STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1707

State of Minnesota,
Respondent,

vs.

William Maurice Anderson,
Appellant.

Filed December 2, 2013
Affirmed in part, reversed in part, and remanded
Chutich, Judge

Ramsey County District Court
File No. 62-CR-12-1102

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Kirk Anderson, Anderson Law Firm, PLLC, Special Assistant State Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Kalitowski, Judge; and Chutich, Judge.

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

CHUTICH, Judge

Appellant William Maurice Anderson appeals his conviction of first-degree criminal sexual conduct, contending that the district court abused its discretion or plainly

erred in making various evidentiary rulings at trial and by inappropriately imposing an upward sentencing departure. He also claims that the prosecutor committed misconduct and that his defense attorney provided him with ineffective assistance of counsel.

Because the district court did not abuse its discretion or err on the evidentiary issues raised by Anderson, no prosecutorial misconduct occurred, and Anderson's defense attorney provided him with effective assistance of counsel, we affirm his conviction. Because the district court improperly sentenced Anderson to an upward departure, we reverse his sentence only and remand for further sentencing proceedings.

FACTS

Anderson married H.M.'s mother, J.A., in approximately 2005, when H.M. was eight years old. Anderson was H.M.'s stepfather, but H.M. referred to him as "Dad." When H.M. reached puberty, Anderson's relationship with H.M. evolved inappropriately.

In 2010, when H.M. was approximately twelve years old, Anderson suggested that he should engage in sexual behavior with her to teach her about sex. Anderson also told H.M. that he heard her having a sexual dream one night and that she tried to get him to have sex with her. Anderson then told H.M. that he had sex with her that night. H.M. did not believe that she and Anderson had sex, but later found a dildo behind her bed. Anderson told her he had romantic feelings for her, and this made H.M. "afraid and worried" because "[she] didn't think it was right to feel that way."

After Anderson told H.M. he had romantic feelings for her, she went to her grandmother's home in California for the summer. Anderson conversed by phone with H.M. while she was in California about having sex together. H.M.'s grandmother noticed

that H.M. and Anderson talked on the phone for one or two hours several times a week and that H.M. closed her door during these conversations. When H.M. came home from California, Anderson provided marijuana for them to smoke together. Shortly after that, Anderson told her again that he needed to help her learn about sex, and he touched her breasts.

Anderson later told H.M. that she needed to try the drug ecstasy because she would soon be exposed to drugs at school. H.M. took the ecstasy that Anderson gave her, and Anderson then suggested that they go upstairs to a bedroom to play with glow sticks. While H.M. was playing with the glow sticks, Anderson rubbed H.M.'s genitals over her pants and then put his hand under her pants and put his finger in her vagina. Anderson stopped when H.M. told him it made her uncomfortable; he told her that his "feelings just came about, and it just happened." Anderson touched her breasts again the following winter and told her he was doing it to help her learn about sex. When H.M. responded that it made her uncomfortable and that she did not like it, he told her that they could take a break and did not have to do it again.

H.M. went to California again the summer of 2011, and Anderson and H.M. again talked on the phone about having sex. Anderson told her they needed to have sex together because it would help her learn how sex works and strengthen their relationship. After H.M. returned to Minnesota, Anderson had sex with H.M. while her mother was traveling. H.M. saw that her stepfather was uncircumcised, used a condom with a square, gold wrapper with black print on it, and also used lubricant.

Anderson had sex with H.M. a total of eight times that summer and fall. During this time period, Anderson also penetrated her vagina with his fingers, and once he performed oral sex on H.M. Anderson gave H.M. an inhalant called "poppers" several of the times they had sex to help her muscles relax. H.M. asked Anderson to stop every time they had sex because it was painful for her, and he complied. Anderson told H.M. three or four times that she could not tell anyone about what they were doing because he would go to jail and their family would fall apart.

In addition to the ecstasy and "poppers," Anderson also suggested that H.M. should try cocaine, alcohol, and tobacco products. H.M. tried all of these things after Anderson gave them to her, but Anderson and H.M. did not have sex after she used them.

In November 2011, H.M. told Anderson that she did not want to have sex because of the stress she was experiencing. Anderson later expressed anger at her in a text message for her refusal.

