STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0694

State of Minnesota,
Respondent,

vs.

Jordan Latrell Jefferson,
Appellant.

Filed July 18, 2022
Affirmed in part, reversed in part, and remanded
Larkin, Judge

Hennepin County District Court
File No. 27-CR-20-13019

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

Michael O. Freeman, Hennepin County Attorney, Sarah J. Vokes, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Halbrooks, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant challenges his convictions for felony murder and domestic assault, arguing that the district court erred by refusing to admit a witness's out-of-court statements either as substantive or impeachment evidence. Appellant also argues that the district court erred by sentencing him for two crimes that arose from a single behavioral incident and abused its discretion by imposing an upward durational sentencing departure. Because the district court's decision to exclude the out-of-court statements does not constitute reversible error, we affirm the convictions. We also affirm the basis for the upward durational sentencing departure. But because the record does not support imposition of separate sentences where it is unclear whether the underlying offenses arose from a single behavioral incident, we reverse and remand for resentencing consistent with this opinion.

FACTS

The state charged appellant Jordan Latrell Jefferson with second-degree intentional murder, second-degree unintentional murder during the commission of a felony, two counts of felony domestic assault, and aiding an accomplice after the fact. The charges were tried to a jury. The evidence at trial showed that in May 2020, Jefferson left a gathering with two women, BM and OB, after a night of drinking and that the trio got into OB's gray Pontiac. Despite being intoxicated, Jefferson entered the driver's seat; OB was in the passenger seat and BM was in the back seat. Prior to driving away, Jefferson argued with OB and struck her with his hand. Jefferson and OB continued to argue and fight while Jefferson drove. At some point, Jefferson stopped the Pontiac, and OB got out of the car.

Jefferson tried to convince OB to return to the vehicle, but she refused. Jefferson then drove into OB as she walked on the sidewalk. Her body came to rest in the front yard of a residence.

Jefferson got out of the vehicle to assess OB's condition. BM remained in the back seat of the vehicle. Jefferson put OB's body into the back seat of the Pontiac and drove away. However, he quickly crashed the Pontiac, rendering it inoperable. BM and Jefferson left OB in the Pontiac and walked away.

Jefferson called another woman, AR, for a ride. AR arrived in a maroon car and picked up Jefferson and BM. They drove back to the Pontiac and checked on OB. After concluding that OB was deceased, Jefferson, BM, and AR left the scene and went to AR's house. During the drive, Jefferson got angry and struck AR with a closed fist. Jefferson told AR that OB had been hanging out the window, he got in an accident, and she "flew out the window." But he later told AR that he was going to "total" OB's car, OB jumped in front of the car, he was moving too fast to stop, and he hit OB.

BM testified against Jefferson. She said that Jefferson gets "out of character" when he drinks and was "acting crazy that night." She testified that Jefferson and OB got into a heated, violent argument before leaving the gathering in the Pontiac. Jefferson began driving recklessly, and he and OB continued to argue and fight. At some point, OB got out of the car. Jefferson was upset and told BM he was going to "hit the pole," referring to a street sign. He then "blanked out," drove the car "really fast," and "didn't turn." BM testified that Jefferson hit OB and that OB "went under the car." Jefferson told BM he had "f-cked up."

Jefferson testified in his own defense. He claimed that BM was driving the Pontiac when OB was struck and killed.

The defense called JW as a witness. JW lived near the location where OB was hit and gave a statement to police several hours after the crash. Although Jefferson, BM, and OB are Black, JW told the police that an intoxicated White female was driving the "little silver car" at the time of the crash, that she "passed out or something" after the accident, and that the passenger, a man, dragged her out of the car and put her in the back seat. According to JW, the car then drove off. JW told the police that she did not see the man because it was "really dark" outside, but she surmised that he was "probably" Black because of the way he spoke. JW told the police that the White woman's hair was "reddish" and that a maroon car containing the man's "friend" was nearby at the time of the crash.

Soon after her initial statement to the officer, JW provided another statement. She told the police that there was no one on the street or sidewalk at the time of the crash. She gave the police several inconsistent descriptions of the alleged White female driver, stating that the woman had "long white hair"; that the woman had "some red hair, like it was real dark"; and that the woman had white "brushy hair," but it was "real short and stylish."

