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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1361**

State of Minnesota,
Respondent,

vs.

Gustavo Vega Garcia,
Appellant.

**Filed July 5, 2011
Affirmed
Wright, Judge**

Ramsey County District Court
File No. 62-CR-09-16131

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

John J. Choi, Ramsey County Attorney, Mitchell L. Rothman, Assistant Ramsey County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

WRIGHT, Judge

Appellant challenges the district court's imposition of the presumptive guidelines sentence for his conviction of attempted second-degree murder, arguing that the district

court failed to balance the proper factors when considering whether substantial and compelling reasons for a downward durational departure exist. We affirm.

FACTS

On the date of the offense, September 29, 2009, appellant Gustavo Vega Garcia and M.A.-S. were in the process of ending their approximately 20-year marriage. An order for protection prohibited Garcia from having contact with M.A.-S. or the couple's two children and from being within a one-block radius of M.A.-S.'s residence. Notwithstanding the order for protection, Garcia went to M.A.-S.'s residence in Saint Paul, entered her basement, and argued with her. During the argument, Garcia pulled a knife from his pocket and stabbed M.A.-S. in her forearm and abdomen. When M.A.-S. attempted to defend herself by grabbing the knife, Garcia cut her finger. Despite M.A.-S.'s efforts to defend herself, Garcia continued his attempts to stab her with his knife and hit her. M.A.-S.'s roommate observed Garcia's attack. As M.A.-S.'s roommate fled the basement, Garcia pushed her into a table.

L.V., the 13-year-old daughter of Garcia and M.A.-S., was upstairs when she heard her parents arguing, her mother screaming, and pounding sounds from the basement. M.A.-S.'s roommate told L.V. that Garcia was attempting to kill L.V.'s mother, and L.V. went to the basement. There she saw her mother bleeding, and L.V. began to strike Garcia with a broom. L.V.'s 17-year-old brother, G.V., was awakened by loud voices and encountered Garcia as Garcia fled the residence.

M.A.-S. was taken to the hospital where she underwent surgery on her abdomen and hand. M.A.-S.'s roommate, who was eight months pregnant and experienced

abdominal pain from Garcia pushing her into the table, also received medical treatment. During their investigation, the police obtained a recorded telephone conversation between Garcia and M.A.-S. from August 2009, during which Garcia repeatedly threatened to kill M.A.-S.

Garcia was charged with attempted second-degree murder, a violation of Minn. Stat. §§ 609.11, subd. 4, 609.17, subd. 1, 609.19, subd. 1(1) (2010); first-degree burglary, a violation of Minn. Stat. § 609.582, subd. 1(c) (2010); and two counts of violating an order for protection, a violation of Minn. Stat. § 518B.01, subd. 14(b) (2010). Garcia pleaded guilty to attempted second-degree murder, and pursuant to the plea agreement with the state, the remaining charges were dismissed.

Garcia moved for a downward durational departure from the sentencing guidelines based on his employment history, lack of violent criminal convictions, family and community support, and remorse for the offense. Garcia also personally apologized to his children. The prosecutor read M.A.-S.'s victim-impact statement. The district court sentenced Garcia to 183 months' imprisonment, which represents the upper end of the presumptive guidelines range, and ordered him to pay restitution. This appeal followed.

D E C I S I O N

The district court must impose the presumptive guidelines sentence unless there are “substantial and compelling circumstances” that warrant a downward departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). The decision to depart from the sentencing guidelines rests within the district court's sound discretion. *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011). The district court's imposition of the presumptive

guidelines sentence ordinarily will not be disturbed on appeal even when reasons for a downward departure exist. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006).

A district court may grant a downward durational departure “if the defendant’s conduct is significantly less serious than that typically involved in the commission of the offense.” *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985). But only offense-related mitigating factors may support a downward durational departure. *See State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995) (distinguishing between offender-related factors, which may justify dispositional departure, and offense-related factors, which may support both dispositional and durational departures); *State v. Behl*, 573 N.W.2d 711, 713 (Minn. App. 1998) (holding that nonoffense-related conduct is not relevant to durational-departure decision), *review denied* (Minn. Mar. 19, 1998). The existence of mitigating factors, however, does not require the imposition of a downward departure. *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984).

