STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1000

State of Minnesota,
Respondent,

vs.

Vincent Lee Kelley,
Appellant.

Filed September 6, 2022
Affirmed
Halbrooks, Judge[*]

Dakota County District Court
File No. 19HA-CR-19-2817

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

Kathryn M. Keena, Dakota County Attorney, Jessica A. Bierwerth, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Bratvold, Judge; and Halbrooks, Judge.

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

NONPRECEDENTIAL OPINION

HALBROOKS, Judge

Appellant challenges his conviction of first-degree criminal sexual conduct on the grounds that (1) he received ineffective assistance of counsel and (2) the district court was not impartial. He also challenges his sentence on the ground that the district court abused its discretion in imposing an upward durational departure from the guideline sentence. We affirm.

FACTS

In 2019, appellant Vincent Kelley lived with his girlfriend, R.S., and R.S.'s two daughters, one aged five and the other (the victim) aged 11. Appellant stayed with the girls at night while R.S. worked. When R.S. arrived home from work one morning, she found appellant intoxicated and unresponsive in bed, blood and lubricant on the sheets, and appellant's pants and underwear on the floor outside the bedroom.

When R.S. asked the victim if anything had happened the previous night, the victim told her that appellant had come into her bedroom, pulled her off her bed, dragged her into his bedroom, taken her clothes off, put his fingers into her vagina, tried to penetrate her with his penis, and choked her. When R.S. questioned appellant, he admitted that he had penetrated the victim digitally but said that he had been unable to penetrate her with his penis.

R.S. informed the victim's father of what had happened, and he notified the police. Appellant was charged with first-degree criminal sexual conduct with a victim under 13 by an actor more than 36 months older, first-degree criminal sexual conduct with a victim

under 16 having a significant relationship with the actor, and second-degree criminal sexual conduct with a victim under 13 by an actor more than 36 months older.

Following discussion with his attorney and the district court, appellant chose to proceed with a jury trial. The jury found appellant guilty and also found four aggravating factors: (1) particular cruelty, because appellant acted with particular cruelty in injuring the victim's genital area and because the assault lasted three hours; (2) zone of privacy, because appellant entered the victim's bedroom and dragged her to his room to assault her; (3) psychological harm, because the victim had difficulty living in her home, taking showers, and using her own bedroom, as well as becoming withdrawn; and (4) penetration and attempted penetration, because appellant penetrated the victim's vagina with his fingers and attempted to penetrate it with his penis. The sentencing guideline range for appellant's offense, given his criminal-history score of zero, was 144 to 172 months. Based on the aggravating factors, the state requested a sentence of between 288 and 344 months, or twice the guideline range. The district court sentenced appellant to 288 months.

Appellant argues that (1) his counsel provided ineffective assistance because she was more interested in making a record that would preclude appellant from attacking a guilty verdict than in defending him; (2) that the district court judge committed plain error by not disqualifying himself because he was prejudiced against appellant; and (3) the district court abused its discretion by departing upward in sentencing him because the reasons for the departure were invalid and inadequate.

DECISION

I. Ineffective assistance of counsel

Ineffective-assistance-of-counsel claims involve mixed questions of law and fact that appellate courts review de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). An ineffective-assistance-of-counsel claim must show that: (1) counsel's representation fell below an objective standard of reasonableness and (2) there was a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Peltier v. State*, 946 N.W.2d 369, 372 (Minn. 2020) (relying on *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). "If one prong is not met, we need not address the other." *State v. Smith*, 932 N.W.2d 257, 271 (Minn. 2019). Effective assistance of counsel precludes counsel from having a conflict of interest in the representation. *Wood v. Georgia*, 450 U.S. 261, 271 (1981). While a conflict of interest may arise from the lawyer's interest in protecting the professional reputation that is part of all attorney-client relationships, courts presume that a lawyer resolves any such conflict in favor of the client, absent evidence to the contrary. *State v. Moore*, 481 N.W.2d 355, 363 (Minn. 1992).

Appellant did not object at trial to his counsel's alleged conflict of interest, and the district court noted at the sentencing hearing that appellant was "very well represented in this matter." A defendant who has not objected at trial to counsel's alleged conflict of interest must show on appeal that counsel actively represented conflicting interests and that this conflict adversely affected counsel's representation of the defendant. *Cooper v. State*, 565 N.W.2d 27, 32 (Minn. App. 1997), *rev. denied* (Minn. Aug. 5, 1997).

