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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1236**

State of Minnesota,
Respondent,

vs.

Angkhane Chanthapanya,
Appellant.

**Filed May 23, 2011
Affirmed
Halbrooks, Judge**

Hennepin County District Court
File No. 27-CR-09-42230

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Elizabeth R. Johnston, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Melissa Sheridan, Assistant Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Randall, Judge.*

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

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges the district court's imposition of an upward durational departure for his conviction of first-degree assault. Because we conclude that the district court did not abuse its discretion, we affirm.

FACTS

On June 19, 2009, Minneapolis Police received a call about an assault in progress in North Minneapolis. When police arrived, they saw the victim, N.B., lying on the ground, unresponsive and having difficulty breathing. N.B. was admitted to the intensive-care unit of North Memorial Hospital with a severe traumatic brain injury, multiple facial fractures, abrasions on his abdomen, and other injuries. He underwent multiple surgeries and remained in a coma until sometime in July. In August 2009, N.B. was transferred to a rehabilitation facility, where he remained for approximately one month before being transferred to a long-term care facility.

Through its investigation, Minneapolis Police determined that appellant Angkhane Chanthapanya was one of four assailants. Police learned that appellant and N.B. were involved in an oral altercation that day and that one of appellant's acquaintances hit N.B. The rest of the group joined in the assault, kicking and punching N.B., and at one point, appellant hit N.B. with a barbecue grill. Following the assault, the group left N.B. on the ground and went to a friend's house.

Respondent State of Minnesota charged appellant with first-degree assault. Appellant agreed to plead guilty to the offense and waived his right to a trial on any

aggravating factors that may support an enhanced sentence. The presumptive sentence was 86 months, but the state moved for the maximum statutory sentence of 240 months. The state's grounds for the upward durational departure included (1) the severity of N.B.'s injuries, (2) the particular cruelty with which the crime was committed, (3) the fact that the crime was committed by a group of three or more persons, (4) the vulnerability of N.B., and (5) the randomness of the criminal act. Appellant opposed the state's motion and argued for a downward durational departure on the grounds that his role in the assault was secondary, he lacked substantial capacity for judgment at the time due to psychological issues resulting from long-term chemical dependency, and he felt remorse for his actions.

At the sentencing hearing, the state called Curtis Keller, M.D., as a witness. Dr. Keller provides medical treatment at the long-term care facility, and he testified to N.B.'s then-current condition. Dr. Keller stated that N.B. remained in a semi-vegetative state and described N.B.'s life as "basically sit[ting] in his bed or his chair, staring ahead, with some—with very minimal responses to the care personnel. His arms are contracted and essentially paralyzed. His legs flail about, and he is fed by tube feedings." Dr. Keller testified that N.B.'s leg flailing has caused him to fall out of bed with some frequency. N.B. now requires a special bed with high, soft sides and a mat on either side of the bed so that he will not sustain injuries if he does fall out of the bed. According to Dr. Keller, N.B. is still mostly unresponsive to communication, but there are rare occasions when he will attempt to respond to a question by mouthing a one- or two-word response.

Dr. Keller testified that N.B. requires nursing care because he is fed through a tube, wears diapers, and requires regular movement to avoid pressure ulcers as a result of his bedridden state. Since the assault, N.B. has had aspiration pneumonia, gallbladder surgery, and intestinal reconstruction. N.B. has also suffered weight loss. When admitted, N.B. weighed 165 pounds; during his hospitalization and subsequent nursing care he dropped to as low as 113 pounds. Dr. Keller testified that it is unlikely that N.B. will ever experience significant improvement from his current condition or be able to live independently. In exhibits introduced during the hearing, N.B.'s situation is described as difficult "in part because [his wife and two sons] continue[] to hold out hope that he is going to get better when it appears to the neurosurgeon and everyone else involved that he will not."

The district court found three aggravating factors to support an upward sentencing departure, including the severity of N.B.'s injuries, the particular cruelty with which the crime was committed, and the fact that the crime was committed with three or more individuals. The district court stated that "[t]he facts of this case are facts in which I would agree that it's probably one of the worst assaults that I've heard about or seen the result of." The district court sentenced appellant to a double durational departure of 172 months in prison. This appeal follows.

