STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0937

State of Minnesota,
Appellant,

vs.

Chad Allen Rourke,
Respondent.

Filed May 20, 2008
Reversed and remanded
Schellhas, Judge

Stevens County District Court
File No. 75-K3-03-17

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Considered and decided by Schellhas, Presiding Judge; Klaphake, Judge; and Halbrooks, Judge.

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

SCHELLHAS, Judge

Appellant State of Minnesota challenges a sentence imposed after a *Blakely* trial. The state argues that the district court erred when it: (1) ruled that the aggravating factor of "particular cruelty" is unconstitutionally vague for lack of a clear, objective statutory definition; (2) refused to submit to the jury the aggravating factor of "abuse of a position of power" because it is not enumerated in the sentencing guidelines; and (3) refused to define the aggravating factor of "particular vulnerability" to include vulnerability created by repeated attacks and intimidation, and extreme and escalating ongoing violence. We reverse the district court's ruling that the aggravating factor of "particular cruelty" is unconstitutionally vague and hold that the district court abused its discretion in ruling that the aggravating factor of "abuse of a position of power" could not be submitted to the jury and in refusing to define the aggravating factor of "particular vulnerability" to include vulnerability created by repeated attacks and intimidation, and extreme and escalating ongoing violence. We remand for a new *Blakely* trial and resentencing.

FACTS

Respondent Chad Allen Rourke and the victim, E.B., met in 1998, and had two children together but did not marry. At trial, E.B. recounted several incidents of domestic violence committed by Rourke. For example, in 1999, Rourke pinned her down, choked, slapped and insulted her, and forced her into her car, hitting her head on the car door. E.B.'s hands were cut as she and Rourke struggled over her car keys. Rourke then drove

around with E.B. in the car and threatened to find a gun and shoot her. From 1999 until 2003, the relationship continued intermittently with Rourke frequently committing acts of severe violence and abuse against E.B.

On January 28, 2003, in the incident giving rise to the charge, Rourke drove E.B.'s van erratically with E.B. in it and repeatedly told E.B. that he would kill her. E.B. believed that she was going to die. The drive ended when Rourke crashed the van into a telephone pole, pinning E.B. in the van, and causing her serious injuries. In an attempt to make the accident appear as though E.B. had been the driver, Rourke attempted to pull E.B. from the car even though her legs were pinned. Acquiescing to E.B.'s pleas to stop pulling on her legs, Rourke ran from the scene of the accident without seeking help for E.B.

Rourke was charged with and pleaded guilty to first-degree assault under Minn. Stat. § 609.221, subd. 1 (2002), and was sentenced to 128 months' imprisonment, an upward-durational departure from the presumptive sentence. The departure was based on a plea agreement, Rourke's two prior gross-misdemeanor convictions involving the same victim, his abuse of a position of power and control over E.B., and the particular cruelty of the offense. Rourke's conviction was affirmed by this court in *State v. Rourke (Rourke I)*, 681 N.W.2d 35 (Minn. App. 2004), *vacated* (Minn. Sept. 21, 2004) (remanding to court of appeals for reconsideration in light of *Blakely*). Upon reconsideration, this court reversed and remanded to the district court for sentencing under *Blakely*. *State v. Rourke (Rourke II)*, No. A03-1254, 2005 WL 525522, at *2-*3 (Minn. App. Mar. 8, 2005),

review granted and stayed (Minn. May 17, 2005), *stay vacated and remanded* (Minn. July 19, 2006).

Upon remand, the district court submitted the case to a jury for a *Blakely* trial for the determination of aggravating factors, if any. Before the *Blakely* trial, the prosecutor argued that the factors supporting an aggravated sentence included: (1) the plea agreement; (2) particular cruelty; (3) abuse of a position of power; and (4) vulnerability of the victim. The district court determined that only the factors of particular cruelty and vulnerability of the victim should be submitted to the jury and refused to instruct the jury that particular vulnerability could be constituted by repeated attacks and intimidation and extreme and escalating ongoing violence. The state did not appeal from these rulings before the matter was submitted to the jury. After submitting his case to the jury, Rourke moved to dismiss the allegations of aggravating factors, arguing that: (1) the term "particular cruelty" is unconstitutionally vague; (2) aggravating factors not enumerated or defined in the sentencing guidelines are an unconstitutional delegation of legislative power; and (3) the state failed to establish particular cruelty. The district court deferred its ruling on Rourke's motion and submitted the case to the jury. The aggravating factor of "particular cruelty" was submitted to the jury based on the instruction provided by the state; Rourke did not submit a proposed instruction.