Appellant argues for the first time on appeal that his counsel had a conflict of interest because her interest in protecting her professional reputation from an ineffective-assistance claim caused her, prior to trial, to disclose confidential conversations with appellant, thus putting her own interests above appellant's interest. The conversations pertained to the decision not to call a particular expert witness, to appellant's potential risk of a 30-year sentence if he went to trial, to appellant's knowledge that he had the right to plead guilty, to his attorney's willingness to attempt further negotiations with the state, and to appellant's decision to proceed to trial. The district court asked appellant's counsel to make a record of her discussions of these topics with appellant, which necessitated her questioning appellant about them. Questioning defendants prior to trial about what their attorney has discussed with them is accepted procedure. *See, e.g.*, *State v. Bell,* 971 N.W.2d 92, 99 (Minn. App. 2022) (noting that, at an evidentiary hearing on a defendant's motion to withdraw his guilty plea soon after making it, the defendant "and counsel each testified to their recollections of [his] request to initiate plea negotiations after victim's testimony, the state's new offer, their discussions about whether [he] should accept the offer, and what counsel communicated to [him] as to the terms of the sentence"), *rev. denied* (Minn. Apr 27, 2022); *State v. Nicholas*, 924 N.W.2d 286, 288 (Minn. App. 2019) ("At the plea hearing, the district court had asked [appellant] 'has anyone made any threats to you, your friends or your family to get you to do this deal,' and he had answered 'no, sir.'"), *rev. denied* (Minn. Apr. 24, 2019).

Appellant's counsel's questioning appellant and making a record as to what he understood about his options and the possible consequences of his decision to go to trial

did not fall below an objective standard of reasonableness for counsel's performance. *See Peltier*, 946 N.W.2d at 372. Because the first prong of an ineffective-assistance claim has not been met, we need not address the second. *See id.*

II. Impartiality of the district court

Criminal defendants have a constitutional right to be tried before a fair and impartial judge. *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997). Whether this right has been violated is reviewed de novo. *See, e.g.*, *Cuypers v. State*, 711 N.W.2d 100, 104 (Minn. 2006). A judge will be found to have acted with bias when "a reasonable examiner, with full knowledge of the facts and circumstances, would question the judge's impartiality." *State v. Reek*, 942 N.W.2d 148, 156 (Minn. 2020) (quotation omitted). "The mere fact that a party declares a judge partial does not in itself generate a reasonable question as to the judge's impartiality." *Id.* (quotation omitted). There is a presumption that the district court has discharged its duties properly. *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998).

Appellant argues that the district court's impartiality could reasonably be questioned because it (a) failed to protect appellant's rights, (b) participated in plea negotiations by advising appellant to plead guilty and by predicting the outcome of appellant's trial and his sentence, and (c) derided appellant for exercising his constitutional rights. A review of the record does not support appellant's arguments.

Appellant first argues that the district court failed to protect appellant's right to attorney/client privilege by insisting that his counsel ask him questions about their previous discussions. The district court explained to appellant why his attorney would question him.

> I just need to know that you understand what is going on here today and what is at risk. . . .
>
> . . . I just want you to understand that I'm going to let your lawyer make a record of all the things that she has talked to you about.
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> . . . [Y]ou need to understand that you are really not going to have any success in the future of trying to overturn anything that happens to you on the basis of your lawyer not telling you what is going on.

The district court's efforts to be sure that appellant understood (1) the proceeding and his options and (2) that a record was being made so that appellant could not later argue that his attorney had not adequately informed him about the proceeding and his options were not an indication of bias against appellant.

Moreover, as noted earlier, asking defendants if counsel has fully explained the various options for pleading guilty and the possible consequences of going to trial is common practice. *See, e.g., Bell*, 971 N.W.2d at 99; *Nicholas*, 924 N.W.2d at 288. And the practice can benefit defendants. Here, for example, the questioning enabled the district court to learn that appellant was not aware of the options for two alternative types of pleas and to enlighten him as to those options. The questioning did not violate appellant's rights; it informed him of his rights.

Next, appellant argues that the district court engaged in plea negotiations by encouraging appellant to plead guilty. The district court said to appellant:

> [I]f the jury convicts you, then [the] State has filed a motion to seek an aggravated sentence, right? And an aggravated sentence is that then they are seeking 30 years in prison, right? And I need you to understand that if they convict you and they find the aggravating circumstances . . . that it happened in the

> [victim's] home and was in her zone of privacy, different types of penetration, then I'm in a spot where I'm going to go yeah, 30 years. . . .
>
> So, you need to understand what you are looking at, right? And that is all I want to make sure of with you.

