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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1144**

State of Minnesota,
Respondent,

vs.

Corey Dell Andrews,
Appellant.

**Filed May 28, 2013
Affirmed
Peterson, Judge**

Stearns County District Court
File No. 73-CR-09-9131

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota; and

Bradford W. Colbert, St. Paul, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Peterson, Judge; and Smith,
Judge.

UNPUBLISHED OPINION

PETERSON, Judge

On appeal following this court's remand for resentencing, appellant argues that the district court erred in departing from the presumptive sentence based on the fact that a child was present during a burglary. We affirm.

FACTS

Appellant Corey Dell Andrews and another man broke into the victim's home early one morning. The victim, whose nine-month-old son was sleeping next to her, awakened to find the two men standing near her bed. The men bound the victim's hands, arms, and legs with duct tape. The victim's son had also awakened and was trying to get off the bed, and the men placed him between the victim's duct-taped arms. The men then rifled through the house, stole two cell phones and a wallet, and left.

Appellant was charged with multiple crimes. He waived his right to a jury trial, and the case was tried to the court. The district court found appellant not guilty of (1) first-degree aggravated robbery, (2) first-degree burglary (possession of a dangerous weapon), (3) first-degree possession of a dangerous weapon, (4) second-degree assault with a dangerous weapon against the victim, (5) second-degree assault with a dangerous weapon against the son, and (6) felon in possession of a firearm. The court found appellant guilty of (1) simple robbery, a lesser-included offense of first-degree aggravated robbery; (2) first-degree burglary (assault of a person); (3) fifth-degree assault against the victim, a lesser-included offense of second-degree assault with a dangerous weapon; and (4) false imprisonment.

The district court granted the state's motion for an aggravated sentence and imposed concurrent sentences of 150 months for first-degree burglary, a 57-month upward departure; 66 months for simple robbery, a 27-month upward departure; and 17 months for false imprisonment. Appellant challenged his sentence on appeal. This court concluded that invasion of the victim's zone of privacy was an improper fact to rely on to support the durational departure and remanded for resentencing because it was unclear whether the district court would have imposed the same sentences if it had relied only on the fact that the offenses were committed in the presence of a child. *State v. Andrews*, No. A11-194, 2012 WL 426576, at *4-5 (Minn. App. Feb. 13, 2012). On remand, based on the fact that a child was present, the district court resentenced appellant to concurrent terms of 126 months for first-degree burglary, a 33-month upward departure; 60 months for simple robbery, a 21-month upward departure; and 17 months for false imprisonment.

This appeal followed.

D E C I S I O N

We review the district court's decision to depart from a presumptive sentence for an abuse of discretion. *Tucker v. State*, 799 N.W.2d 583, 585-86 (Minn. 2011). But we conduct a de novo assessment of the district court's decision as to "whether a valid departure ground exists, relying on the factual findings that support the decision." *State v. Weaver*, 796 N.W.2d 561, 567 (Minn. App. 2011).

"Departures are warranted only when substantial and compelling circumstances are present." *State v. Jones*, 745 N.W.2d 845, 848 (Minn. 2008). "Substantial and compelling circumstances are those demonstrating that 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” and include the nonexclusive list of aggravating factors found in the sentencing guidelines. *Id.* (quotation omitted). “The presence of a single aggravating factor is sufficient to uphold an upward departure.” *Weaver*, 796 N.W.2d at 571 (quotation omitted).

Appellant argues that the child’s presence was an improper basis for a departure because the child’s presence was implicitly considered in the burglary conviction. “[T]he district court may not base an upward departure on facts necessary to prove elements of the offense being sentenced.” *State v. Edwards*, 774 N.W.2d 596, 602 (Minn. 2009). Citing *State v. Hodges*, 386 N.W.2d 709, 711 (Minn. 1986), appellant contends that, because a defendant may be convicted of only one burglary offense even if multiple persons were present during the burglary, “[i]t follows that the district court could not justify a departure based on the presence of another person being present during the commission of the burglary.” The *Hodges* court stated:

