STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1111

State of Minnesota,
Respondent,

vs.

Bradley William Ornes,
Appellant.

Filed July 8, 2008
Affirmed
Shumaker, Judge

Isanti County District Court
File No. 30-CR-06-545

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Jeffrey R. Edblad, Isanti County Attorney, Amy Reed-Hall, Assistant County Attorney, 555 18th Avenue SW, Cambridge, MN 55008 (for respondent)

Patrick Chinedu Nwaneri, Nwaneri & Associates, PLLC, 2147 University Ave. W., Suite 105, St. Paul, MN 55114-1326 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Schellhas, Judge; and Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

SHUMAKER, Judge

On appeal from his convictions of and sentences for first-degree and second-degree criminal sexual conduct, appellant argues that the district court abused its discretion by denying his motion to withdraw his pleas of guilty, that he did not validly waive his right to a jury determination of the aggravating sentencing factors, that the district court abused its discretion by sentencing him to an upward durational departure, and that the district court abused its discretion by denying his motion for a change of venue. We disagree and affirm.

FACTS

Appellant Bradley William Ornes was charged with multiple counts of first-degree and second-degree criminal sexual conduct and one count of possession of child pornography. The criminal-sexual-conduct charges arose out of allegations that Ornes sexually assaulted two juvenile males on multiple occasions in 2004 and 2005.

On November 6, 2006, the day that his jury trial was scheduled to begin, Ornes reached a plea agreement with the state. He pleaded guilty to one count of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2004), and one count of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(b) (2004); he also agreed to an upward durational departure based on aggravating factors to 240 months.

At the November 6 hearing, Ornes stated on the record that he was pleading guilty to first-degree criminal sexual conduct and second-degree criminal sexual conduct. He

was then placed under oath and examined by his attorney. He testified that he had reviewed, discussed with his attorney, and signed the rule 15 plea petition and the petition regarding an aggravated sentence; that he understood his constitutional right to a jury trial; that his attorney had explained that evidence of aggravating sentencing factors would be introduced at his trial and what that meant in his case; and that he had waived his right to a jury trial and agreed to the pleas. Ornes was then questioned under oath by the prosecutor, and he testified to facts establishing the elements of the offenses and aggravating sentencing factors. Finally, Ornes was asked by the district court about the two petitions and about his right to a jury trial. Based on these proceedings, the district court concluded that Ornes had waived his right to a jury trial as to guilt and sentencing issues and accepted his pleas of guilty.

A little over a week later, on November 14, 2006, Ornes, with representation by new counsel, moved to withdraw his pleas of guilty, alleging that he was pressured to plead guilty by his former attorney, that he did not know that the plea agreement contained aggravating sentencing factors, and that he did not understand what he was doing because he was emotionally distraught. In support of his motion, Ornes submitted affidavits from himself and his father.

The district court denied Ornes's motion, concluding that Ornes had failed to identify a reason grounded in fairness and justice for withdrawal of his pleas of guilty and that the state would be prejudiced if Ornes was allowed to withdraw his pleas. In so ruling, the court rejected both affidavits because they were not credible. The court explained:

> [T]hose Affidavits, quite frankly, are totally and completely inconsistent with my personal observations of the day. And because they are completely and totally inconsistent with my own personal observations, I totally discount them and count them for what I believe they are, and that simply is self-serving documents.

The district court recalled the events from the date of the plea hearing, explaining that the parties had spent the entire morning negotiating; that the pleas were not "thrown together in five minutes and shoved down someone's throat, it was contemplated and discussed over the entire morning period"; that Ornes did not seem distraught during the plea hearing, but rather appeared to be "clear-minded and, frankly, calculating"; and that there was "no question" that Ornes "knew what was going on, that he accurately understood what the circumstances were . . . [and] that he knowingly and willingly waived [his] rights and entered into this Plea." The court also noted that Ornes's claim that his pleas were inaccurate was "wholly and completely inconsistent with the record," because both the rule 15 petition and petition regarding aggravated sentencing referred to the agreed upward durational departure to 240 months.

The district court also considered how the state would be prejudiced if Ornes was allowed to withdraw his pleas of guilty, explaining that the state had requested a speedy trial, that the state was fully prepared to go to trial and had all its witnesses ready on November 6, and that it would be unfair and unjust to force the victims and witnesses to again prepare themselves "emotionally, spiritually, and physically for the trial."

From December 2006 through February 2007, Ornes filed additional motions. He moved for a change of venue, to remove the judge for cause, and for reconsideration of

his motion to withdraw his pleas of guilty. He also filed a *Blakely* motion, claiming that he had not validly waived his right to a jury determination on aggravating sentencing factors.

In February, the chief judge of the Tenth Judicial District heard Ornes's motion to remove, but denied it. The district court considered Ornes's three remaining motions at the sentencing hearing on March 7, 2007, denied them, and then sentenced Ornes to 240 months for his conviction of first-degree criminal sexual conduct and 33 months for his conviction of second-degree criminal sexual conduct, with the sentences to run concurrently. In addition, the district court imposed the conditional-release term of five years. This appeal followed.

D E C I S I O N

I.