It is true that there is a "bright line" rule against judicial participation in plea negotiations. *Wheeler v. State*, 909 N.W.2d 558, 564-65 (Minn. 2018). But here, the only question the district court asked appellant was whether he understood what was going on and what he risked by going to trial, i.e., what would happen if he were found guilty. Ensuring that appellant was aware of these matters was not an indication of bias. Nor did the sentence that the district court imposed reflect bias. It was not 360 months but 288 months—twice the guideline minimum and the minimum requested by the state.

Finally, appellant contends that, at the sentencing hearing, the district court judge derided him for not pleading guilty. The district court said to appellant:

> I'm troubled . . . by the fact that I have not heard you say I'm sorry. I have not heard you accept responsibility. You put this child through hell twice; once when you sexually offended on her and, again, when you made her sit up there, in front of a roomful of strangers and you, and tell what happened to her. She is 11. There is absolutely no justification for that to take place.
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> . . . .
>
> . . . Despite the DNA evidence being present, you wanted to put [the victim] through that, and that was cruel.
>
> . . . [W]hen you challenged the DNA evidence as not being yours, you are telling me either it was your brother or your dad who perpetrated this on [the victim].

> That is what you are saying. You are throwing somebody else under the bus.

Appellant refers to this as "derid[ing]" him for exercising his constitutional rights to have a trial, to confront his accuser, and to challenge the state's evidence. But stating the consequences of appellant having exercised his rights was not deriding him for exercising those rights, and appellant does not challenge the accuracy of the district court's statements. Moreover, lack of remorse and blame-shifting are appropriate factors for a judge to consider at sentencing. Based on our review of the record, appellant has failed to overcome the presumption that the district court performed its duties properly. *See McKenzie*, 583 N.W.2d at 747.

III. The upward durational departure from the sentencing guidelines

The district court may depart from the sentencing guidelines "only if aggravating or mitigating circumstances are present, and those circumstances provide a substantial and compelling reason not to impose a guidelines sentence." *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotation and citation omitted). We review a district court's decision to impose a sentencing departure for an abuse of discretion. *State v. Barthman*, 938 N.W.2d 257, 269 (Minn. 2020). More specifically, we review de novo whether the district court has identified proper grounds justifying a departure, but our review of the district court's decision to depart is "extremely deferential." *Dillon v. State*, 781 N.W.2d 588, 594-96 (Minn. App. 2010), *rev. denied* (Minn. July 10, 2010). One factor is sufficient to justify an upward durational departure. *See State v. O'Brien*, 369 N.W.2d 525, 527 (Minn. 1985).

Here, the minimum guideline sentence for appellant was 144 months; the sentence imposed was twice that—288 months. The district court based its departure on four aggravating factors: (a) particular cruelty (b) multiple acts or forms of penetration, (c) the violation of the victim's zone of privacy, and (d) the psychological harm suffered by the victim. Appellant argues that all of these are "invalid and inadequate," but the record supports each factor.

As to particular cruelty, the district court observed that the victim "suffered an injury to her genital area." This is supported by a nurse's testimony that there was bruising to the area and the victim's testimony that the assault lasted for about three hours. Appellant offers no legal or medical support for his view that the injury to the victim's genital area was minor because it had healed two weeks later.

As to multiple acts of penetration, the district court said to appellant that "there were repeated attempts with [your] fingers, and then, . . . with the assistance of lube, to penetrate her with your penis." The victim's mother testified that appellant told her that he had penetrated the victim with his fingers but was unsuccessful in penetrating her with his penis, which supports the district court's finding.

As to the zone-of-privacy violation, appellant argues that this factor does not apply because appellant and the victim lived in the same house and the assault did not occur in the victim's bedroom, relying on *State v. Mohamed*, 779 N.W.2d 93, 100 (Minn. App. 2010) (holding that when the defendant and the victim share a residence, the factor applies only if the offense is in the victim's bedroom), *rev. denied* (Minn. May 18, 2010). The district court told appellant that the zone-of-privacy factor did apply "because you dragged

her forcefully out of her bedroom" and this was a basis "to distinguish . . . the normal zone of privacy argument." We see no error in the district court's analysis of this factor.

As to psychological harm, the district court noted that the victim "wasn't willing to sleep in her bedroom," and "didn't want to shower," and became "more and more withdrawn as a result of this offense." Again, testimony supports the findings. A district court acts within its discretion in finding that the psychological impact of an event justifies a finding of aggravating factors and an upward departure. *See, e.g.*, *State v. Allen*, 482 N.W.2d 228, 233 (Minn. App. 1992), *rev. denied* (Minn. Mar. 3, 1992). The district court did not abuse its discretion in departing from the sentencing guidelines based on these four aggravating factors.

Affirmed.