STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1444

State of Minnesota,
Respondent,

vs.

Roland Leslie Hunt,
Appellant.

Filed June 29, 2011
Affirmed
Willis, Judge*

Mille Lacs County District Court
File No. 48-CR-09-2334

Lori Swanson, Attorney General, James B. Early, St. Paul, Minnesota; and

Janice S. Jude, Mille Lacs County Attorney's Office, Milaca, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Toussaint, Presiding Judge; Connolly, Judge; and Willis, Judge.

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

U N P U B L I S H E D O P I N I O N

WILLIS, Judge

Following his convictions of and sentencing for first- and third-degree assault, appellant challenges the district court's rulings on the state's challenge for cause of a jury-panel member and on several evidentiary issues, and the district court's decision to impose an upward double durational departure in sentencing. Appellant also raises several issues in his pro se brief. Because we find no reversible error, we affirm.

FACTS

On October 3, 2009, M.L.C., the mother of 16-month old M.C. and two-and-a-half year old M.P., left the children with appellant Roland Leslie Hunt and his girlfriend, T.L., in Mille Lacs County while she travelled to the Twin Cities to purchase methamphetamine. M.L.C. was unable to find transportation back to Mille Lacs for several days, and Hunt became increasingly angry with M.L.C. for leaving the children and for failing to return with the methamphetamine.

On October 9, M.L.C. found a ride to Mille Lacs County; she called Hunt to tell him that she was on her way. Hunt told T.L. that M.L.C. would not get her children back until he got the promised methamphetamine. That morning, Hunt took M.C. and M.P. into the bathroom at his apartment, ostensibly to bathe them. T.L. reported hearing water running in the bathtub for a period of time and then screaming from the children for approximately two minutes, but she did not investigate. Hunt's and T.L.'s four-year-old daughter, T.M.H., entered the bathroom during this time.

Hunt subsequently put M.C. and M.P. in a closet and ordered T.L. to leave them there; he then left the house. T.L. nevertheless retrieved the children and noticed that M.C. was lethargic and whined about being diapered and dressed. Meanwhile, although M.L.C. had returned to the Mille Lacs area, she could not find her children because Hunt directed her by telephone to various locations, promising her that the children would be there.

About three hours after the bathing incident, T.L. noticed that M.C. had developed blisters and his skin was peeling. Two to three hours later, M.L.C. finally found Hunt, who took her to his apartment. M.L.C. found her children in a neighboring apartment and ran out with them before noticing that M.C. was badly burned. She took both children to the local hospital, and M.C. was transported by helicopter to the Hennepin County Medical Center burn unit. M.C. nearly died from his injuries; M.P. suffered less-serious burns. Experts from Hennepin County testified that the children's injuries were consistent with immersion burns.

Hunt ordered T.L. to say nothing to the authorities about his role in the children's injuries until they agreed to a plausible story. In several interviews, T.L. told police that she had accidentally burned the children or that they had turned the hot water on themselves. About a month later, after Hunt left her, T.L. changed her story and told police that Hunt had burned the children in the bathtub.

Hunt and T.L. had at the time three children together, including four-year old T.M.H. The children were placed in foster care. T.M.H. was interviewed by a social worker in a Cornerhouse-style interview at the request of the police investigator. She

told the social worker that her father, Hunt, held M.P.'s baby brother [M.C.] in the bathtub when the water was hot and that M.C. had "owies." Two weeks later, T.M.H. spontaneously told her foster mother that "daddy put the baby in the water and it got boo-boos all over its legs." She identified the "baby" as a child other than one of her siblings. T.M.H. was found incompetent to testify. The videotaped interview by the social worker was played at trial, and the social worker testified regarding what T.M.H. said. The foster mother was also allowed to testify as to T.M.H.'s statements.

While investigating the incident, the police executed multiple search warrants at appellant's apartment. During two of those searches, an investigator attempted an experiment to test how hot the water in the bathtub could get under various conditions. The investigator was allowed to testify regarding his experiments.

