly denied request where state may have been prejudiced by loss of witness testimony and defendant had already received five continuances); *State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998) (concluding that district court properly denied request to substitute counsel on the first day of trial). But the central question remains whether the

defendant was so prejudiced as to materially affect the outcome of the trial. *See Smith*, 932 N.W.2d at 268.

Baldwin argues that the following circumstances before the district court weighed in favor of granting a continuance: Baldwin had good reason for the request because her expert witness had been hospitalized, the prosecutor did not specify any prejudice to the state, Baldwin had requested no other continuances, and the request was timely filed. Baldwin also argues that she was prejudiced by the district court's denial of her request because it prevented her attorneys from preparing an adequate defense. She argues specifically that if the defense had received an expert's assistance—in preparing for trial and cross-examination of the state's witnesses and in helping to educate the jury on the debate in the scientific community about abusive-head-trauma diagnoses—there is a reasonable probability that the jury would have acquitted her. We are not persuaded.

First, we discern no abuse of discretion in the district court's consideration of the circumstances surrounding Baldwin's continuance request. The district court denied Baldwin's request for a continuance after a thoughtful discussion of the interests at stake, including Baldwin's right to present a complete defense. The district court concluded that it did not have enough facts before it to grant the request. The district court emphasized that the length of the continuance Baldwin requested was open-ended, and Baldwin did not adequately explain why another expert from the NAA Group could not testify—particularly when the expert group had more than two-months' notice of the trial date.

Further, Baldwin was able to make her central arguments at trial. Three of the medical professionals who testified for the state acknowledged the possibility of a longer

time period between the moment C.S. sustained his injuries and the onset of his symptoms. Four of them testified that infants can compensate for injuries for a period of time before showing signs of medical distress. The jury heard all of this testimony, which supported the defense's theory that a different caretaker was responsible for C.S.'s injuries, and still found Baldwin guilty. Though Baldwin denied shaking C.S., she admitted to handling him "roughly," and no other witnesses suggested another possible explanation for his injuries.

Finally, Baldwin has presented no evidence that the NAA Group expert, who was hospitalized, would have provided testimony that would have materially affected the outcome of the trial if he had been available to testify. We therefore conclude that the record fails to demonstrate that Baldwin was so prejudiced in preparing or presenting a defense as to materially affect the outcome of the trial. The district court did not clearly abuse its discretion by denying Baldwin's pretrial motion for a continuance based on her expert's unavailability.

II. The district court did not abuse its discretion by denying postconviction relief because Baldwin received effective assistance of counsel.

Baldwin argues in the alternative that the district court erred when it denied her postconviction request for a new trial based on ineffective assistance of counsel. She contends that her convictions should be reversed because her right to effective assistance of counsel was impaired by her attorneys' failure to obtain expert-witness testimony.

We review a district court's denial of postconviction relief for an abuse of discretion and any "embedded issues of law" de novo. *Petersen v. State*, 937 N.W.2d 136, 139 (Minn. 2019). A district court abuses its discretion when it bases a ruling on an erroneous

view of the law or makes clearly erroneous factual findings. *Id.* We therefore review factual findings made by a district court in deciding an ineffective-assistance-of-counsel claim for clear error. *Pearson v. State*, 891 N.W.2d 590, 600 (Minn. 2017). But we review a district court's analysis of the "performance and prejudice components of the ineffectiveness inquiry" de novo because they involve mixed questions of law and fact. *Id.* (quotation omitted).

We analyze ineffective-assistance-of-counsel claims under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017). To prevail on such a claim, an appellant must demonstrate that (1) "counsel's performance fell below an objective standard of reasonableness," and (2) a reasonable probability exists that the outcome would have been different but for counsel's errors. *Peltier v. State*, 946 N.W.2d 369, 372 (Minn. 2020) (quotation omitted). We need not address both prongs if one is determinative. *Id.* Because the first prong is not met in this case, we limit our analysis to that prong.

Under the first prong, we examine whether counsel's "representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. An objective standard of reasonableness is the level of "customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009). There is "a strong presumption that counsel's performance was reasonable." *Swaney v. State*, 882 N.W.2d 207, 217 (Minn. 2016).