D E C I S I O N

A district court must order the presumptive sentence provided by the sentencing guidelines unless there are "identifiable, substantial, and compelling circumstances" to warrant an upward departure. Minn. Sent. Guidelines II.D (2010). Substantial and

compelling circumstances are present when “the defendant’s conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question.” *State v. Misquadace*, 644 N.W.2d 65, 69 (Minn. 2002). In determining whether “substantial and compelling circumstances” justify an upward sentencing departure in a first-degree-assault case, the district court must determine whether aggravating factors exist. *Id.* The guidelines provide a nonexclusive list of aggravating factors that may support a departure. Minn. Sent. Guidelines II.D.2.b. Whether a particular reason for an upward departure is permissible is a question of law, which is subject to a de novo standard of review. *Dillon v. State*, 781 N.W.2d 588, 601 (Minn. App. 2010), *review denied* (Minn. July 10, 2010). But a district court’s decision to depart from the sentencing guidelines based on permissible grounds is reviewed for an abuse of discretion. *Id.* at 598.

The district court recited three reasons for granting the state’s motion for an upward departure: the nature of N.B.’s injuries, particular cruelty, and the fact that the crime was committed by a group of three or more people. Appellant first argues that because the seriousness of a victim’s injuries is included as an element of the crime, the district court erred by considering the nature of N.B.’s injuries as an aggravating factor.

We have previously held that the district court may properly consider the extent of a victim’s injuries when considering whether an upward sentencing departure is appropriate in a first-degree-assault case. In *State v. Felix*, we affirmed an upward departure on a first-degree-assault conviction based on the serious and permanent nature of the victim’s injuries. 410 N.W.2d 398, 401 (Minn. App. 1987), *review denied* (Minn.

Sept. 29, 1987). In *Felix*, the district court imposed a double durational departure on the ground that “the assault was particularly vicious and torturous in that the victim lost consciousness early and repeatedly was beaten by the defendant.” *Id.* at 400. We recognized that serious and permanent injuries may be considered when aggravating a sentence, especially when the victim is subjected to all of the four definitions of great bodily harm. *Id.* at 401. In *Felix*, the victim was subjected to “a high probability of death and serious permanent disfigurement and a permanent impairment of a bodily function and other serious bodily harm.” *Id.*; *see also* Minn. Stat. § 609.02, subd. 8 (2008) (defining “great bodily harm”). Because only one of the four factors defining great bodily harm is required to convict for first-degree assault, the presence of all four demonstrated to this court that the crime was significantly more serious than a typical first-degree assault. *Id.*; *see also Dillon*, 781 N.W.2d at 601 (affirming an upward departure based on the extent of the victim’s injuries).

Applying those principles here, we conclude that the district court’s consideration of the severity of N.B.’s injuries as an aggravating factor was appropriate. Not only are N.B.’s injuries a useful indicator of the brutality of the actual assault, but under *Felix*, the fact that N.B. was subjected to a high probability of death, serious permanent disfigurement, permanent impairment of a bodily function, and other serious bodily harm also supports an upward departure. Following the assault, N.B. was brought to the emergency room in a comatose state, and he remained in a coma for nearly one month. His physician testified that he remains in a persistent semi-vegetative state, with little cognitive functioning and that there is only a small chance that N.B. will have any

significant recovery. N.B. suffered severe brain injuries and will require professional care for the rest of his life. Because the nature of N.B.'s injuries are so severe and because the injuries are an indication of the brutality of the attack, the district court's reliance on the nature of N.B.'s injuries as a basis for departure in conjunction with the particular cruelty of the assault was not an abuse of discretion.

Appellant also contends that the district court abused its discretion by imposing an upward departure because his conduct was "not more serious than that typically involved in a first degree assault." We disagree. The record demonstrates that N.B. was repeatedly kicked and punched by a group of three or more individuals and that at one point, appellant struck N.B. with a nearby grill. The injuries sustained by N.B. are serious and permanent. The record supports the district court's decision to depart on the basis of N.B.'s injuries, the particular cruelty of the assault, and the fact that the crime was committed by a group of three or more. Because the sentence does not unfairly exaggerate appellant's criminal conduct, we conclude that the district court did not abuse its discretion in imposing a double durational departure.

Affirmed.