Hunt was convicted by a jury of one count of first-degree assault, two counts of third-degree assault, and two counts of child endangerment. The district court imposed concurrent sentences of 292 months for first-degree assault on M.C. and 60 months for third-degree assault on M.P. This appeal follows.

D E C I S I O N

I. The district court properly granted the state's motion to strike a jury-panel member for cause.

Hunt, a Native American, argues that the district court erred by granting the state's challenge for cause of the only Native American on the voir dire panel. The jury-panel member, N.L., had been convicted in Florida of two felonies: sexual act, coercion of a child by an adult, and sexual battery, coercion of a child by an adult. The Mille Lacs

County District Court administrator testified that he contacted the Florida Bureau of Criminal Apprehension and was told that although N.L. had been released from probation in January 2001, his civil rights had not been restored in Florida.

The district court is accorded considerable discretion in ruling on challenges for cause. *State v. Prtine*, 784 N.W.2d 303, 310-11 (Minn. 2010); *State v. Logan*, 535 N.W.2d 320, 324 (Minn. 1995). A challenge to a jury panel member for cause is made on one of several narrow grounds. Minn. R. Crim. P. 26.02, subd. 5. One basis for challenge is a "felony conviction unless the juror's civil rights have been restored." *Id.*, subd. 5(2).

The plain language of rule 26.02, subd. 5(2), provides that a jury-panel member's felony conviction supports a challenge for cause unless the proposed juror's civil rights have been restored. When, as here, the felony conviction is in another state, the rule does not require consideration of what the status of the proposed juror's civil rights might be if the conviction had been entered in Minnesota, and we will not read such a requirement into the clear language of the rule. The district court did not abuse its discretion in granting the state's challenge of N.L. for cause.

II. The district court properly admitted statements that T.M.H. made to her foster mother.

Hunt argues that the district court erred by permitting T.M.H's foster mother to testify about statements spontaneously made to her by T.M.H. The child, T.M.H., was found incompetent to testify at trial. Hunt asserts that admission of these statements

violates both his right to confront witnesses and prohibitions against the use of hearsay testimony.

We review a violation of the Confrontation Clause as a question of law. *State v. Ahmed*, 782 N.W.2d 253, 258 (Minn. App. 2010). A criminal defendant has the right to confront the witnesses against him. U.S. Const. amend. VI. The United States Supreme Court has interpreted this to mean that the Sixth Amendment prohibits the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365 (2004). The key question here is whether the statements T.M.H. made to her foster mother and to which the foster mother testified are testimonial in nature.

The Supreme Court did not conclusively define "testimonial statements" in *Crawford* but stated that they include "formal statement[s] to government officers"; "in-court testimony"; "affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; and "police interrogations." *Id.* at 51-52, 124 S. Ct. at 1364.

We have previously determined that a child's spontaneous statement to his grandmother is not testimonial, reasoning that the statement was not made to a person acting as an agent of the government. *Ahmed*, 782 N.W.2d at 259. Likewise, T.M.H.'s spontaneous statements to her foster mother were nontestimonial. The foster mother was not collecting information, was not acting as an agent of the government, and knew very

little about why T.M.H had been placed in foster care. Thus, Hunt's confrontation rights were not implicated by the use of these nontestimonial statements.

We review for an abuse of discretion the district court's decision to admit testimony under an exception to the hearsay rule. *Ahmed*, 782 N.W.2d at 259. To be admitted under the residual exception to the hearsay rule, Minn. R. Evid. 807[1], the district court must find that the proffered statement has "circumstantial guarantees of trustworthiness." *State v. Fields*, 679 N.W.2d 341, 346 (Minn. 2004) (quotation omitted). "Such guarantees of trustworthiness must be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." *Id.* (quotation omitted). In addition, the district court must determine that (1) the statement relates to a material fact; (2) the statement is more probative than other evidence that can be secured by reasonable means; and (3) admission of the statement serves the interests of justice and the purposes of the evidentiary rules. Minn. R. Evid. 807; *Ahmed*, 782 N.W.2d at 259.