Although the multiple-victim exception clearly permits three assault convictions if a burglar assaults three different people after entering a house, the exception does not allow three burglary convictions simply because three people were present in the house when it was burglarized. Although the crime of burglary carries with it some special risks to life and is not therefore purely a property offense, it nonetheless is classified in the criminal code under the heading “Damage or Trespass to Property.” Thus, we believe that for the purpose of [Minn. Stat. §] 609.04 [1984], the burglarious entry of one dwelling should justify only one burglary conviction. Under this approach, the commission of other crimes, such as assault or robbery, against the occupants of the dwelling after entry is made may be additionally punished with convictions and sentences on the basis of one extra conviction and sentence

per victim of the other crimes, but only one burglary conviction would be allowed.

Id.

Minn. Stat. § 609.582, subd. 1(c) (2008), provides:

Whoever . . . enters a building without consent and commits a crime while in the building, either directly or as an accomplice, commits burglary in the first degree . . . if:

. . .

(c) the burglar assaults a person within the building or on the building's appurtenant property.

The district court found appellant guilty of first-degree burglary based on his commission of “the crimes of theft and assault while in the building.” Because the victim, rather than her child, was assaulted, the state could prove the elements of first-degree burglary without proving that the child was present during the assault. Committing the assault in the child’s presence made appellant’s conduct significantly more serious than that typically involved in first-degree burglary. Therefore, the child’s presence is a sufficient basis for the sentencing departure.

Citing *Edwards*, 774 N.W.2d at 605, appellant argues that because the assault committed against the victim was used to enhance the burglary offense from second to first degree, “the characteristics of the assault—including that it was committed in the presence of [the child]—cannot also be used as a basis for a departure.” In *Edwards*, the supreme court explained that firing multiple shots into a group of people could not be a basis for a sentencing departure on a drive-by shooting conviction because firing multiple shots was contemplated by the legislature when it set the presumptive sentence for drive-

by shooting, but firing multiple shots could be a basis for a sentencing departure on an assault conviction because the legislature did not contemplate the risk of firing multiple shots into a group of people when it set the presumptive sentence for first-degree assault. *Id.* We see no basis to conclude that when the legislature set the presumptive sentence for first-degree burglary, it contemplated that a child would be present during an assault committed during the burglary. Consequently, the child's presence during appellant's assault of the victim is a permissible basis for the sentencing departure.

Appellant also argues that the departure based on the child's presence is improper because appellant was acquitted of assaulting the child. "Departures cannot be based on conduct underlying an offense of which the defendant was acquitted." *Jones*, 745 N.W.2d at 849. But the departure was not based on conduct underlying an assault of the child, it was based on the child witnessing an assault of the victim.

Finally, appellant argues that the departure was improper because the child was too young to comprehend what was happening. Neither this court nor the supreme court requires a child to comprehend an offense committed in the child's presence in order for the child's presence to be a basis for a sentencing departure. Instead, the supreme court held that

[t]he mere presence of children . . ., *absent any evidence that they saw or heard the offense* is not a substantial and compelling circumstance demonstrating that a defendant's conduct was significantly more serious than that typically involved in the commission of the offense. . . . [T]he State had to prove that the children saw, heard, or otherwise witnessed the offense to support a finding that the offense was committed in the presence of children.

State v. Vance, 765 N.W.2d 390, 394 (Minn. 2009) (emphasis added). And in further explaining when the presence of a child may be a basis for a departure, the supreme court stated

that the aggravating factor of an offense committed in the presence of a child is limited to *those situations where the child sees, hears, or otherwise witnesses* some portion of the commission of the offense in question. The phrase “otherwise witnessed” refers to other sensory perceptions of the child, such as smelling or feeling, by which a child witnesses the commission of a crime.

State v. Robideau, 796 N.W.2d 147, 152 (Minn. 2011) (emphasis added).

When appellant assaulted the victim, the child was awake and lying next to the victim. This is sufficient for the district court to find that the child saw, heard, or otherwise witnessed the assault and, therefore, to support the upward durational departure based on the aggravating factor that the assault was committed in the presence of a child.

Affirmed.