STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1516

State of Minnesota,
Respondent,

vs.

Guy Francis Bloomquist,
Appellant.

Filed September 19, 2022
Affirmed in part, reversed in part, and remanded
Larson, Judge

Hennepin County District Court
File No. 27-CR-19-20347

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

Michael O. Freeman, Hennepin County Attorney, Mark V. Griffin, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Tracy Smith, Presiding Judge; Larson, Judge; and Hooten, Judge.*

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

NONPRECEDENTIAL OPINION

LARSON, Judge

Appellant Guy Francis Bloomquist challenges his fourth-degree sexual-assault conviction and sentence. We affirm in part, reverse in part, and remand.

FACTS

Victim, her mother, and Bloomquist rented separate rooms in an apartment. On August 18, 2019, then-23-year-old victim returned home from work around 8:00 p.m. She observed Bloomquist smoking from a crack pipe. Bloomquist asked victim if she had any alcohol, and she offered to share her alcohol with him.

For the next hour, Bloomquist and victim watched television in victim's room—a normal activity because the residence did not have a living room. Victim and Bloomquist smoked marijuana and drank alcohol. At 10:00 p.m., victim asked Bloomquist to leave so she could go to bed. Victim closed her bedroom door, but did not lock it, and went to sleep.

Around midnight, victim awoke to Bloomquist's face on her pubic area and his hand on her inner thigh. Victim kicked Bloomquist in the chest and said, "[W]hat the f-ck are you doing, get the f-ck out of here." Bloomquist apologized and left the room. Victim called 911, reported the assault, and later spoke with an investigator. Bloomquist was arrested around 2:30 a.m.

Respondent State of Minnesota charged Bloomquist with one count of fourth-degree sexual assault under Minn. Stat. § 609.345, subd. 1(d) (2018). The state also notified Bloomquist that it intended to seek an aggravated sentence because the offense occurred in victim's zone of privacy—her bedroom. The case proceeded to a jury trial. Before jury

selection concluded, victim disclosed that she observed Bloomquist smoking crack prior to the assault. Both sides had the opportunity to question potential jurors about their views on drug use.

Victim testified to the aforementioned facts at trial. The state also presented evidence corroborating victim's testimony, including testimony from victim's mother and Bloomquist's text messages with victim and mother. The jury found Bloomquist guilty of fourth-degree sexual assault.

Bloomquist waived his *Blakely* right to a jury determination on the zone-of-privacy aggravating factor and agreed to submit the question to the district court. The state argued the fourth-degree sexual assault occurred in victim's zone of privacy because it occurred in victim's bedroom. The defense offered no opposing argument. The district court found that Bloomquist committed the offense in victim's zone of privacy.

The district court ordered a presentence investigation (PSI) and a psychosexual evaluation. In the PSI, the probation officer recommended the presumptive sentence, including a stayed 24-month prison term. The probation officer filed a supplemental memorandum after the district court made its findings on the zone-of-privacy aggravating factor, recommending an executed 60-month prison term. In the PSI, the probation officer also noted that Bloomquist engaged in a pattern of criminal sexual conduct and was unamenable to probation.

The district court imposed an upward dispositional departure and sentenced Bloomquist to 24-months' imprisonment and ten years' conditional release. The district court based the departure on: (1) the zone-of-privacy finding and (2) findings in the PSI

and supplemental memorandum that Bloomquist was unamenable to probation. Bloomquist appeals.

DECISION

Bloomquist challenges his conviction of fourth-degree sexual assault and the resulting sentence. First, Bloomquist argues the district court erred when it allowed victim's testimony about Bloomquist smoking crack prior to the assault. Second, Bloomquist argues the district court improperly imposed an upward dispositional departure. We address each argument in turn.

I.

Bloomquist challenges the district court's decision to admit testimony that Bloomquist smoked crack prior to the assault, arguing the challenged evidence was irrelevant and more prejudicial than probative. "[W]e will not overturn a district court's evidentiary rulings unless appellant shows a clear abuse of discretion and that this abuse resulted in prejudice." *State v. Steward*, 645 N.W.2d 115, 120 (Minn. 2002).