The district court here found that the statements that T.M.H. made to her foster mother had circumstantial guarantees of trustworthiness because they were made close in time to the event, the language of the statements reflected the cognitive ability of the child and appeared to represent her own independent thought, and the statements were inconsistent with the story then adhered to by her parents and thus seemed unrehearsed. The statements were both probative and evidence of a material fact because T.M.H.

[1] Minn. R. Evid. 803(24) and 804(b)(5), the former residual hearsay exceptions, have been combined in Minn. R. Evid. 807.

offered the only eyewitness account of what happened. Based on these considerations, the district court did not abuse its discretion by permitting the foster mother to testify regarding T.M.H.'s statements.

III. The district court erred by permitting the jury to view a videotaped interview of T.M.H., but the error was harmless.

The district court overruled Hunt's objection to the admission of a videotaped Cornerhouse-style interview of T.M.H. and the interviewer's trial testimony about the interview as violations of his right to confrontation.

In a case that has moved through the Minnesota courts and into the federal courts, the Eighth Circuit determined that a Cornerhouse-style interview of a child victim of sexual abuse is testimonial in nature, even if the interview is conducted by a social worker rather than a police investigator. *Bobadilla v. Carlson*, 575 F.3d 785, 793 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 108 (2010). *See also Ahmed*, 782 N.W.2d at 259.

The state urges us to consider that the Supreme Court has signaled a change in Confrontation Clause law in its decision in *Michigan v. Bryant*, ___U.S.___, 131 S. Ct. 1143 (2011). We are not persuaded that this case can be read as broadly as the state suggests. Under the current state of Minnesota law, the Cornerhouse-style interview is a testimonial statement, and the admission of T.M.H.'s statements in that interview when she was unavailable for cross-examination violated Hunt's right to confrontation. *See Bobadilla*, 575 F.3d at 791-92; *Ahmed*, 782 N.W.2d at 259. But we must also address the question of whether the decision to admit the videotape and the social worker's testimony was harmless error.

Confrontation Clause violations are subject to harmless-error analysis. *State v. Swaney*, 787 N.W.2d 541, 555 (Minn. 2010). An error is harmless beyond a reasonable doubt if the jury's verdict was surely unattributable to the error. *Id.* This requires a review of the entire record and a balancing of the manner in which the evidence was presented, whether the evidence was highly persuasive, whether the evidence was used in closing arguments, whether the defense successfully countered it, and whether there was other evidence of defendant's guilt. *Id.*

The state presented both the videotape of the Cornerhouse-style interview and a transcript of the interview, as well as the testimony of the interviewer. The interviewer was cross-examined by defense counsel, who pointed out inconsistencies in the child's answers. The child was not unusually verbal; her answers reflected the limitations of a four-year-old child and were difficult to follow. The state made three references to the Cornerhouse-style interview in its closing argument. Defense counsel also referred to the videotape in his closing argument, pointing out inconsistencies in the child's statements and how they conflicted with statements of other witnesses. Finally, there was other evidence of Hunt's guilt, including the testimony of T.L. and the injuries to M.C. and M.P., which were consistent with T.M.H.'s statement as reported by her foster mother.

In *Swaney*, the supreme court concluded that use of questionable testimony was harmless error because of the overwhelming evidence of the defendant's guilt and because the facts included in the testimony were also presented in other ways. 787 N.W.2d at 555. Although T.M.H. gave the only direct eyewitness account of the assaults, T.L.'s testimony also placed Hunt in the bathroom with the children when they

were injured; she described hearing screaming from the bathroom while Hunt was there with the children. Expert testimony confirmed that the children's burns were caused by immersion in hot water. Finally, T.M.H.'s spontaneous, nontestimonial statements to her foster mother provided virtually the same evidence as that in the videotape.