In January of 2012, H.M. began dating a boy from school. H.M.'s family went to dinner with the boy's family, and Anderson later told H.M. that he did not approve of her dating because it would "get in the way of [their] relationship." H.M. told Anderson that she did not want to continue a sexual relationship with him. As a result, Anderson responded that she would be punished more often and that he would not be as open to her spending time with her friends. H.M.'s mother walked in on the two of them arguing, and Anderson told her, "We're having a mature relationship behind your back." H.M. told her mother the next night about having sex and using drugs with Anderson. H.M.'s mother immediately called the police and filed a report. H.M. was then taken to Midwest

Children's Resource Center in St. Paul, where she was interviewed and physically evaluated by a registered nurse.

Ramsey County charged Anderson with first-degree criminal sexual conduct. *See* Minn. Stat. § 609.342, subd. 1(h)(iii) (2010). A jury trial took place over five days in April and May 2012. H.M. testified about the abuse she suffered, and her mother and grandmother also testified. Condoms, lubricant, and "poppers" matching H.M.'s description were admitted into evidence at trial, and H.M.'s mother corroborated H.M.'s testimony that Anderson was uncircumcised. Additionally, the registered nurse who examined H.M. at the Midwest Children's Resource Center testified, and Anderson's journal and text messages to H.M. were admitted into evidence.

Anderson testified at trial. He admitted that he had an inappropriately close relationship with H.M., but denied ever having sexual contact with her. He stated that J.A. was very jealous of the relationship he had with H.M. Anderson testified that H.M. fabricated the allegations of sexual abuse against him to punish him because he was divorcing H.M.'s mother.

The jury found Anderson guilty of first-degree criminal sexual conduct, and he was sentenced to 258 months imprisonment, an upward sentencing departure. This appeal followed.

D E C I S I O N

I. Evidentiary Rulings To Which Objection Was Made at Trial

We generally review evidentiary rulings for an abuse of discretion. *See State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). "A court abuses its discretion when its

decision is based on an erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011). On appeal, Anderson has the burden of establishing that the district court abused its discretion and that he was prejudiced as a result. *See State v. Nunn*, 561 N.W.2d 902, 907 (Minn. 1997).

A. H.M.'s Sexual History

Anderson argues that the prosecutor's line of questioning to H.M. wrongly implied that H.M. had her first sexual experience with him and that the district court improperly denied his request for a curative question regarding H.M.'s virginity or to cross-examine H.M. about her sexual history. The state contends that the district court's ruling was proper because, taken in context, the prosecutor was asking about H.M.'s first sexual experience *with Anderson* and not generally about her first sexual experience. The state further contends that Anderson's request to elicit testimony about H.M.'s sexual history is barred under Minnesota Rule of Evidence 412.

After reviewing the transcript and relevant rule of evidence, we agree that the district court acted well within its discretion in denying Anderson's request. First, when considered in light of the entire direct examination of H.M., the prosecutor's questions and H.M.'s responses relate primarily to the first time that H.M. had sexual intercourse with Anderson, and not to whether she was a virgin. Because Anderson had intercourse with H.M. eight times, references to the "first time" or the "first incident" were a legitimate way to differentiate one episode of intercourse from another.

More importantly, Minnesota Rule of Evidence 412(1) prohibits examination of a victim's sexual history unless "consent of the victim is a defense in the case" or "[w]hen

the prosecution's case includes evidence of semen, pregnancy or disease at the time of the incident." Minn. R. Evid. 412(1)(A), (B). When a defendant wants to impeach a sexual assault victim's testimony on chastity, the impeachment evidence is inadmissible when the "defendant has met none of the requirements" of Rule 412. *State v. Carpenter*, 459 N.W.2d 121, 126 (Minn. 1990).

Because consent was irrelevant in this case and because the prosecution's case did not rely on the enumerated physical evidence, Rule 412 barred Anderson from delving further into H.M.'s sexual history. Accordingly, the district court properly exercised its discretion in excluding this evidence.

B. Text Messages

Anderson next argues that the district court abused its discretion by admitting text messages that J.A. found on Anderson's phone, which she then forwarded to her phone and e-mail account, and ultimately to the police. He contends that the state did not properly authenticate the messages or lay foundation for the text messages to be admissible. We disagree.