The jury returned a verdict, finding that Rourke treated E.B. with particular cruelty and that E.B. was not "particularly vulnerable . . . due to age, infirmity, reduced physical capacity, or reduced mental capacity." The district court then ruled on Rourke's motion for dismissal of the aggravating factors, dismissing the aggravating factor of "particular

cruelty" as unconstitutionally vague for lack of a clear, objective statutory definition and rejecting the balance of Rourke's arguments. The district court's rulings were made on the record and later explained in an order filed February 13, 2007.

After dismissal of the aggravating factor of "particular cruelty," no aggravating factor existed to justify a durational departure. The district court sentenced Rourke to 103 months' imprisonment, the high end of the presumptive range, and ordered restitution of $2,065.31. The state appeals, seeking reversal of the district court's order that the aggravating factor of "particular cruelty" is unconstitutionally vague and a remand for resentencing based on the jury's finding of particular cruelty. Alternatively, the state seeks a remand for a new *Blakely* trial with instructions to the district court to (1) define "particular cruelty" in light of the language in prior cases, including in particular *Rourke I*, 681 N.W.2d 35; (2) submit to the jury an interrogatory regarding the aggravating factor of "abuse of position of power"; and (3) use an expanded definition of "particular vulnerability" based on repeated attacks and intimidation and extreme and escalating ongoing violence. Rourke argues that the state cannot appeal the district court's rulings made before the matter was submitted to the *Blakely* jury and that the term "particular cruelty" was correctly held to be unconstitutionally vague. Rourke asks that if we reverse the district court's ruling that the aggravating factor of "particular cruelty" is unconstitutionally vague, rather than remand for resentencing, we remand for a new *Blakely* trial so that Rourke has an opportunity to submit to the jury an instruction on the meaning of "particular cruelty."

D E C I S I O N

I.

The district court imposed a sentence on the high end of the presumptive range after rejecting the only aggravating factor found by the jury, "particular cruelty." The state challenges the sentence imposed by the district court, in part, by challenging the court's ruling that the aggravating factor of "particular cruelty" cannot be applied because it is unconstitutionally vague without a clear, objective statutory definition.

A prosecuting attorney may appeal any sentence imposed or stayed in a felony case. Minn. R. Crim. P. 28.04, subd. 1(2). An appellate court may review the sentence to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact. Minn. R. Crim. P. 28.05, subd. 2. Rulings on questions of law, including construction of the sentencing guidelines, are reviewed de novo. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996).

As a threshold question, we consider whether the Minnesota Sentencing Guidelines can be the subject of a vagueness attack. The Minnesota Supreme Court and the Eighth Circuit Court of Appeals have held that a vagueness challenge to sentencing guidelines is permitted only in death-penalty cases and that other sentencing guidelines are not subject to attack on vagueness grounds. *United States v. Wivell*, 893 F.2d 156, 159 (8th Cir. 1990); *State v. Givens*, 332 N.W.2d 187, 189-90 (Minn. 1983).