There is sufficient evidence absent the videotape of the interview and the interview testimony to support the jury's verdict beyond a reasonable doubt. We therefore conclude that although it was error to admit the videotape of the interview and the interview testimony, the error was harmless.

IV. The district court did not err by failing to suppress evidence obtained pursuant to the third search warrant.

Hunt argues that evidence obtained pursuant to the third of four search warrants issued here should be suppressed because it was not based on independent probable cause. Hunt did not challenge the third search warrant in the district court, so we need not address the validity of that warrant. *See State v. Sorenson*, 441 N.W.2d 445, 457 (Minn. 1989) (declining to address pretrial issue for the first time on appeal when the district court did not address the issue). We address the issue briefly in the merits, however, because appellant also argues that his counsel was ineffective for failing to raise the issue to the district court.

A search warrant is issued upon a showing of probable cause that contraband or evidence of a crime will be found in a particular place. *State v. Fort*, 768 N.W.2d 335, 342 (Minn. 2009). An appellate court considers the totality of the circumstances when reviewing whether there was sufficient probable cause to support the issuance of a search

warrant and gives "great deference to the [district court's] decision." *Id.* (quotation omitted).

When multiple search warrants are issued in the course of an investigation, each warrant must be supported by independent probable cause. *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995). Each warrant is independently executed and is limited in scope by the application supporting it; the police may not use previous warrants to expand the scope of a subsequent warrant beyond the independent facts asserted in the application. *Id.* at 634.

Although the applications for the second and third search warrant here are similar, they reflect the changing information that Hunt and T.L. provided to the investigating officers about how the injuries occurred. While the wording of the applications is not greatly different, there is a slight but significant difference in the stated purposes of the search warrants: in the application for the second search warrant, the investigator wanted to "document the water temperature in the apartment using an evidence worksheet for immersion burns" and to check other details provided by T.L. In the application for the third search warrant, the investigator wanted to make sure the water-heater temperature had not changed. And unlike in *Zanter*, the investigating officer did not expand his search beyond what was described in the application for the warrant. *Cf. id.* at 633 (approving district court's limitation of execution of search warrant to areas mentioned in warrant application).

We find no error in the district court's decision to issue the third search warrant and also conclude that Hunt's alternative claim that his counsel was ineffective for failing to challenge this warrant is without merit.

V. The district court did not err by permitting the investigating officer to testify regarding his water-temperature measurements.

Hunt argues that the district court erred by permitting the investigating officer to testify about his two measurements of the water temperature in the bathtub at Hunt's apartment and by allowing the jury to view a videotape of the second measurement. We review the district court's evidentiary rulings for an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). The party challenging an evidentiary ruling must show both an abuse of discretion and prejudice. *Id.*

In *State v. Darrow*, 287 Minn. 230, 177 N.W.2d 778 (1970), which involved unauthorized use of a motor vehicle, police attempted to reenact the defendant's movements to demonstrate that his alibi was improbable. *Id.* at 233, 177 N.W.2d 780. The defendant argued that "time-travel experiments conducted by the police did not have sufficient probative value to support the verdict beyond a reasonable doubt." *Id.* at 234, 177 N.W.2d at 780. The supreme court ruled that

> the performance of experiments in the presence of the jury, or the admission of evidence of experiments performed out of the presence of the jury, when they are made under conditions and circumstances substantially similar to those existing in the case at issue rests in the sound discretion of the trial court.

Id., 177 N.W.2d at 781 (quotation omitted).