Baldwin argues that her attorneys' conduct fell below an objective standard of reasonableness because they failed to call an expert witness to bolster the defense and refute

the state's witnesses. Baldwin points to testimony her witnesses presented at the postconviction hearing to support her claim. Three witnesses testified at the postconviction hearing: Baldwin's main defense attorney, a second attorney who assisted in Baldwin's representation at trial, and a third attorney who testified as an expert on the standard of care for attorneys. Baldwin's main defense attorney discussed the defense's strategy of presenting an expert witness to refute the state's theory that C.S.'s last caregiver must have caused his injuries. This included requesting a continuance when the defense learned that the NAA Group expert would be unavailable to testify at trial. Baldwin's defense attorney testified that, after reviewing the hearing transcript documenting the district court's denial of the continuance request, it seemed clear that the district court was asking for additional information about the nature of the expert's illness and how long of a continuance was needed. The defense attorney testified that he made a mistake by not giving the district court that information and that "having an expert help us prepare the case would have been incredibly important." The other two attorneys also testified that expert testimony was critical to the case. The attorney who assisted with Baldwin's trial representation testified that he could have represented Baldwin more effectively with help from an expert. The standard-of-care expert testified that there was no strategic reason not to provide the information requested by the district court and that, by failing to provide it, Baldwin's attorneys' performance fell below an objective standard of reasonableness.

In its order denying postconviction relief, the district court found that the attorneys' testimony was not credible. The district court found that the testimony of Baldwin's main defense attorney regarding her ineffective-assistance-of-counsel claim was "inconsistent"

and "carefully tailored to benefit [Baldwin's] position while preserving [the attorney's] competency." Specifically, the district court found "not credible" the attorney's testimony that he misunderstood the district court's denial of the continuance motion. The district court also gave little weight to the testimony of the two other attorneys who testified. It noted that the testimony of the expert who addressed the attorneys' standard of care was not credible because the expert's testimony was inconsistent with the expert's own conduct in cases he handled involving child abuse. The district court was also unpersuaded by the third attorney's testimony on the defense's competency because of his lack of experience in criminal trials. The district court ultimately concluded that Baldwin had not met her burden to prove the first prong of the *Strickland* test.[1]

While we recognize Baldwin's right to present a complete defense, we agree with the district court that Baldwin failed to meet the first *Strickland* prong—that her attorneys' representation fell below an objective standard of reasonableness. We reach this conclusion for the following reasons. First, we defer to the district court's credibility findings on the testimony presented at the postconviction hearing and, accordingly, do not interfere with the district court's determination that the testimony was not persuasive. *See Miles v. State*, 840 N.W.2d 195, 201 (Minn. 2013) (stating that "[t]he postconviction court is in the best position to evaluate witness credibility"). Next, other evidence in the record demonstrates that Baldwin's attorneys undertook reasonable efforts to retain and present an expert witness at trial. The record demonstrates that the attorneys contacted the NAA

[1] The district court also concluded that Baldwin had not met her burden to prove the second prong of the *Strickland* test.

Group within a reasonable amount of time given that the original trial strategy had been to pursue a motion to dismiss—the district court denied Baldwin's motion to dismiss in early February 2019, and her attorneys reached out to the NAA Group before the end of March after first contacting another potential expert. Further, the attorneys could not have predicted that the NAA Group expert whom they planned to call at trial would be hospitalized a few weeks before trial. Finally, when the attorneys requested a continuance following the hospitalization of the NAA Group expert, the attorneys appear to have provided the district court with all the information they had at the time. They did not know how long of a continuance would be required or why no one else from the NAA Group could testify, though they had asked for a substitute from the NAA Group. And, when the district court denied the motion for a continuance, they sought and obtained funding for a new type of expert, a biomechanical engineer, but did not ultimately present testimony from that expert at trial.

We are not persuaded otherwise by the case law Baldwin cites to support the argument that her attorneys were ineffective because they failed to present expert testimony at trial. In *Hinton v. Alabama*, a capital murder case, the United States Supreme Court held that defendant's counsel was ineffective for failing to request additional funds to replace an inadequate expert. 571 U.S. 263, 273 (2014). The Supreme Court emphasized that "the core of the prosecution's case was the state experts' conclusion" that bullets found at the scene had been fired from Hinton's gun, and "effectively rebutting that case required a competent expert on the defense side." *Id.* The Supreme Court concluded that counsel's legal error in determining how much state funding was available to the defense to replace

the expert that counsel "knew to be inadequate" constituted deficient performance that resulted in Hinton receiving ineffective assistance of counsel. *Id.* at 274. The Supreme Court's conclusion that the attorney provided ineffective assistance of counsel was therefore based on the attorney's ignorance of a point of law central to his case. Here, by contrast, no error of law prevented Baldwin's attorneys from presenting expert testimony at trial; rather, the attorneys timely requested a continuance once they learned that the expert witness was unavailable. And after the continuance request was denied, they pursued other avenues, such as requesting a *Frye-Mack* hearing and obtaining funding for an expert in another field.