The district court has "considerable discretion" under Minnesota Rule of Evidence 901 in determining whether evidence has been authenticated. *State v. Dulak*, 348 N.W.2d 342, 344 (Minn. 1984). "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Minn. R. Evid. 901(a). The foundation for authentication may be laid by testimony of a witness "that a matter is what it is claimed to be." *Id.* at (b)(1). Under Minnesota Rule of Evidence 1004(1), "The

original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if . . . [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith."

Applying these principles, we conclude that the district court properly admitted the text messages into evidence. H.M. was shown copies of all of the text messages that were later admitted into evidence, and she stated that she remembered receiving all but one. Concerning that one text message, H.M. stated that she had received similar text messages from Anderson on the same subject. J.A. explained in her testimony that she discovered the text messages between Anderson and H.M. on Anderson's phone. She testified that Anderson was the only person who sent text messages from his personal phone and that she did not alter any of the text messages in the process of forwarding them to herself and to the police.

Anderson cross-examined both H.M. and J.A. about whether the text messages were altered before being sent to the police. Because the state properly laid the foundation for and authenticated the text messages, Anderson's argument about reliability goes to the weight of the text messages as evidence against him, not to their admissibility. *See State v. Johnson*, 307 Minn. 501, 504, 239 N.W.2d 239, 242 (1976). Given this record, the district court did not abuse its discretion by admitting the text messages into evidence.

C. Impeachment of J.A.

Anderson contends that he was not allowed to attack J.A.'s credibility because the district court granted the state's request to exclude any evidence about "a false rape

allegation that [J.A.] had made years earlier[.]" Anderson claims that Minnesota Rule of Evidence 412 did not apply to J.A. because she was not the victim in this case. The district court granted the state's motion to exclude this evidence because "the fact that the prosecution declined to prosecute says nothing about whether the allegation was false" and because "[i]t distracts the jury from making the determination of whether, in this case, Mr. Anderson engaged in some type of sexual contact with the alleged victim in this case." The district court's reasoning is sound.

Here, no evidence suggested that J.A.'s report to the police about being sexually assaulted was false. The decision of the county attorney's office not to pursue charges after J.A. filed a report does not mean the authorities did not believe her allegations; the decision not to charge may have been related to the perceived difficulty in proving the rape beyond a reasonable doubt. Where no evidence confirms that a witness made a fabricated claim to the police, it is not relevant to question that witness about fabricating criminal allegations. *See State v. Gerring*, 378 N.W.2d 94, 96–97 (Minn. App. 1985). The district court acted within its discretion in excluding this evidence.

II. Evidentiary Issues Reviewed For Plain Error

Because Anderson failed to object to the following evidentiary issues, we review them for plain error. *See* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Plain error requires that the appellant show "(1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). For an error to affect substantial rights, it must be "prejudicial and affect[] the outcome of the case." *Griller*, 583 N.W.2d at 741. "If those three prongs are met, we

may correct the error only if it 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Strommen*, 648 N.W.2d at 686 (quoting *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001)).

A. Prior Bad Acts

Anderson argues that the district court improperly admitted evidence of prior bad acts that he committed without engaging in a *Spreigl* analysis. *See State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965). Specifically, he states that evidence of him having sexual discussions with H.M., providing drugs to H.M., and engaging in sexual conduct with H.M. before the time period charged in the complaint should not have been admitted. The state explains that evidence of these acts was properly admitted as relationship evidence under Minnesota Statute section 634.20 or as evidence directly related to the charged crime. We agree that this evidence was properly admitted.

Section 634.20 governs relationship evidence and states:

> Evidence of similar conduct by the accused against the victim of domestic abuse, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Minn. Stat. § 634.20 (2012). "[S]imilar conduct" includes "evidence of domestic abuse," and "domestic abuse" includes "physical harm, bodily injury, or assault" and "criminal sexual conduct" when "committed against a family or household member by a family or household member." Minn. Stat. § 518B.01, subd. 2(a) (2012). Evidence of prior bad

acts admitted under this statute is not subject to analysis under *Spreigl*. *State v. Sanders*, 743 N.W.2d 616, 621 (Minn. App. 2008), *aff'd* 775 N.W.2d 883 (Minn. 2009).