When a defendant moves for a downward departure, a district court must exercise its discretion and consider mitigating factors when they are present. *State v. Kier*, 678 N.W.2d 672, 677 (Minn. App. 2004). In doing so, the district court must weigh the reasons for and against a downward departure. *State v. Mendoza*, 638 N.W.2d 480, 484 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). If, after considering reasons for a downward departure, the district court elects to impose the presumptive sentence, an explanation for denying the downward-departure motion is not required. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

Garcia argues that the district court erred by failing to weigh the factors for and against a downward durational departure. The record, however, does not support this contention. Before imposing the sentence, the district court stated:

I appreciate that the defendant has supportive family and community members here and that [defense counsel] has made arguments in favor of a departure. But, in order for the court to move toward that departure, the court would have to find substantial grounds to excuse or mitigate the defendant's culpability[,] and the offense would have to involve compelling circumstances that would somehow permit the court to address this conduct as something less serious than what it actually is. In fact, without a prior record of violent offenses and in the face of the long relationship with wonderful children and no suggestion that something like this of such seriousness might happen, the world of the entire family was harmed and changed in a way that the court cannot ignore or even adequately address.

And in fact, there were aggravating factors here[:] the presence of one or more of the children[,] the fact that serious injuries were inflicted[,] and that these injuries continue to cause pain and a limitation on activities. And in fact, the court finds the victim particularly vulnerable because of the long marital relationship and because of the ups and downs of the efforts to separate.

Indeed, the district court's acknowledgment of Garcia's arguments in support of his downward-departure motion and his community support reflects its consideration of the mitigating factors that Garcia presented.¹ But after considering the reasons Garcia identified in support of a downward departure and several reasons to deny a downward

¹ The only factor that Garcia presented that is offense-related, and thus properly considered by a district court on a motion for a downward durational departure, is Garcia's remorse. See *Behl*, 573 N.W.2d at 713 (holding that nonoffense-related conduct is not relevant to durational-departure decision); *State v. Bauerly*, 520 N.W.2d 760, 762-63 (Minn. App. 1994) (holding that district court may consider defendant's remorse when deciding whether to grant downward durational departure from sentencing guidelines), review denied (Minn. Oct. 27, 1997).

departure, the district court concluded that a downward durational departure was not warranted. Factors that weighed against granting Garcia's motion included the serious and unanticipated nature of the offense and the resulting harm that the family suffered. But factors including the presence of the children during the offense, the serious and persistent nature of M.A.-S.'s injuries, and M.A.-S.'s vulnerability in the unstable and lengthy marital relationship outweighed the mitigating factors on which Garcia relied. Indeed, these factors could constitute aggravating factors warranting an upward departure. *See State v. Robideau*, 796 N.W.2d 147, 152 (Minn. 2011) (holding that when child sees, hears, or otherwise witnesses through sensory perception some portion of offense, presence of child may justify upward departure); *State v. Van Gorden*, 326 N.W.2d 633, 634 (Minn. 1982) (stating that defendant's infliction of injuries of a "serious and permanent nature" may justify upward departure); *State v. Elvin*, 481 N.W.2d 571, 576 (Minn. App. 1992) (holding that victim's particular vulnerability because of pattern of attacks and intimidation in relationship with defendant justified upward departure), *review denied* (Minn. Apr. 13, 1992).

The relevant inquiry for a downward durational departure is whether Garcia's conduct is "significantly less serious than that typically involved in the commission of the offense." *See Mattson*, 376 N.W.2d at 415. Each of the facts that the district court considered bears on this question. Before denying Garcia's motion and imposing a sentence in the presumptive-guidelines range, the district court carefully considered facts and circumstances in favor of and against granting a downward durational departure.

Garcia's arguments to the contrary are without merit. The district court's exercise of its discretion is legally sound.

Affirmed.