At trial, JW testified that she did not recall telling the police that a White woman was driving the silver car. The defense did not attempt to impeach JW with her prior statements to the police while she was on the stand. Instead, the day after JW testified, Jefferson moved to introduce JW's prior statements to the police as substantive evidence and for impeachment purposes. Jefferson indicated that he would offer JW's statements through an officer who had interviewed her. The district court denied Jefferson's motion.

The jury found Jefferson not guilty of second-degree intentional murder, guilty of second-degree unintentional murder during the commission of a felony (assault with a dangerous weapon), guilty of both counts of felony domestic assault (against OB and AR), and not guilty of aiding an accomplice in a crime after the fact. By special verdict form, the jury found that Jefferson hit OB with a motor vehicle after she exited the vehicle and left her in a particularly vulnerable state after hitting her.[1]

The district court sentenced Jefferson to 27 months in prison for domestic assault of OB, 360 months for felony murder of OB, and 33 months for domestic assault of AR, with the sentences to be served concurrently. The sentence for felony murder constituted an upward durational departure, which was based on "particular cruelty."

Jefferson appeals.

DECISION

I.

Jefferson contends that the district court violated his right to present a defense by refusing to admit, as substantive evidence under the residual hearsay exception, JW's prior statements that she saw a White woman driving the car involved in the crash.

Due process requires that a defendant be afforded a meaningful opportunity to present a complete defense. *State v. Smith*, 876 N.W.2d 310, 331 (Minn. 2016); *see also* U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. But the right to present a complete defense is not unlimited; a defendant must comply with the rules of evidence. *State v.*

[1] The state had given notice of its intent to seek an upward durational sentencing departure on the ground that the victim was treated with particular cruelty.

Wolf, 605 N.W.2d 381, 384 (Minn. 2000); *State v. Nissalke*, 801 N.W.2d 82, 102 (Minn. 2011).

A district court's evidentiary rulings are generally reviewed for an abuse of discretion. *State v. Davis*, 864 N.W.2d 171, 179 (Minn. 2015); *State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989). The abuse-of-discretion standard applies even if a "defendant claims that the exclusion of evidence deprived him of his constitutional right to a meaningful opportunity to present a complete defense." *State v. Zumberge*, 888 N.W.2d 688, 694 (Minn. 2017). "A court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *State v. Thomas*, 891 N.W.2d 612, 618 (Minn. 2017) (quotation omitted).

If evidence was erroneously excluded in violation of the defendant's right to present a defense, a reviewing court will reverse the resulting conviction unless the error was harmless beyond a reasonable doubt. *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994). "[T]he reviewing court must be satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, an average jury (*i.e.*, a reasonable jury) would have reached the same verdict." *Id.* (footnote omitted). "If, on the other hand, there is a reasonable possibility that the verdict might have been different if the evidence had been admitted, then the erroneous exclusion of the evidence is prejudicial." *Id.*

Jefferson's due-process argument raises a hearsay issue. Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Hearsay is not

admissible unless permitted by an evidentiary rule or statutory exception. *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019). "If a statement is not covered under a specific hearsay exemption or exception, it still may be admitted under the 'residual exception' found in Minnesota Rule of Evidence 807." *Id.*

Under rule 807:

> A statement not specifically covered by [r]ule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Analyzing whether a hearsay statement should be admitted under rule 807 involves two steps. First, the district court must determine whether the statement has circumstantial guarantees of trustworthiness by considering the totality of the circumstances. *Id.* at 292. Second, the district court must determine whether the specific requirements of rule 807 are met. *Id.* at 293.

In examining the trustworthiness of prior statements, district courts are instructed to consider whether the statements were "given voluntarily, under oath, and subject to cross-examination and penalty of perjury"; "the declarant's relationship to the parties" and "motivation to make the statement"; "the declarant's personal knowledge" and "whether the declarant ever recanted the statement"; the existence or absence of corroborating evidence; and "the character of the declarant for truthfulness and honesty." *Id.* at 292 (quotations omitted). In *State v. Ortlepp*, the supreme court set forth additional factors that

contribute to the trustworthiness of a statement: (1) the declarant testifies, admits to making the prior statement, and is available for cross-examination, (2) the statement is recorded, (3) the statement is against the declarant's penal interest, and (4) the statement is consistent with other evidence. 363 N.W.2d 39, 44 (Minn. 1985).