In addition, Minnesota cases recognize a basis for the introduction of relationship evidence apart from section 634.20. "[R]elationship evidence is character evidence that may be offered to show the strained relationship between the accused and the victim . . . [and] such evidence has further probative value when it serves to place the incident for which appellant was charged into proper context." *State v. Loving*, 775 N.W.2d 872, 880 (Minn. 2009) (quotations omitted).

Applying these principles here, we conclude that H.M.'s testimony that Anderson gave her ecstasy and then digitally penetrated her vagina in the summer of 2010 qualifies as relationship evidence under section 634.20. Because the touching was a prior act of first-degree criminal sexual conduct against H.M., it meets the statute's requirement of "similar conduct." This evidence was highly probative in demonstrating Anderson's grooming of H.M and the progression of Anderson's behavior toward H.M. before the sexual conduct detailed in the complaint occurred. Its probative value thus outweighed any risk of unfair prejudice to Anderson.

Similarly, Anderson's discussions with H.M. about sex and her body, and his provision to her of drugs, alcohol, and cigarettes were properly admitted under relationship-evidence caselaw, as these actions illuminated Anderson's abnormal relationship with his stepdaughter and placed the sexual intercourse in its proper context. These conversations and Anderson's behavior in providing illegal substances to H.M. showed Anderson's continued grooming of H.M. and his efforts to lure her into a sexual

relationship. Because all of Anderson's prior bad acts fall under "[e]vidence of similar conduct by the accused against the victim of domestic abuse" under section 634.20; are covered by general relationship evidence caselaw; or were intimately tied to the charged episodes of sexual intercourse; we conclude that the district court did not err by admitting this evidence.

Although Anderson did not object at trial or raise this issue on appeal, we have noted that "[a] cautionary instruction" on relationship evidence "is strongly preferred." *State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). Omitting the instruction, however, "does not automatically constitute plain error. Instead, other evidence offered during trial may negate the allegation that the probative value of other-crimes evidence is outweighed by its potential for unfair prejudice." *Id.*

The evidence against Anderson at trial was strong. The prosecutor also minimized any danger that the relationship evidence would be used improperly by explaining in her closing statement that Anderson was not on trial for any acts committed outside the charged time frame and that the jury need not consider those acts in making its factual findings. Under these circumstances, the district court did not plainly err when it did not caution the jury when the relationship evidence was admitted.

B. Anderson's Journal Entries

Anderson contends in his pro se brief that the district court erred by admitting into evidence entries from his journal, contending that the evidence was unreliable because it was a record of his dreams and that it was improper *Spriegl* evidence. The state argues

that the journal entries were relevant because they demonstrated that "[Anderson] was sexually attracted to [and] in love with H.M."

Consideration of the journal entries shows that they are relevant under Minnesota Rule of Evidence 401 and otherwise admissible. In one journal entry, Anderson describes his dreams: "I'm in the shower with [H.M.]. We're not doing anything sexual. Just conserving water by sharing. We're talking but I can't hear what she's saying. Several times I catch myself looking down at her ass. It is fantastic." Another entry states, "I am in love with [H.M.]." Because this case involves criminal sexual conduct, evidence showing that Anderson expressed inappropriate feelings and desires toward his minor stepdaughter is highly relevant.

Anderson's assertions that these entries are comparable to statements made during a "hypnotic interview" and therefore unreliable, or that *Spreigl* protections should apply, are unavailing. Unlike *State v. Mack*, 292 N.W.2d 764, 772 (Minn. 1980), where statements made in a pre-trial hypnotic interview were inadmissible, Anderson's journal entries were composed when he was wide-awake. And because these journal entries were not about actual acts at all, but primarily about feelings, *Spreigl*, 272 Minn. 488, 139 N.W.2d 167, does not apply. The district court properly admitted these journal entries into evidence.

C. Leah Mickschl's Expert Witness Testimony

Anderson next asserts that Leah Mickschl, a nurse at the Midwest Children's Resource Center, improperly testified as an expert witness about characteristics of sexual abuse victims and why H.M. sustained no physical injury. Because Anderson only

objected to Mickschl's testimony about the absence of physical injury, we evaluate all of her testimony but that particular statement for plain error. *See State v. Tovar*, 605 N.W.2d 717, 726 (Minn. 2000) ("Absent clear and specific objections raised before the district court, we will generally not consider issues of the admissibility of evidence raised for the first time on appeal.").