More recently, in *State v. Walen*, 563 N.W.2d 742 (Minn. 1997), the district court permitted the prosecution to cause the alleged murder weapon to be fired at a shooting range with the jury present to demonstrate that a witness was lying when he testified that the shot he heard was not loud. *Id.* at 749. The supreme court stated that "[d]etermination of a piece of evidence's relevance and accuracy is within the discretion of the trial court and will be overturned only if clearly abused." *Id.* The supreme court concluded that the demonstration was relevant "to whether or not the witness was telling the truth" and that therefore the district court had not abused its discretion by permitting the demonstration. *Id.*

The jury here was presented with two different scenarios: one that implicated Hunt and the other that supported his claim of accidental injury. No claim of scientific accuracy was made; the investigating officer described the steps he took in measuring the temperature of the bathtub water and presented a videotape showing those steps. The evidence was relevant to whether or not Hunt's version of events was credible. Defense counsel cross-examined the investigating officer, pointing out the lack of rigorous scientific technique, and also pointing out in closing argument the alleged weaknesses in the officer's methodology. Based on these circumstances, the district court did not abuse its discretion by permitting the testimony regarding the water-temperature measurements and allowing the jury to view the videotape of the second measurement.

VI. The district court did not err by failing to give an accomplice-testimony instruction.

Hunt asserts that the district court erred by failing sua sponte to give an accomplice-testimony instruction because, he argues, it was reasonable to consider T.L. as an accomplice.

> "A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

Minn. Stat. § 634.04 (2010).

The district court must give an accomplice-testimony instruction whenever it is "reasonable to consider any witness against the defendant to be an accomplice." *Strommen*, 648 N.W.2d at 689. The district court must instruct the jury that it cannot find the defendant guilty based on the testimony of a person who could be charged with the same crime, unless there is other corroborating evidence. *State v. Barrientos-Quintana*, 787 N.W.2d 603, 610 (Minn. 2010). The district court is obligated to give such an instruction whether or not the defendant has requested it. *Id.*

A person is an accomplice if he or she could have been charged with and convicted of the same crime as the defendant. *Id.* The person must "have played a knowing role in the crime—the witness's mere presence at the scene is not sufficient." *Id.* (quotation omitted). But an accessory after the fact is not an accomplice. *State v. Swanson*, 707 N.W.2d 645, 652 (Minn. 2006). And "[a] witness who is alleged to have

committed the crime *instead* of the defendant is, as a matter of law, not an accomplice." *Id.* at 653; *see also State v. Evans*, 756 N.W.2d 854, 877 (Minn. 2008).

Here, T.L. was charged with aiding an offender to avoid arrest and aiding an offender by being an accomplice after the fact, both charges that involve assistance after the commission of the crime. Further, defense counsel argued that T.L., not Hunt, was responsible for the victims' injuries. Thus, T.L. was either an accessory after the fact or an alternate perpetrator, both roles that preclude consideration of T.L. as an accomplice. *See Swanson*, 707 N.W.2d at 652-53. Under these circumstances, the district court did not err by failing to sua sponte give an accomplice-testimony instruction.

VII. The district court did not abuse its discretion by imposing upward durational departures in sentencing.

Hunt contends that the district court abused its discretion by imposing sentences that represent upward double durational departures from the sentencing guidelines. The appellate court reviews the district court's decision to depart from the presumptive sentence under the guidelines for an abuse of discretion. *State v. Shattuck*, 704 N.W.2d 131, 140 (Minn. 2005). A guidelines sentence is presumed to be appropriate; although the district court has the discretion to depart from the presumptive sentence, it may do so only if there are substantial and compelling circumstances that render the defendant's conduct significantly more or less serious than that typically associated with commission of the crime. *State v. Jones*, 745 N.W.2d 845, 848 (Minn. 2008); Minn. Sent. Guidelines II.D.01 (2010). The district court must set forth its reasons for departing from the presumptive sentence. *Shattuck*, 704 N.W.2d at 140. A reviewing court determines if the

reasons given for departure are "legally permissible and factually supported in the record" and will reverse if the "district court's reasons for departure are improper or inadequate." *State v. Robideau*, 796 N.W.2d 147, 150 (Minn. 2011) (quotation omitted).