In *Givens*, the district court imposed an upward-durational departure based on the aggravating factors of particularly vulnerable victims, severe brutality toward one of the victims, and leaving another victim in an unsafe area. 332 N.W.2d. at 189. The supreme court concluded that sentencing decisions are subject to vagueness principles under *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759 (1980), which addressed a death-penalty sentencing issue, and rejected the defendant's argument that the aggravating factors were unconstitutionally vague. *Givens*, 332 N.W.2d at 189. Of "fundamental importance" to the *Givens* court was the fact that *Godfrey* applied the Eighth Amendment and determined that it was cruel and unusual punishment to impose death through vague construction of a statute authorizing the death penalty. *Id.* at 190. Although the supreme court concluded that sentencing decisions are subject to vagueness principles under *Godfrey*, the court distinguished *Godfrey* as a death-penalty case and concluded that a vagueness argument is inapplicable "to more routine sentencing decisions—those not including the death sentence." *Id.* Under *Givens*, because Rourke challenged an aggravating factor not used to impose a death sentence and because no cruel-and-unusual-punishment argument was made, the district court erred by applying a vagueness analysis to the Minnesota Sentencing Guidelines.

Rourke attempts to distinguish *Givens* by arguing that *Blakely* has changed the law. But nothing in *Blakely* addresses whether sentencing guidelines are subject to a vagueness attack in non-death-penalty cases; rather, *Blakely* holds that a jury must find all facts on which a court will rely for sentencing. *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 2537 (2004) (holding that a judge exceeds his or her proper

authority when the judge inflicts punishment that a jury's verdict alone does not allow and that a jury must find all facts which the law makes essential to the punishment). *Givens* therefore is not distinguishable as a pre-*Blakely* case.

In *Wivell*, the Eighth Circuit also concluded that sentencing guidelines are not subject to vagueness attack. 893 F.2d at 160. The *Wivell* court reasoned that sentencing guidelines are not subject to challenge on vagueness grounds because they "do not define illegal conduct: they are directives to judges for their guidance in sentencing convicted criminals, not to citizens at large." *Id.* The court noted that except in death-penalty cases, there is no right to be sentenced according to guidelines and a defendant's due-process rights "are unimpaired by the complete absence of sentencing guidelines." *Id.* (citing *Lockett v. Ohio*, 438 U.S. 586, 603, 98 S. Ct. 2954, 2964 (1978), for the proposition that there is no constitutional right to application of any sentencing guidelines). The court reasoned:

> Because there is no constitutional right to sentencing guidelines—or, more generally, to a less discretionary application of sentences than that permitted prior to the Guidelines—the limitations the Guidelines place on a judge's discretion cannot violate a defendant's right to due process by reason of being vague. It therefore follows that the Guidelines cannot be unconstitutionally vague as applied to [the defendant] in this case.

Id. Like *Givens*, *Wivell* provides authority for the principle that sentencing guidelines are not subject to a vagueness challenge except in death-penalty cases. *See also United States v. Brierton*, 165 F.3d 1133, 1139 (7th Cir. 1999); *United States v. Salas*, No. 93-5897, 1994 WL 24982, at *2 (6th Cir. Jan. 27, 1994); *United States v. Pearson*, 910 F.2d

221, 223 (5th Cir. 1990); *Regan v. State*, 787 So. 2d 265, 269-70 (Fla. Dist. Ct. App. 2001) (citing *Wivell* and *Brierton* and noting that "being sentenced pursuant to a guideline is not a constitutional right"); *State v. Moore*, No. 19544, 2000 WL 422412, at *9 (Ohio Ct. App. 2000) (citing *Wivell* and concluding that a sentencing guideline does not give notice of what conduct is forbidden but serves as a guide for judges when imposing a sentence); *State v. Baldwin*, 78 P.3d 1005, 1011 (Wash. 2003) (following *Wivell* to conclude that "the due process considerations that underlie the void-for-vagueness doctrine have no application in the context of sentencing guidelines"). *But see United States v. Johnson*, 130 F.3d 1352, 1354 (9th Cir. 1997) (permitting vagueness attacks to sentencing provisions "in deference to the Supreme Court's declaration that vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute" (quotation omitted)); *State v. Wagner*, 982 P.2d 270, 272-73 (Ariz. 1999) (citing the Ninth Circuit *Johnson* case and concluding that a "criminal sentencing scheme can be challenged on vagueness grounds" and reversing a Washington court of appeals decision that relied on *Wivell* to reach a contrary conclusion).