Here, the district court considered the totality of the circumstances and determined that JW's prior statements lacked circumstantial guarantees of trustworthiness. The district court engaged in a detailed analysis that addressed the factors set forth above and summarized its decision as follows:

> This court has read the transcript of the video clip of [JW], Clip 1, about 10 times. This court has also read the second transcript of the video clips, Clips 2 and Clips 3. It took me that long to figure out what [JW] was testifying to. I found both of these statements besides incorporating the arguments just made by the state -- I found them confusing, I found that there were so many discrepancies between the two statements, I -- and, specifically, talking about just two people involved. Also the fact that there was a maroon car present at the site -- I believe that's 17:31 -- and there wasn't, besides the fact that she consistently says it's a [W]hite woman driving. She swore to -- I mean, she test- -- or she stated in here that it was a [W]hite woman. She said she was sure, and then she said she was 100 percent sure. And the defense in this case is that [BM] . . . is the one who was driving the vehicle.
>
> Now, I think we all saw when [BM] appeared in court to testify that she is a dark-skinned African American woman. There is nothing [W]hite about her. There's no way anyone who is looking at that young lady on the stand could mistake[] her for a [W]hite woman. *This is confusing, it's not helpful, it doesn't support the defendant's defense, and for those reasons that I previously stated, these statements are not to come in. They're unreliable. They're inconsistent. They don't track anything with regards to what the rest of the testimony in case says, other than the fact that there was a silver car and a maroon car, and perhaps the fact that there was a woman*

> *involved, but other than that, it's unreliable. I'm not going to allow it to be admitted into evidence.* I'm also not going to allow any reference to any of the substance contained in either one of these statements. I don't know what you're going to do or what either party's going to do with regards to an opening statement that was made with regards to this. That's up to the parties to decide how you want the court to handle that, but there will be no closing arguments referencing anything to do with the identification of another woman, [W]hite woman.

(Emphasis added.)

The district court did not err in determining that JW's prior statements were not sufficiently trustworthy. Although JW seemingly had no motive to lie and voluntarily provided recorded statements to the police soon after the crash, her statements are inconsistent with the evidence presented at trial. There was no other evidence of a White female driver. Jefferson testified that BM, a Black woman, was driving. And BM testified that Jefferson was driving. Additionally, JW did not give her statements under oath and seemingly recanted her prior statements when speaking to a defense investigator some months after her initial statements to police. She told the investigator that "she remembered telling police that she thought it was a female that was driving, because at that moment all the details pointed to what looked like a woman driving," but after thinking about it, "it didn't make sense to her as to why, if a woman was driving . . . a man [got] back into the driver's seat."

The district court reasoned that this case is similar to *State v. Davis*, 820 N.W.2d 525 (Minn. 2012). In that case, the supreme court concluded that a district court did not err in declining to admit witnesses' hearsay statements under the residual hearsay exception, in part, because the statements "were not given under oath," the declarants were

not subject to cross-examination or penalty of perjury, "and no other evidence corroborate[d] their statements." *Davis*, 820 N.W.2d at 527, 537. *Davis* supports the district court's conclusion that JW's statements were not trustworthy.

As to whether JW's prior statements met the requirements of rule 807, the district court determined that the statements were "offered as evidence of a material fact regarding who was driving the vehicle," but the district court concluded that such evidence was "procurable through other efforts because [JW] already testified." Moreover, given the inconsistencies in JW's statements, as well as the conflict between her statements, the other evidence, and Jefferson's defense, the district court did not err in determining that the purpose of the rules of evidence and interests of justice would not be served by introducing the statements. *See* Minn. R. Evid. 102 (stating that the rules shall be construed "to the end that the truth may be ascertained"). In sum, the district court did not abuse its discretion by refusing to admit JW's prior hearsay statements as substantive evidence under the residual hearsay exception.

