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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-453**

State of Minnesota,  
Respondent,

vs.

Michael Frederick Schmidt,  
Appellant.

**Filed April 9, 2012  
Affirmed  
Klaphake, Judge**

Dakota County District Court  
File No. 19HA-CR-10-1575

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

James Backstrom, Dakota County Attorney, Nicole E. Nee, Assistant County Attorney, Hastings, Minnesota (for respondent)

Mark D. Nyvold, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Klaphake, Judge; and Cleary, Judge.

**UNPUBLISHED OPINION**

**KLAPHAKE**, Judge

In this criminal appeal following conviction for first-degree sexual conduct, appellant Michael Frederick Schmidt seeks a new trial because he claims that (1) admission of *Spreigl* evidence pertaining to his role in the injury of another infant,

admitted to show absence of mistake in this case, was unfair; and (2) the district court abused its discretion by imposing a 324-month sentence, which constituted a less-than-double departure from the presumptive sentence. Because we conclude that even if the district court erred by admitting the *Spreigl* evidence, any error was harmless in light of the strong evidence of guilt, and because the durational departure was a proper exercise of the district court's sentencing discretion, we affirm.

## DECISION

### *Admissibility of Spreigl Evidence*

*Spreigl* evidence is evidence of other crimes, wrongs, or acts, which is inadmissible as evidence of character or propensity, but is admissible under limited circumstances for other purposes, including to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Minn. R. Evid. 404(b) (codifying *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965)). “Evidentiary rulings are within the sound discretion of the district court[,] and we will not disturb those rulings on appeal absent a clear abuse of that discretion.” *State v. Nissalke*, 801 N.W.2d 82, 99 (Minn. 2011) (quotation omitted); see *State v. Blom*, 682 N.W.2d 578, 611 (Minn. 2004) (applying abuse-of-discretion standard of review to district court decisions on admissibility of *Spreigl* evidence). This court will reverse if “there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” *State v. Ness*, 707 N.W.2d 676, 691 (Minn. 2006). But “[a] defendant who claims the trial court erred in admitting evidence bears the burden of showing the error and any resulting prejudice.” *Id.* at 685 (quotation omitted).

This case involved infliction of a significant vaginal penetration wound on a nine-month-old infant while the infant was in appellant's care. Appellant admitted to causing the injury, but he claims that it was accidental. Likewise, the *Spreigl* evidence involved an injury to an infant's genital area that occurred while the infant was in appellant's care. Appellant claimed that the injury was accidental, and was convicted of child neglect for that incident.

We decline to assess the admissibility of the *Spreigl* evidence because we conclude that any error in its admission did not affect the jury's verdict. *Ness*, 707 N.W.2d at 691 (requiring reversal of conviction for improper admission of *Spreigl* evidence only if there is a "reasonable possibility that the wrongfully admitted evidence significantly affected the verdict"). The evidence of guilt here was very strong: appellant admitted to causing the harm to the infant but claimed that it was accidental. The pediatric urologic surgeon who performed reconstructive surgery on the victim testified that in his twenty years of experience this was the "most severe" injury he had seen on a child of the victim's age. The trial record, which clearly demonstrates horrific, extensive, and severe injuries to the victim, belies appellant's claim that his penetration of the victim was caused by accidental insertion of his thumbnail. *See State v. Mahkuk*, 736 N.W.2d 675, 687 (Minn. 2007) (stating that even if evidence is erroneously admitted, "there must be actual prejudice to the defendant's case in order to reverse the district court and provide relief") (quotation omitted)).

### *Sentence*

A district court must impose the presumptive guidelines sentence unless there are “identifiable, substantial, and compelling circumstances” to warrant an upward departure from the presumptive sentence.” Minn. Sent. Guidelines II.D. (2008). Before imposition of an upward durational departure, the district court must be satisfied that one or more factual circumstances exist to support a departure that is not embodied in the guilty plea, and must explain “why those circumstances create a substantial and compelling reason to impose a sentence outside the range on the grid.” *State v. Rourke*, 773 N.W.2d 913, 919 (Minn. 2009). “Substantial and compelling circumstances are those showing that the defendant’s conduct was significantly more or less serious than that typically involved in the commission of the offense in question.” *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). This court reviews a district court’s decision to depart from the presumptive sentence for an abuse of discretion. *State v. Steinke*, 764 N.W.2d 824, 827 (Minn. 2009).