Our resolution of this appeal proceeds under the authority of the Minnesota Supreme Court in *Givens* and the Eighth Circuit in *Wivell* on this issue. Because we are not faced with a death-penalty case, we conclude that to allow a vagueness challenge to an aggravating factor in the Minnesota Sentencing Guidelines would be contrary to clear caselaw precedent. Thus, we conclude that the district court erred when it allowed the

challenge and when it dismissed the aggravating factor of "particular cruelty" after it was found by the jury.

By seeking the alternate remedies of remand for resentencing based on the jury's finding of particular cruelty or a new *Blakely* trial to consider the challenged aggravating factors followed by resentencing, the state asks this court to reverse on the ground that the district court abused its discretion by its refusal to depart from the sentencing guidelines. Though it is a "rare case" that would warrant reversal of the refusal to depart from the presumptive sentence under the guidelines, *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981), we conclude that reversal of the refusal to depart and remand for resentencing is warranted here. Where a district court fails to consider valid reasons for departure, we have held it was "not that rare case where we interfere with the exercise of discretion, but a case where the exercise of discretion has not occurred." *State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984). Here, like in *Curtiss*, there was a valid reason to depart that the district court incorrectly ruled was invalid and failed to consider. Here, like in *Curtiss*, the sentence imposed should be disturbed due to the district court's failure to consider valid reasons for departure. We conclude that remand is appropriate.

At oral argument, Rourke asked that if we reverse the district court's ruling on particular cruelty, we remand for a new *Blakely* trial to give him the opportunity to define particular cruelty for the jury. This request suffers from two defects: Rourke has also argued that double jeopardy bars any sentencing retrial, and Rourke failed to file a notice of review on the issue of error in the jury instructions on particular cruelty.

As to Rourke's double-jeopardy argument, a retrial can only be barred by double jeopardy "after jeopardy from the first prosecution has terminated." *Hankerson v. State*, 723 N.W.2d 232, 237 (Minn. 2006) (citing *Sattazhan v. Pennsylvania*, 537 U.S. 101, 106, 123 S. Ct. 732, 737 (2003). "[J]eopardy does not terminate unless the fact finder affirmatively rejects the existence of aggravating factors in a manner that can fairly be called an 'acquittal' on those factors." *Id.* *Hankerson* demonstrates that resentencing can take place without violating double-jeopardy protections for aggravating factors, the existence of which has not been affirmatively rejected by a trier of fact. Here, under *Hankerson*, the aggravating factor of "particular cruelty" can be tried again because it was not affirmatively rejected by the jury; rather, the jury found the existence of particular cruelty.

As to Rourke's failure to file a notice of review, because we conclude that justice requires that the aggravating factor of "particular cruelty" be defined for the jury consistently with our prior cases, we consider and grant Rourke's request that "particular cruelty" be defined for the jury. *See* Minn. R. Civ. App. P. 103.04 (allowing this court to address any issue as justice requires).

We remand for retrial and resentencing. On remand, particular cruelty should be defined for the jury consistently with *State v. Weaver*, 733 N.W.2d 793, 802 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007), a case that was not available to the district court at the time of its decision. In *Weaver*, we stated that a jury should be given a definition of "particular cruelty" and provided standards for deciding when conduct is particularly cruel under the sentencing guidelines. *Id*. Under *Weaver*, to be particularly

cruel, "a defendant's conduct must be significantly more cruel than that usually associated with the offense of which he was convicted." *Id.* In *Weaver*, we noted instances in which particular cruelty was found, including setting fire to a victim who was still alive, leaving a victim to die alone without notifying emergency personnel, degradation of the victim, and gratuitous infliction of pain. *Id.* at 802-03.

II.

The state argues that the district court abused its discretion in refusing to submit the aggravating factor of "abuse of a position of power" to the jury and in refusing to define "particular vulnerability" for the jury to include repeated attacks and intimidation and extreme and escalating ongoing violence. The state asks that it be allowed to submit these aggravating factors to the jury if we remand for retrial.