Here, we need not decide whether the district court abused its discretion because the error was harmless. An evidentiary error is harmless unless it "substantially influenced the jury's decision." *See State v. Vang*, 774 N.W.2d 566, 576 (Minn. 2009) (quotation omitted). Even without the challenged evidence, the state presented substantial and compelling evidence of Bloomquist's guilt. Victim's testimony largely paralleled her 911 call and follow-up interview. The state corroborated victim's testimony with testimony from victim's mother and Bloomquist's text-message conversations. And the state did not dwell on Bloomquist's crack use at trial, discussing it a handful of times during opening

and closing arguments and only asking victim limited questions about it during her testimony.

Further, the district court minimized the influence the challenged evidence had on the jury's decision. First, the district court limited testimony on drug use to the evening of the assault. Second, the testimony encompassed both Bloomquist's and victim's drug use that evening. Finally, both parties knew about the drug use during jury selection, allowing both sides to question potential jurors on the issue.

For these reasons, any evidentiary error regarding Bloomquist's crack use was harmless because it could not have substantially influenced the jury's decision. *Vang*, 774 N.W.2d at 576. We affirm Bloomquist's conviction.

II.

Bloomquist also challenges his sentence, arguing the district court erred when it imposed an upward dispositional departure based on both the zone-of-privacy aggravating factor and his unamenability to probation. This court uses a "broad umbrella standard that encompasses varying degrees of deference" to evaluate an upward dispositional departure. *Dillon v. State*, 781 N.W.2d 588, 594 (Minn. App. 2010), *rev. denied* (Minn. July 10, 2010). We review de novo whether the district court identified proper grounds to justify a challenged departure. *Id*. at 595 (citing *State v. Vance*, 765 N.W.2d 390, 395-96 (Minn. 2009)). We then review the district court's "decision whether to depart for an abuse of discretion." *Id*. (emphasis omitted).

The Minnesota Sentencing Guidelines prescribe sentencing ranges that are presumed appropriate. Minn. Sent. Guidelines 1.A.6, 2.D.1 (Supp. 2019). Bloomquist's presumptive sentence under the guidelines included a stayed 24-month prison term.

But the guidelines allow for departures from the presumptive guideline range in certain circumstances. *See id.* For upward dispositional departures, the guidelines include a nonexclusive list of aggravating factors meant to describe cases where the crime is more serious than typical of the charged offense. Minn. Sent. Guidelines 2.D.3.b, cmt. 2.D.301 (Supp. 2019); *State v. Cox*, 343 N.W.2d 641, 643 (Minn. 1984). A district court can impose a dispositional departure on either offender- or offense-related aggravating factors. *See State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982); *State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995). But any fact that increases the penalty for a crime beyond the prescribed statutory minimum must be submitted to a jury and proved beyond a reasonable doubt, unless waived. *Blakely v. Washington*, 542 U.S. 296, 301 (2004). Here, the district court imposed an upward dispositional departure when it sentenced Bloomquist to an executed 24-month prison term.

A. Zone of privacy

Bloomquist argues the district court erroneously imposed an upward dispositional departure for committing the crime in victim's zone of privacy. The guidelines list zone of privacy as an aggravating factor that can support an upward dispositional departure. Minn. Sent. Guidelines cmt. 2.D.3.b.14; Minn. Stat. § 244.10, subd. 5a(14) (2018). The zone-of-privacy aggravating factor generally encompasses a victim's home. *State v. Jones*, 328 N.W.2d 736, 738 (Minn. 1983). But within a shared home, the zone of privacy is

limited to an individual's bedroom. *State v. Mohamed*, 779 N.W.2d 93, 100 (Minn. App. 2010), *rev. denied* (Minn. May 18, 2010).

After a hearing on the zone-of-privacy aggravating factor, the district court found that Bloomquist's crime was significantly more serious than a typical fourth-degree sexual assault. The district court based its decision on the apartment-mate relationship, the time of day, and that Bloomquist assaulted victim in her bedroom. The district court reasoned that the state had proved Bloomquist did not have a right to be in victim's bedroom and that victim had an expectation of privacy when "she was sleeping in her own bed at night."

Citing the rule that a district court can only impose an upward departure when the defendant's conduct is significantly more "serious than that typically involved in the commission of the *crime in question*," *Cox*, 343 N.W.2d at 643 (emphasis added), Bloomquist argues that the district court cannot use the zone-of-privacy aggravating factor when the crime is fourth-degree criminal sexual conduct on a sleeping person. Bloomquist asserts that such offenses often occur in a victim's bedroom, so Bloomquist committed a typical crime. We are not persuaded.