The district court found three factors that justified the departure in this case: the particular vulnerability of the victim, the particular cruelty of the crime, and appellant’s abuse of a position of trust and authority during commission of the crime.<sup>1</sup>

As to vulnerability, appellant contends that this court should not permit departure because the legislature took the victim’s age into account when defining first-degree sexual conduct under Minn. Stat. § 609.342, subd. 1(a), which applies when the

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<sup>1</sup> Appellant waived the right to have a jury determine facts that could be used in determining his sentence.

complainant is under thirteen years of age. In *Taylor v. State*, 670 N.W.2d 584, 589 (Minn. 2003), the supreme court prohibited an upward durational departure in a first-degree sexual conduct case involving an adult offender and a three-year-old child victim, stating that “the victim’s vulnerability both as to age and the defendant’s position of authority or trust were inappropriate bases for departure where those facts were already taken into account by the legislature in determining the degree of seriousness of the offense.” The *Taylor* court based its conclusion on the fact that the legislature in recent years has comprehensively refined the law pertaining to sex offenders, including creating more particularized sexual conduct offense categories with attendant presumptive and mandatory sentences, and developing the “framework of risk management tools” for sex offenders. *Id.* at 590.

While the rationale applied in *Taylor* could be applied here, this victim is an infant who could neither walk nor speak. In that regard, the victim’s potential vulnerability is quite different from older children who fit within the age range of under-thirteen-year-old victims to which Minn. Stat. § 609.342, subd. 1(a) applies. See *State v. Mohamed*, 779 N.W.2d 93, 99 (Minn. App. 2010) (rejecting application of *Taylor* to malicious punishment of a child offense, even though statutory scheme took into account the age of the victim, because the statutory scheme did not “account[] for the particular vulnerability accompanying *infancy* of a child”), *review denied* (Minn. May 18, 2010). Likewise, appellant’s violation of a position of trust was more egregious in this case because the victim was completely dependent.

As to the particular cruelty basis for departure, if a victim is “treated with particular cruelty for which the individual offender should be held responsible,” that fact can constitute a basis for an upward durational departure. Minn. Sent. Guidelines II.D.2.b.(2) (2008). “Particular cruelty” is cruelty “of a kind not usually associated with the commission of the offense in question.” *State v. Schantzen*, 308 N.W.2d 484, 487 (Minn. 1981). Particular cruelty to a child may be “demonstrated by the nature and extent of physical damage.” *State v. Steinhaus*, 405 N.W.2d 270, 271 (Minn. 1987). In a sexual assault case, the supreme court upheld a double durational departure when the victim, a two-and-a-half-year-old child, suffered injuries during a sexual assault that involved the same type of injury that the victim suffered in this case. *State v. Partlow*, 321 N.W.2d 886, 887 (Minn. 1982). There, the court stated that “[t]he cruelty practiced upon the child is demonstrated by the nature and extent of the physical damage and the treatment necessary to repair the injury.” *Id.*; see also *State v. Hart*, 477 N.W.2d 732, 740 (Minn. App. 1991) (affirming a double durational departure for first-degree sexual conduct where victim was subjected to various types of penetration “that caused bleeding”), *review denied* (Minn. Jan. 16, 1992). The injuries that appellant caused by the penetration in this case demonstrated that the offense was conducted with a cruelty not typical for first-degree sexual conduct. The infant experienced significant blood loss, and was required to undergo extensive reconstructive surgery to repair a profound and deep genital wound that necessitated a several-day hospital stay. The particular cruelty of the offense, as demonstrated by the injury to the victim, supports the district court’s decision to depart.

Normally, an upward durational departure is limited to double the presumptive sentence, but a greater departure is permissible if the facts are “unusually compelling.” *State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981). Here, the presumptive sentence for the offense was 144 months, with a range of 144-173 months included in the presumptive range. Minn. Sent. Guidelines IV (2008).<sup>2</sup> Appellant claims that in calculating whether the district court imposed a double- or greater-than-double departure, the presumptive sentence should have been the typical sentence for the offense indicated in the guidelines grid, not the presumptive range. Because appellant cites no legal authority for this proposition, we conclude that the district court did not abuse its discretion by choosing a sentence duration within the permissible presumptive range as the presumptive base sentence from which to depart. Under these circumstances, the sentence imposed here, 325 months, was less than double the presumptive range for the offense. *See Evans*, 311 N.W.2d at 483 (stating that “*generally* in a case in which an upward departure in sentence length is justified, the upper limit will be double the presumptive sentence length.”). Because we conclude that the sentence duration was not in excess of a double departure, we need not address whether the facts are “unusually compelling,” allowing a greater-than-double durational departure.

**Affirmed.**

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<sup>2</sup> The statutory maximum sentence is 30 years. Minn. Stat. § 609.342, subd. 2(a) (2008).