We nonetheless also conclude that the alleged error was harmless beyond a reasonable doubt. Under that standard, we "must be satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, an average jury (*i.e.*, a reasonable jury) would have reached the same verdict." *Post*, 512 N.W.2d at 102 (footnote omitted).

Although JW mentioned a female driver, her statements did not support Jefferson's theory that BM was driving the Pontiac when it struck OB. Moreover, evidence showed that Jefferson made numerous incriminating statements inculpating himself as the driver

that struck OB. He told AR that he was the driver. And Jefferson told BM's mother that he was sorry for what occurred, that he "knew better," that BM "had nothing to do with it," and that he was going to turn himself in to law enforcement. Additionally, BM's and AR's testimony was largely consistent and pointed to Jefferson's guilt. Lastly, BM's mother testified that she saw Jefferson driving when Jefferson, OB, and BM left the gathering. We are satisfied beyond a reasonable doubt that if J.W.'s statements had been admitted, the jury would have reached the same verdict.

II.

Jefferson also contends that the district court violated his right to present a complete defense by not allowing him to impeach JW with her prior statements to police that a White woman had been driving the car involved in the crash. Again, we review a district court's evidentiary rulings for an abuse of discretion, and if an error occurred, we are obligated to reverse Jefferson's conviction unless the error was harmless beyond a reasonable doubt. *See Kelly*, 435 N.W.2d at 813; *Post*, 512 N.W.2d at 102.

A witness may be impeached with her prior inconsistent statement. Minn. R. Evid. 613; *State v. Martin*, 614 N.W.2d 214, 224 (Minn. 2000); *Doe 136 v. Liebsch*, 872 N.W.2d 875, 882 (Minn. 2015). However, extrinsic evidence of the witness's prior inconsistent statement is not admissible unless the witness is given an opportunity to explain or deny the statement "and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." Minn. R. Evid. 613(b).

A witness's failure to recollect a prior statement may provide grounds for impeachment with a prior statement. *Martin*, 614 N.W.2d at 224. Once it is established

that the witness does not recollect making the statement, the witness should be confronted with the document or recording containing the statement. *Price v. Grieger*, 70 N.W.2d 421, 425 (Minn. 1955); *see also Martin*, 614 N.W.2d at 224 (noting that witness's failure to recall a prior statement "was sufficient foundation to impeach" with extrinsic evidence). If the witness then denies or does not recall making the inconsistent statement, the statement may be offered for the purpose of impeaching the witness. *Price*, 70 N.W.2d at 425. If the witness admits to making the inconsistent statement, the witness has effectively impeached herself. *Id.* In that case, the extrinsic evidence potentially has "no further materiality." *Id.*

Here, the defense did not follow proper procedures for impeachment with extrinsic evidence. JW testified that she did not recall telling an officer that she saw a White woman driving. The defense attorney then played JW a "brief clip." We presume that clip contained JW's inconsistent statement to the police. But after showing JW the clip, defense counsel ended her direct examination and did not give JW an opportunity to explain or deny the statements. Again, the defense could not impeach JW with extrinsic evidence of her prior inconsistent statements unless she first denied or failed to recollect the statements after being confronted with them. *Id.* That did not happen here.

Instead of attempting to impeach JW during her testimony according to the procedure set forth in caselaw and rule, the defense sought to impeach her the following day, after she had been excused as a witness, by proffering her statements to the police through the testimony of an officer. The district court refused to allow that procedure. It reasoned that the beneficial effect of JW's prior statement would be outweighed by the

prejudicial effect, noting that JW had testified the prior day and that attacking her credibility "one day later" would potentially confuse the jury.

The district court also reasoned that the defense's effort to introduce JW's statements was an attempt "to introduce otherwise inadmissible hearsay." The district court explained, "Finally, defense counsel now seeks to introduce [JW's] statements as both substantive evidence and impeachment evidence. The purpose of calling [the officer] is clear; it is to introduce otherwise inadmissible hearsay through his testimony, therefore the statements under 613(b) are inadmissible for impeachment purposes." The district court's reasoning is consistent with *State v. Dexter*, in which the supreme court held that a party may not seek to introduce otherwise inadmissible evidence "in the guise of impeachment." 269 N.W.2d 721, 721 (Minn. 1978).