Rourke makes two arguments in opposition. First, Rourke argues that the state cannot appeal the district court's pre-*Blakely*-trial rulings and that "issues related to the judge's conduct of the sentencing trial, including instruction issues concerning particular vulnerability and abuse of power" can be challenged only by appeal before the matter is submitted to the sentencing jury. Second, Rourke argues that any retrial is barred by double jeopardy.

Under Minn. R. Crim. P. 28.04, subd. 1(2), a prosecutor may appeal as of right to this court "in felony cases from any sentence imposed or stayed by the trial court." An appellate court may review the sentence to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact. Minn. R. Crim. P. 28.05, subd. 2.

Nothing in the rule prohibits the state from appealing, after sentencing, the district court's rulings on what aggravating factors may be submitted to the jury. We conclude therefore that the state's right to appeal a sentence includes the state's right to appeal the district court's rulings on what aggravating factors may be submitted to a jury.

Here, the district court ruled that "abuse of a position of power" could not be used as an aggravating factor because it was not enumerated in the sentencing guidelines. Rulings on questions of law, including construction of the sentencing guidelines, are reviewed de novo. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996). We previously addressed the use of the aggravating factor of "abuse of a position of power" in this case. In *Rourke I*, we stated that "[a]buse of positions of trust and authority are aggravating factors justifying a durational departure." 681 N.W.2d at 40. While cautioning that not every domestic-violence case would warrant the use of this aggravating factor, we stated that the district court did not abuse its discretion in using Rourke's position of authority as an aggravating factor, "[where], given the long history of egregious domestic violence perpetrated by [Rourke] against [E.B.], and specifically the power and control [Rourke] achieved by years of terrorizing the victim[.]" *Id.* at 41. Our ruling in *Rourke I*, that abuse of a position of power could be used as an aggravating factor, became the law of the case. *See In re Welfare of M.D.O.*, 462 N.W.2d 370, 375 (Minn. 1990) (stating that law of the case requires that a prior decision on the same issue be adhered to in later stages of same case). The district court therefore abused its discretion in its refusal to submit this aggravating factor to the jury and in its ruling that aggravating factors not specifically enumerated in the sentencing guidelines cannot be used. Post-*Blakely* and

prior to the district court's ruling on this issue, the Minnesota Supreme Court reaffirmed that an un-enumerated aggravating factor can be used to justify a departure from the guidelines. *State v. Allen*, 706 N.W.2d 40, 46 (Minn. 2005).

Appellant also challenges the district court's definition of "particular vulnerability" in the jury instructions submitted to the jury. Jury instructions are reviewed for an abuse of discretion. *State v. Lory*, 559 N.W.2d 425, 427-28 (Minn. App. 1997), *review denied* (Minn. Apr. 15, 1997). In *Rourke I*, we stated that "because of the level of extreme and escalating ongoing violence, [Rourke's] threats to kill [E.B.], and his efforts to control and intimidate [E.B.], we conclude that [E.B.] was in a position of particular vulnerability." 681 N.W.2d at 41. Our ruling became the law of the case, *see M.D.O.*, 462 N.W.2d at 375, and the district court's later refusal to allow the use of the expanded definition of "particular vulnerability" was contrary to the law of the case. Because the district court's ruling on this issue was contrary to our decision in *Rourke I*, we conclude that the district court abused its discretion when it refused to define "particular vulnerability" to include vulnerability created by repeated attacks and intimidation and extreme and escalating ongoing violence.

A new *Blakely* trial on the aggravating factors erroneously excluded by the district court is appropriate in this case. Double jeopardy does not bar a retrial on the aggravating factor of "abuse of a position of power" because this factor was not submitted to the jury and therefore was not affirmatively rejected by the trier of fact. *See Hankerson*, 723 N.W.2d at 237. But the factor of "particular vulnerability" was submitted to the *Blakely* jury and affirmatively rejected. Although the district court

improperly defined the term, because "particular vulnerability" was rejected by the jury, we conclude that a retrial of the aggravating factor of "particular vulnerability" would violate double jeopardy under *Hankerson* and is barred. On remand for a new *Blakely* trial, only the aggravating factors of "particular cruelty" and "abuse of a position of power" may be submitted to the jury.

Reversed and remanded.