Baldwin also relies on *State v. Beecroft*, 813 N.W.2d 814 (Minn. 2012). Baldwin notes that, in *Beecroft*, the concurrence stated that counsel was ineffective because they failed to assert a due-process violation when state interference prevented them from calling a medical expert at trial. 813 N.W.2d at 857-58 (Anderson, J., concurring). Unlike the deficient performance Baldwin alleges here, the concurrence in *Beecroft* emphasized a legal error, and the expert testimony at issue in that case was precluded by state misconduct rather than the expert's unavailability. Baldwin's reliance on *Beecroft* is therefore misguided.[2]

In sum, given both the strong presumption that counsel's performance was reasonable and the deference owed to the district court's negative credibility determinations, we conclude that Baldwin has failed to demonstrate that her attorneys'

[2] Baldwin also relies on nonbinding case law from other jurisdictions, which we decline to address.

representation fell below an objective standard of reasonableness as required under *Strickland*'s first prong. Because Baldwin has failed to satisfy the first *Strickland* prong, we decline to consider the second *Strickland* prong. We conclude that Baldwin was not deprived of her right to effective assistance of counsel.

III. We need not address whether the district court abused its discretion by denying Baldwin's request for funds to retain an expert in postconviction proceedings.

Baldwin also argues that the district court erred by denying her request for funds to retain an expert to testify in postconviction proceedings under Minn. Stat. § 611.21. She argues that, based on this error, remand is appropriate for further proceedings at which she could introduce favorable expert testimony. This testimony would theoretically have supported the defense's view that presenting expert testimony at trial to refute the state's expert testimony on the timing of C.S.'s injuries could have led to a different outcome—the second *Strickland* prong.

Because we conclude that Baldwin failed to establish the first *Strickland* prong in her ineffective-assistance-of-counsel claim, any error with respect to funding for an expert witness to testify to the second *Strickland* prong in postconviction proceedings would not affect our analysis. Accordingly, it is not necessary to address this argument, and we decline to do so.

IV. The district court abused its discretion by imposing an upward sentencing departure based on the victim's age because it is an element of the offense.

Finally, Baldwin argues that her sentence must be reversed because the district court abused its discretion by imposing an upward durational sentencing departure based on its determination that the victim's age was an aggravating factor. Specifically, Baldwin

argues that basing an upward departure on C.S.'s vulnerability due to his age was erroneous because age is an element of the offense—second-degree unintentional murder while committing felony third-degree assault of a victim under the age of four. *See* Minn. Stat. §§ 609.19, subd. 2(1), .223, subd. 3.

We review a district court's decision to depart from a 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.*

A district court may impose an upward departure from the presumptive guidelines sentence if aggravating factors are present that "provide a substantial and compelling reason" to do so. *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotation omitted). But the reasons for a departure "must not themselves be elements of the underlying crime." *State v. Jones*, 745 N.W.2d 845, 849 (Minn. 2008) (quotation omitted). Therefore, a victim's age is not generally a permissible reason for a departure when age is already an element of the offense, but "in certain cases the youth of the victim, in conjunction with other factors, may justify a departure." *Rairdon v. State*, 557 N.W.2d 318, 327 (Minn. 1996).

Here, the district court based its upward departure of "approximately double the low end of the box" on the aggravating factor that C.S. was particularly vulnerable due to his age and that Baldwin knew or should have known of his vulnerability. *See* Minn. Sent. Guidelines 2.D.3.b(1) (2017) (listing particular vulnerability of a victim as an aggravating factor). The district court referenced the jury's *Blakely* findings in applying the factor of

particular vulnerability. The district court reasoned that, even though the victim's age is an element of second-degree unintentional murder while committing third-degree felony assault of a victim under the age of four, "the aggravating factors still apply" in this case because "[a] nine-month-old is significantly more vulnerable than even . . . a three-year-old toddler."

Baldwin argues that the district court improperly considered C.S.'s age as a basis for departure because the elements of the offense already "account for the vulnerability of a child under four." Baldwin acknowledges that age *may* be a proper consideration as an aggravating factor even when it is an element of the offense, as this court found in *State v. Mohamed*, 779 N.W.2d 93, 98 (Minn. App. 2010), *rev. denied* (Minn. May 18, 2010). In that case, the defendant was convicted of malicious punishment of a four-month-old child under a statute prohibiting malicious punishment of a child under the age of 18. *Mohamed*, 779 N.W.2d at 95, 97. This court concluded that a departure based on the victim's infancy was appropriate "given the broad spectrum of physical development captured in [an] 18-year time span." *Id.* at 98. Baldwin argues that her case does not support a similar departure because there is no similarly broad spectrum of development here—"a nine-month-old is not more vulnerable than a three-year-old to the same extent that an infant is more vulnerable than a seventeen-year-old." We agree.