In sum, the defense's imperfect approach to impeachment supports the district court's ruling for two reasons: defense counsel did not attempt to impeach JW with her prior inconsistent statements while she was on the stand, as contemplated by the rules of evidence and caselaw, and in doing so appears to have made an improper attempt to admit inadmissible hearsay under the guise of impeachment. Thus, the district court did not abuse its discretion by refusing to admit JW's inconsistent statement for "impeachment" purposes. Finally, for the reasons discussed in section I of this opinion, we are satisfied that the alleged error was harmless beyond a reasonable doubt.

III.

Jefferson contends that his domestic-assault sentence for assaulting OB must be vacated under Minn. Stat. § 609.035 (2018), because it was part of the same behavioral

incident as his murder of OB. The state agrees that Jefferson should not have been sentenced for the domestic assault of OB.

Under section 609.035, subdivision 1, "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." The statute "limits the imposition of punishment." *Munt v. State*, 920 N.W.2d 410, 416 (Minn. 2018). Under the statute, "a person may be punished for only one of the offenses that results from acts committed during a single behavioral incident and that did not involve multiple victims." *State v. Branch*, 942 N.W.2d 711, 713 (Minn. 2020). "In determining whether a course of conduct consists of a single behavioral incident we have considered factors of time and place and whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective." *State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2000) (quotation omitted).

The state has the burden of proving, by a preponderance of the evidence, that the offenses did not occur as part of a single behavioral incident. *Id.* at 841-42. "Whether the offenses were part of a single behavioral incident is a mixed question of law and fact, so we review the district court's findings of fact for clear error and its application of the law to those facts de novo." *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016). "Determining whether multiple offenses are part of a single behavioral incident is not a mechanical exercise, but rather requires an examination of all the facts and circumstances." *Id.* (quotation omitted).

Jefferson's argument on appeal focuses on the traditional factors of time and place and whether the segment of conduct involved was motivated by an effort to obtain a single

criminal objective. The state takes a different approach, consistent with its position at sentencing. In district court, the state argued that it was unclear whether the offenses at issue should "merge" because there was no way of knowing whether the jury concluded "that the assault was with the car or . . . in the car where [Jefferson] was striking [OB]." Nonetheless, the district court found that the domestic assault of OB "occurred first" as a distinct criminal act and concluded that it could impose sentences for both of the offenses against OB.

The district court's reasoning presumes that the jury found Jefferson guilty of domestic assault based on his act of striking OB with his hand, and not his act of striking OB with the vehicle. But the verdict form did not specify which of Jefferson's acts constituted domestic assault. In fact, during its deliberations, the jury asked the district court whether the domestic-assault charge involving OB was "defined" as Jefferson hitting OB "with his hand" or "with the car." The district court responded that the jury "may consider all evidence alleged to have occurred at any time between" Jefferson and OB. Thus, as the state noted at sentencing, the jury could have concluded that Jefferson's act of hitting OB with the car constituted both domestic assault and felony murder. If that was the jury's conclusion, the proved domestic assault and felony murder arose from a single behavioral incident.

Because the state has not attempted to show that the felony domestic assault and felony murder crimes against OB arose from separate behavioral incidents, and because there is no way of knowing whether the guilty verdicts for those offenses were based on the single act of striking OB with the vehicle, we cannot say that the record supports a

separate sentence for the domestic-assault conviction involving OB. We therefore reverse and remand for the district court to vacate the sentence for domestic assault against OB.

On remand, if Jefferson's sentence for domestic assault of OB contributed to the criminal-history score used in determining his sentences for felony murder of OB and domestic assault of AR, the district court must correct his criminal-history score and resentence Jefferson based on that score. *See* Minn. Sent. Guidelines 2.B.1 (Supp. 2019) (stating that the sentencing court is to assign a "particular weight" for each felony conviction "provided that a felony sentence was stayed or imposed before the current sentencing"); *State v. Hernandez*, 311 N.W.2d 478, 479, 481 (Minn. 1981) (concluding, in a case in which the defendant was sentenced on the same day for three separate and distinct offenses, that the district court could consider the first two convictions in determining the defendant's criminal-history score for the third conviction); *State v. Huynh*, 504 N.W.2d 477, 484 (Minn. App. 1993) ("[T]he *Hernandez* method cannot be used to increase a defendant's criminal history score unless sentencing for more than one offense is permitted under section 609.035."), *aff'd*, 519 N.W.2d 191 (Minn. 1994).