Using a plain-error standard, we conclude that the district court did not plainly err by allowing Mickschl to testify as an expert witness. The district court has "broad discretion" on admitting expert witness testimony at trial. *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999). Minnesota Rule of Evidence 702 allows a witness who is "qualified as an expert by knowledge, skill, experience, training, or education" to testify in the "form of an opinion" about her "specialized knowledge." "Expert testimony generally is admissible if: (1) it assists the trier of fact; (2) it has a reasonable basis; (3) it is relevant; and (4) its probative value outweighs its potential for unfair prejudice." *State v. Edstrom*, 792 N.W.2d 105, 111 (Minn. App. 2010) (quoting *State v. Jensen*, 482 N.W.2d 238, 239 (Minn. App. 1992), *review denied* (Minn. May 15, 1992)).

The record shows that Mickschl qualified as an expert witness. She is a registered nurse at the Midwest Children's Resource Center, which is a specialty clinic of Children's Hospitals and Clinics in St. Paul. For the past thirteen years, Mickschl has evaluated over one thousand children suspected of being abused or neglected.

As an expert witness, Mickschl testified about behavioral traits of child sexual abuse victims and also explained that H.M.'s hymen could have healed between the time of sexual penetration and Michschl's examination of H.M. This testimony was helpful to

the jury because it explained why H.M. delayed reporting the abuse by Anderson and why any lack of injury was not necessarily determinative of whether sexual penetration had occurred. The relevance and probative value of expert witness testimony in child sexual abuse cases has long been recognized. *See, e.g.*, *State v. Hall*, 406 N.W.2d 503, 504–05 (Minn. 1987) (affirming the admission of expert testimony from a psychologist who stated that "experts are able to identify behavioral characteristics commonly exhibited by sexually abused adolescents[,]" including a delay in reporting and continued contact with the assailant); *State v. Myers*, 359 N.W.2d 604, 609–11 (Minn. 1984) (upholding a district court's ruling to admit expert witness testimony describing traits and characteristics typically observed in children who have suffered sexual abuse).

In sum, given Mickschl's extensive background in evaluating sexual abuse victims and the relevance of her testimony to the case, the district court did not err, much less plainly err, by admitting her testimony about the characteristics of sexual abuse victims. In addition, Mickschl did not improperly speculate as to why H.M. was not physically injured because, as an expert witness, she was qualified to give her opinion on that issue. The district court did not abuse its discretion by allowing her to testify about why H.M. sustained no bodily injury from the sexual acts.

III. Prosecutorial Misconduct

Anderson further asserts in his pro se brief that the prosecutor knowingly committed misconduct by stating that H.M.'s first sexual experience was with him when H.M. had a previous sexual experience. Anderson also argues that the prosecutor committed misconduct by improperly speculating about his state of mind and referring to

Leah Mickschl as an expert witness in her closing argument. After a careful review of the record, we conclude that no prosecutorial misconduct occurred.

Because Anderson made no objection to these statements at trial, a new trial will be granted only if the misconduct is plain error that affects a defendant's substantial rights. *State v. Hayes*, 826 N.W.2d 799, 807 (Minn. 2013). An error is plain if it "contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). "A prosecutor's misconduct affects substantial rights if there is a reasonable likelihood that it would have had a significant effect on the verdict of the jury." *State v. Washington*, 725 N.W.2d 125, 133 (Minn. App. 2006). "The state bears the burden of showing that error does not affect substantial rights." *Id.*

In closing argument, a prosecutor "may present all legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence." *State v. Pearson*, 775 N.W.2d 155, 163 (Minn. 2009). Conversely, "[p]rosecutors may not make arguments that are not supported by evidence or that are designed to inflame the passions and prejudices of the jury." *State v. Bobo*, 770 N.W.2d 129, 142 (Minn. 2009). Further, in assessing the alleged misconduct, this court reviews the argument as a whole and does not focus solely upon the challenged statement. *State v. Taylor*, 650 N.W.2d 190, 208 (Minn. 2002).

Applying this standard to Anderson's claims of misconduct, we conclude that the prosecutor's references to Anderson's state of mind and to Mickschl as an expert witness were fair and appropriate. Anderson's remaining challenge is a closer question, however.