Baldwin was sentenced on her conviction of second-degree unintentional murder while committing third-degree felony assault of a victim under the age of four. By statute, a person is guilty of unintentional second-degree murder if they (1) "cause the death of a human being," (2) "without intent to effect the death of any person," (3) while committing

a felony offense. Minn. Stat. § 609.19, subd. 2(1). A person is guilty of third-degree felony assault if they "assault[] a victim *under the age of four*, and cause[] bodily harm to the child's head, eyes, or neck, or otherwise cause[] multiple bruises to the body." Minn. Stat. § 609.223, subd. 3 (emphasis added). The underlying statute thus specifically defines this crime as against very young victims rather than all minors in general. And by making the young age of the victim an element of the offense and elevating the severity of third-degree assault to a felony where that element is present, the legislature has demonstrated consideration of the particular vulnerability of children under four years of age. In other words, the legislature has already taken that vulnerability into account, and the victim's age therefore cannot form the basis for an upward sentencing departure.

We are not persuaded otherwise by the state's argument that this case is not meaningfully distinguishable from *Mohamed* and *State v. Turrubiates*, 830 N.W.2d 173, 179-80 (Minn. App. 2013), *rev. denied* (Minn. July 16, 2013) (similarly affirming an upward sentencing departure for a second-degree felony murder conviction based on the victim's particular vulnerability due to their age despite age being an element of the underlying offense—child endangerment resulting in substantial harm to any person under the age of 18, Minn. Stat. §§ 609.378, subd. 1(b)(1), .376, subd. 2 (2010)). Both *Mohamed* and *Turrubiates* involved statutes that defined the underlying offense as against a child under the age of 18. And while there is a difference in the relative development and capability of a nine-month-old and a three-year-old child, that difference does not reflect the same "broad spectrum of physical development" seen in children between the ages of zero and 18. Even a three-year-old cannot meaningfully defend themselves from harm or

seek help, unlike an older child or a teenager. Both *Mohamed* and *Turrubiates* are therefore inapposite here, when the relevant statute defines the underlying offense as against a child under the age of four. Minn. Stat. § 609.223, subd. 3.

The state also relies on *State v. Beard* to support its argument that C.S.'s age may be properly considered as an aggravating factor even though it is an element of the offense. 574 N.W.2d 87 (Minn. App. 1998), *rev. denied* (Minn. Apr. 14, 1998). In *Beard*, which involved a conviction under an earlier version of the same statute at issue here, this court concluded that the vulnerability of the five-month-old victim, along with the defendant's violation of a position of trust as the victim's daycare provider, supported a double upward durational departure. *Id.* at 88. However, the appellant in *Beard* did not challenge her sentence on the same grounds as Baldwin. Instead, she argued that the departure should be reversed "because there are cases of physical abuse of children in which no departure was imposed or at least not challenged on appeal." *Id.* at 92. Because *Beard* involved a challenge on different grounds and did not raise the issue we consider here, *Beard* does not lend us any guidance.

This case is more similar to the more recent case of *Taylor v. State*, 670 N.W.2d 584 (Minn. 2003). In that case, the supreme court held that a three-year-old victim's vulnerability due to age was already taken into account by the legislature in determining the seriousness of the offense of first-degree criminal sexual conduct, which criminalized sexual contact with a person under 13 years of age. *Taylor*, 670 N.W.2d at 589 (discussing conviction under Minn. Stat. § 609.342, subd. 1 (2002), which provides that "[a] person who engages in sexual penetration with another person, or sexual contact with a person

under 13 years of age . . . is guilty of criminal sexual conduct in the first degree"). As a result, the supreme court concluded that the vulnerability of the victim based on age was not an appropriate basis for an upward departure. *Id.* For similar reasons, as discussed above, we reach the same conclusion here.

Because the crime of third-degree assault of a victim under the age of four, Minn. Stat. § 609.223, subd. 3, includes the victim's age as an element of the offense, we conclude that the district court erred by considering C.S.'s vulnerability due to his age as an aggravating factor and, therefore, abused its discretion by departing upward from the presumptive guidelines sentence on that basis.

We therefore affirm the conviction but reverse the sentence and remand to the district court for resentencing.

Affirmed in part, reversed in part, and remanded.