IV.

Finally, Jefferson contends that the district court abused its discretion by imposing an upward durational departure when sentencing him for felony murder.

A district court must impose a sentence within the presumptive sentencing range unless there are "identifiable, substantial, and compelling circumstances" to warrant an upward departure. Minn. Sent. Guidelines 2.D.1 (Supp. 2019). "Substantial and compelling circumstances," also called aggravating factors, "are those showing that the

defendant's conduct was significantly more . . . serious than that typically involved in the commission of the offense in question." *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009) (quotation omitted).

A single aggravating factor may support an upward durational departure. *State v. Solberg*, 882 N.W.2d 618, 624 (Minn. 2016). But a district court "may not base an upward departure on facts necessary to prove elements of the offense being sentenced" or "on facts that, while not necessary to satisfy the elements of the offense in question, were nonetheless contemplated by the legislature when it set the punishment for the offense being sentenced." *Edwards*, 774 N.W.2d at 602.

We review an upward departure from a guidelines sentence for an abuse of discretion. *Tucker v. State*, 799 N.W.2d 583, 585-86 (Minn. 2011); *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014). "A district court abuses its discretion when its reasons for departure are legally impermissible and insufficient evidence in the record justifies the departure." *Solberg*, 882 N.W.2d at 623. We review de novo whether a particular basis for an upward departure is legally permissible. *State v. Grampre*, 766 N.W.2d 347, 350 (Minn. App. 2009), *rev. denied* (Minn. Aug. 26, 2009).

The facts necessary to support an upward departure from the presumptive guidelines sentence must be found by the fact-finder or admitted by a defendant. *State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009); *State v. Shattuck*, 704 N.W.2d 131, 141-42 (Minn. 2005). Here, the jury found by special verdict form that Jefferson hit OB with a motor vehicle after she exited the vehicle and that he left her in a particularly vulnerable state after hitting her. The district court's stated reason for the departure was particular cruelty based on

Jefferson's act of hitting OB with the car. Particular cruelty is among the aggravating factors specifically listed in the sentencing guidelines; the factor applies if the victim "was treated with particular cruelty for which the individual offender should be held responsible." Minn. Sent. Guidelines 2.D.3.b(2) (Supp. 2019). 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).

> Although the rule announced in *Blakely* now requires that the facts of the case be found by a jury, it does not require us to abandon our view that the particular cruelty aggravating factor is a reason explaining why the *facts* of the case provide the district court a substantial and compelling basis for imposition of a sentence outside the range on the grid. We hold that a district court must submit to a jury the question of whether the State has proven beyond a reasonable doubt the existence of additional facts, which were neither admitted by the defendant, nor necessary to prove the elements of the offense, but which support reasons for departure. But the question of whether those additional facts provide the district court a reason to depart does not involve a factual determination and, therefore, need not be submitted to a jury.

Id. at 920-21 (footnote omitted).

The district court reasoned that the fact that Jefferson hit OB with the vehicle after she exited was "not redundant with the elements of the charged offense" and "not usually associated with the commission of the offense in question." The district court noted that it had "approved the question of hitting the victim with the car as an act which may suggest particular cruelty compared to a typical felony murder" and stated that "the act of hitting your girlfriend with a vehicle at any speed suggests particular cruelty."