Fourth-degree criminal sexual conduct occurs when the victim is "mentally impaired, mentally incapacitated, or physically helpless." Minn. Stat. § 609.345, subd. 1(d). Individuals can meet these conditions in many locations, such as a bar, hospital, or friend's house. Unlike these places, when an assault occurs in the victim's bedroom, the victim must return to the location of the assault daily. As victim testified at sentencing: "I feel like I'll never be safe in the house that I'm living in and I don't have the means to . . . move, so unfortunately I have to sleep in the same room which this happened in."

We therefore conclude the district court did not abuse its discretion when it used the zone-of-privacy aggravating factor to support an upward dispositional departure to Bloomquist's presumptive sentence.

B. Unamenability to probation

Bloomquist finally argues the district court violated his Sixth Amendment right to a jury trial when it improperly relied on facts not provided in the state's *Blakely* notice or found by the trier of fact. Specifically, Bloomquist argues that the district court made an improper judicial finding on unamenability to probation based on the PSI and the probation officer's supplemental memorandum. We agree.

Under the Sixth Amendment, a defendant is entitled to have a jury find the facts that would justify an upward departure, unless the defendant waives this right. *State v. Jones*, 745 N.W.2d 845, 848, 851 (Minn. 2008) (citing *Blakely*, 524 U.S. at 303). In *State v. Allen*, Allen received an upward dispositional departure from a presumptive stayed sentence for first-degree felony test refusal. 706 N.W.2d 40, 43 (Minn. 2005). The district court based its decision on Allen's unamenability to probation, an unproven fact that Allen did not waive. *Id.* The supreme court held that "when the district court found that [the defendant] was unamenable to probation, and on that basis executed his presumptively stayed sentence, it violated [the defendant's] Sixth Amendment right to have a jury make that determination using a reasonable-doubt standard." *Id.* at 47.

Reviewing the record, the district court upwardly departed from Bloomquist's presumed sentence based on both the zone-of-privacy aggravating factor and Bloomquist's

unamenability to probation—a fact found only in the PSI. At the sentencing hearing, the district court explained:

> I did find that there was adequate proof of a violation of zone of privacy under *Blakely*, which means that the presumptive sentence can give way to a period of incarceration or a greater probationary sentence.
>
> . . . .
>
> Based on what I heard at the trial and *based upon the PSI that was completed*, I am going to depart dispositionally and impose a 24-month prison sentence. I feel that that's appropriate for the conduct that was proven . . . at the trial and based upon all the evidence presented.

(Emphasis added.) Additionally, in the departure report, the district court indicated that the departure was

> based upon the *Blakely* finding . . . The court determined this offense happened in the victim's zone of privacy. Additionally, [Bloomquist is] not amenable to probation, having failed several times previously. And the departure is recommended by the Presentence Investigation Report . . . and subsequent memorandum.

Here, Bloomquist waived his right to a jury trial only on the zone-of-privacy aggravating factor, not on his unamenability to probation. Thus, the district court erred when it based the upward dispositional departure on facts a jury did not find and Bloomquist did not waive.

While an error, a remand is unnecessary if we determine "the district court would have imposed the same sentence absent reliance upon the improper aggravating factor." *State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009). We must "consider the weight given

to the invalid factor and whether any remaining factors found by the court independently justify the departure." *Id*.

The record before us is insufficient to determine whether the district court would impose the same sentence. Though the district court did not abuse its discretion when it found the zone-of-privacy aggravating factor, the district court's statement that it imposed an upward departure "based upon the PSI" is unclear. Additionally, the state did not include unamenability to probation in its *Blakely* notice, yet specifically asked for a "departure to prison based on all of . . . the information in the" PSI at the sentencing hearing. A jury did not find these facts, and Bloomquist did not waive his right to have a jury determination. *See United States v. Booker*, 543 U.S. 220, 244 (2005) (reaffirming that "[a]ny fact . . . which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt"). Under these circumstances, an upward departure potentially based on unamenability to probation warrants a remand.

We therefore reverse the imposition of the upward dispositional departure and remand to the district court for resentencing in accordance with this opinion.

Affirmed in part, reversed in part, and remanded.