The sentencing guidelines describe a number of factors that can be considered in support of an upward durational departure; these include, among others, whether the victim was particularly vulnerable due to age, physical or mental capacity, or infirmity, and whether the victim was treated with particular cruelty. Minn. Sent. Guidelines II.D.2b (1), (2). To support an upward departure, the district court may not rely on factors already taken into account by the sentencing guidelines; thus, the district court may not rely on conduct that proves one or more elements of the underlying crime. *Jones*, 745 N.W.2d at 849. A departure may not be based on uncharged or dismissed offenses and the "conduct underlying one conviction cannot be relied on to support departure on a sentence for a separate conviction." *Id.* (quotation omitted).

Here, the district court made both oral and written findings supporting its decision to depart from the guidelines sentences. The district court found, as to the conviction for first-degree assault against M.C., that the child, who was 16 months old, could not walk, ask for assistance, or explain after the fact what had happened, and that Hunt was aware that the child would not be able to relate what had happened. Further, at the time of the assault, Hunt was acting as a caretaker for the child. The district court concluded that this showed that M.C. was particularly vulnerable.

The district court also found that appellant failed to seek medical attention for M.C. and intentionally obstructed his mother's attempts to find him and thereby delayed

timely medical assistance for him; the court concluded that appellant acted with particular cruelty by doing so.

As to the conviction of third-degree assault against M.P., which was based on the infliction of substantial bodily harm, the district court found that because of her age of two-and-a-half years, she was "unable either to ask for assistance or, after the fact, accurately relate what had transpired," that Hunt was aware of that fact, and he was acting as her caretaker. The district court concluded that M.P. also was particularly vulnerable. And the district court found that Hunt had failed to seek medical attention for M.P. and had delayed the return of the child to her mother, thus acting with particular cruelty.

From the trial testimony, it is clear that M.C. in particular was in significant pain and that both children experienced considerable discomfort but were not treated because they could not communicate about their injuries.

Failure to seek medical assistance is a basis for a finding of particular cruelty. *Tucker v. State*, 777 N.W.2d 247, 250-51 (Minn. App. 2010), *review granted* (Minn. Mar. 30, 2010). In *Tucker*, the defendant shot through the windshield of the victim's car but left without determining whether she had been hit or harmed. She was found sometime later, bleeding and struggling to breathe, and she eventually died. *Id.* at 249. This court concluded that the defendant had acted with particular cruelty because of "his indifference to whether [the victim] was in fact injured and needed medical attention. The special cruelty of such indifference is clear because it can mean that the offender not only inflicted serious injury but also deprived the victim of at least a chance to survive

the injury." *Id.* at 251-52. We cited other cases that relied on failure to seek medical assistance as a basis for a finding of particular cruelty: *State v. Stumm*, 312 N.W.2d 248, 248 (Minn. 1981) (citing apparent indifference toward caring for child after a beating); *State v. Morrison*, 437 N.W.2d 422 (Minn. App. 1989) (citing failure to obtain medical assistance for severely beaten child), *review denied* (Minn. Apr. 26, 1989); *State v. Jones*, 328 N.W.2d 736 (Minn. 1983) (citing failure to seek medical aid for 82-year old victim of burglary).

Here, Hunt not only did not seek medical assistance but also put both children in a closet and ordered T.L. to leave them there. Thereafter, he delayed the return of the children to their mother, thus postponing for several hours their access to medical care. M.C. nearly died because of the lack of immediate medical attention.

The district court provided factually supported and legally permissible reasons for departing from the presumptive sentences. We find no abuse of discretion.

VIII. Hunt's pro se issues are not meritorious.

Hunt has raised ten issues in his pro se brief, none of which is supported by legal authority or argument and some of which include facts not developed during trial. An appellate court will consider issues raised in a brief that "contains no argument or citation to legal authority in support of its allegation" to be waived. *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002); *State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006), *review denied* (Minn. Jan 24, 2007).

Affirmed.