"The manner of use of a single deadly weapon . . . has been held sufficient to establish particular cruelty and to justify a double or less-than-double departure." *State v. Dircks*, 412 N.W.2d 765, 768 (Minn. App. 1987), *rev. denied* (Minn. Nov. 24, 1987); *see also State v. Yaritz*, 791 N.W.2d 138, 141, 145 (Minn. App. 2010) (concluding that the use of chloroform as a dangerous weapon in committing a sexual assault provided a legally permissible basis for an upward departure), *rev. denied* (Minn. Feb. 23, 2011). Although "every second-degree unintentional felony murder will undoubtedly involve some degree of cruelty," running someone over with a car after they exit shows distinctive and markedly unusual cruelty. *Tucker*, 799 N.W.2d at 586-87 (analyzing the term "particular cruelty"); *see State v. Sirek*, 374 N.W.2d 481, 484 (Minn. App. 1985) (concluding that the victim was treated with particular cruelty because she "died an extremely violent death" where "she was dragged alongside the car for over 100 feet"), *rev. denied* (Minn. Nov. 26, 1985); *State v. Meyers*, 853 N.W.2d 819, 826 (Minn. App. 2014) (concluding that the district court did not abuse its discretion in departing upward where the attack was "unprovoked and seemingly motivated by a desire to be violent simply for the sake of violence," which "differ[ed] from the allegedly typical assault cases cited"), *aff'd on other grounds*, 869 N.W.2d 893 (Minn. 2015).

This court's nonprecedential decisions are also instructive. Although such decisions are not binding authority, they may be persuasive authority. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800-01 (Minn. App. 1993). Consideration of nonprecedential opinions is appropriate here because the goal of the sentencing guidelines is "uniformity, proportionality, rationality, and predictability in sentencing." Minn. Stat. § 244.09, subd.

5 (2020); *see also State v. Misquadace*, 644 N.W.2d 65, 68 (Minn. 2002) ("In light of a court's discretion in sentencing, the sentencing guidelines were created to assure uniformity, proportionality, rationality, and predictability in sentencing."). Consideration of sentencing departures in both precedential and nonprecedential opinions of this court helps to achieve those goals. *See Holmes v. State*, 437 N.W.2d 58, 59 (Minn. 1989) (explaining that in "the final analysis, our decision whether a particular durational departure by a trial judge was justified must be based on our collective, collegial experience in reviewing a large number of criminal appeals from all the judicial districts" (quotation omitted)).

Jefferson senselessly ran over OB after she exited the car and extricated herself from a dangerous situation: Jefferson was driving while intoxicated, was arguing with OB, and had struck OB with his hand. In *State v. Carothers*, we upheld a sentencing departure for a first-degree assault conviction partly because the defendant acted with particular callousness where he accelerated his car, drove toward the victim, hit the victim, drug the victim a short distance, and ran the victim over. No. C7-98-242, 1998 WL 695021, at *4-5 (Minn. App. Oct. 6, 1998). In *State v. Boswell*, we affirmed a departure partly based on particular cruelty "because the shooting was unprovoked and was done at such close range that the victim had no opportunity to escape." No. A05-2377, 2007 WL 509388, at *5 (Minn. App. Feb. 20, 2007), *rev. denied* (Minn. Apr. 25, 2007). And in *State v. Bergren*, we upheld a departure on the ground that an offense was particularly cruel where the defendant shot the victim as the victim was attempting to flee. No. C9-00-1328, 2001 WL 378978, at *4 (Minn. App. Apr. 17, 2001), *rev. denied* (Minn. June 19, 2001).

In sum, precedential and persuasive authority support the district court's conclusion that there was a legally permissible basis for the departure in this case.

Jefferson argues that hitting OB with the car "was the very act that formed the basis for [his] conviction." But felony assault can be completed with any number of dangerous weapons and in any number of ways. *See* Minn. Stat. § 609.02, subd. 6 (2018) (defining dangerous weapon, in part, as any device used in a manner "likely to produce death or great bodily harm"). Thus, Jefferson's use of a car as the dangerous weapon was not necessarily an element of the crime. *See State v. Blanche*, 696 N.W.2d 351, 378-79 (Minn. 2005) ("The reasons used for departing must not themselves be elements of the underlying crime.").

In conclusion, we affirm Jefferson's convictions and the basis for the district court's upward durational departure for felony murder. But we reverse and remand for the district court to vacate Jefferson's sentence for felony domestic assault of OB and to resentence Jefferson's convictions for felony domestic assault of AR and felony murder of OB using an adjusted criminal-history score if appropriate.

Affirmed in part, reversed in part, and remanded.