In her closing argument, the prosecutor stated, "You have every right to think this is a child's first sexual experience and it's happening with her stepfather. A child's sexual experience with her stepfather." The prosecutor immediately amended this assertion by stating,

> Whether or not [H.M.] ever had any kind of relationships with other boys or involvement with other boys has nothing to do with this case, so to the extent that you might think about it, it really is irrelevant. She may have had some involvement with other boys. There have been subtle inferences throughout this case, but it really has nothing to do with the case. The bottom line is, in this case, what we need to think about is whether this defendant sexually penetrated this girl, and he did.

Because the prosecutor immediately corrected the statement regarding H.M.'s sexual history, we conclude this single statement in a twenty-eight-page-closing argument did not amount to prosecutorial misconduct. Nor did it improperly prejudice Anderson at trial.[1]

IV. Ineffective Assistance of Counsel

Anderson argues in his pro se brief that he received ineffective assistance of counsel at trial because his attorney did not object to prosecutorial misconduct, did not

[1] Even if the prosecutor's statement was erroneous, Anderson's right to a fair trial was not affected. As discussed above, the prosecutor immediately corrected the challenged statement and did not mention it further in her closing argument. The evidence against Anderson was strong as H.M.'s testimony was detailed, consistent with prior statements, and corroborated by her knowledge of Anderson's anatomy, text messages, journal entries, her mother's testimony, and Anderson's own admissions. *See Taylor*, 650 N.W.2d at 208 (quotation omitted) (holding that relief should only be granted "where the misconduct, viewed in the light of the whole record, appears to be inexcusable and so serious and prejudicial that the defendant's right to a fair trial was denied").

object to improper *Spreigl* evidence, and did not object to Leah Mickschl's expert witness testimony. As discussed above, however, none of these claims have merit. Because Anderson cannot show that his counsel's representation "fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quotation omitted), his claim of ineffective assistance of counsel is unavailing.

V. Upward Sentencing Departure

Anderson claims that the district court improperly sentenced him to an upward departure because he did not waive his right to a *Blakely* hearing for the reasons given by the district court to justify an upward sentencing departure. *See Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 2537 (2004). Under *Blakely*, the facts underlying the reasoning for an upward sentencing departure must be found beyond a reasonable doubt by a jury. *Id.* The state concedes that, given *Blakely*, Anderson's case should be remanded to the district court for resentencing.

We review departures from presumptive sentences under an abuse of discretion standard, and "substantial and compelling circumstances" in the record must justify a departure. *Rairdon v. State*, 557 N.W.2d 318, 326 (Minn. 1996). "An upward durational departure from the presumptive sentence, based on findings made by the district court, violates the Sixth Amendment right to trial by jury." *State v. Shattuck*, 704 N.W.2d 131, 141 (Minn. 2005). A defendant's waiver to a *Blakely* hearing "must be supported in the

same manner as a waiver of a jury trial on the elements of the offense; knowingly, voluntarily, and intelligently." *State v. Barker*, 705 N.W.2d 768, 773 (Minn. 2005).

Here, Anderson specifically waived his rights to a *Blakely* hearing on the two departure factors offered by the state: (1) that "multiple forms of penetration were used in the crime;" and (2) the "crime involved providing controlled substances to [H.M.] as part of the commission of the crime." The district court, by contrast, imposed an upward departure for three reasons: (1) his "abuse of a position of trust and authority and confidence with [the] young woman who [was his] stepdaughter;" (2) "based on . . . the particular vulnerability of this victim because of her age;" and (3) "because of the process of cultivating and grooming [H.M.] for the activity that the two of [them] engaged in."

Because Anderson only "knowingly, voluntarily, and intelligently" waived his *Blakely* hearing rights to the two reasons that the state gave for seeking an upward sentencing departure, his waiver only applied to those specific factors. *See Barker*, 705 N.W.2d at 773. The district court's upward departure relied upon aggravating factors outside of the *Blakely* waiver; Anderson's sentence must accordingly be reversed and his case remanded for resentencing in compliance with the standards set in *Blakely*. *See State v. Hagen*, 690 N.W.2d 155, 160 (Minn. App. 2004).

Affirmed in part, reversed in part, and remanded.