A criminal defendant does not have an absolute right to withdraw a plea of guilty once entered. *State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007).

> In its discretion the court may also allow the defendant to withdraw a plea at any time before sentence if it is fair and just to do so, giving due consideration to the reasons advanced by the defendant in support of the motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant's plea.

Minn. R. Crim. P. 15.05, subd. 2.[1] "The defendant bears the burden of proving that there is a 'fair and just' reason for withdrawing his plea." *Farnsworth*, 738 N.W.2d at 371.

[1] In addition, a defendant may withdraw a guilty plea before or after sentencing upon a showing of manifest injustice. Minn. R. Crim. P. 15.05, subd. 1.

When determining if a defendant's reason is fair and just, the district court must duly consider the reasons advanced by the defendant and any prejudice the prosecution would suffer as a result of the plea withdrawal. *Kim v. State*, 434 N.W.2d 263, 266 (Minn. 1989).

"Although the [fair and just] standard is less demanding than the manifest injustice standard, it does not allow a defendant to withdraw a guilty plea 'for simply any reason.'" *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007) (quoting *Farnsworth*, 738 N.W.2d at 372). The court may not grant the motion merely "for any reason or without good reason," otherwise the plea process "would simply be a means of continuing the trial to some indefinite date in the future when the defendant might see fit to come in and make a motion to withdraw his plea." *Kim*, 434 N.W.2d at 266 (quotation omitted). "[T]he 'ultimate decision' of whether to allow withdrawal under the 'fair and just' standard is left to the 'sound discretion of the trial court, and it will be reversed only in the rare case in which the appellate court can fairly conclude that the trial court abused its discretion.'" *State v. Kaiser*, 469 N.W.2d 316, 320 (Minn. 1991) (quoting *Kim*, 434 N.W.2d at 266).

Ornes filed both of his motions to withdraw his pleas prior to sentencing, and the district court properly applied the "fair and just" standard. On appeal, Ornes argues that withdrawal of his pleas is appropriate because his pleas were not accurate, voluntary, and intelligent for numerous reasons.

A plea of guilty is valid if it is accurate, voluntary, and intelligent. *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003). For a plea to be accurate, it must be supported by an adequate factual basis. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). "The

voluntariness requirement insures that the guilty plea is not in response to improper inducements or pressures." *State v. Wukawitz*, 662 N.W.2d 517, 522 (Minn. 2003). "To be intelligently made, a guilty plea must be entered after a defendant has been informed of and understands the charges and direct consequences of a plea." *State v. Byron*, 683 N.W.2d 317, 322 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004).

Relying on his own affidavit, Ornes argues that his pleas were not accurate because he was not aware that the plea agreement contained aggravating sentencing factors. But this argument misconstrues the standard for examining a plea's accuracy, and Ornes does not argue that the factual basis is inadequate to support his pleas of guilty. Ornes has failed to show why his testimony from the plea hearing is insufficient to establish a factual basis to support his pleas of guilty.

Ornes next contends that his pleas were not voluntary, claiming he was coerced by his attorney. In support of his argument, he relies on two affidavits. But the district court found, in light of the events on the day of the plea hearing and Ornes's demeanor during the hearing, that these affidavits were not credible. We defer to that determination. *State v. Aviles-Alvarez*, 561 N.W.2d 523, 527 (Minn. App. 1997) (explaining that, when credibility determinations are crucial in deciding whether to permit plea withdrawal, we defer "to the primary observations and trustworthiness assessments made by the district court"), *review denied* (Minn. June 11, 1997); *State v. Lopez*, 379 N.W.2d 633, 638 (Minn. App. 1986) (stating that the district court is in the best position to judge credibility when deciding if a defendant should be allowed to withdraw a plea of guilty), *review denied* (Minn. Feb. 14, 1986).

Ornes also claims his pleas were not intelligently entered for several reasons. First, he argues that he was emotionally distraught, that his former attorney failed to thoroughly explain the plea agreement to him, and that he did not know that the plea agreement contained aggravating sentencing factors. As noted above, Ornes's claim that he was emotionally distraught was rejected as not credible by the district court. And we conclude that the district court did not err by rejecting Ornes's claim that he did not know that the plea agreement contained aggravating sentencing factors, because both the rule 15 petition and petition regarding aggravated sentence referenced the upward durational departure to 240 months and Ornes testified that he reviewed those documents "line by line" with his attorney and signed them willingly and of his own free accord.

Second, Ornes argues his pleas were not intelligently entered because the form used for his rule 15 petition was outdated and omitted several provisions. In particular, Ornes claims his pleas were not intelligently entered because the rule 15 petition omitted a provision relating to deportation for non-U.S. citizens. But that omission is irrelevant in this case, since there is nothing in the record suggesting that Ornes is not a U.S. citizen and thus subject to deportation. Ornes likewise claims that his pleas were not intelligently made because the rule 15 petition omitted a provision relating to an aggravated sentence. But the rule 15 petition acknowledged the aggravated sentence and provided the substance of the parties' plea agreement by stating, "Plea to count I and count IV agree to upward durational departure to 240 months. Dismiss any related charges." Moreover, the rest of the record indicates that Ornes was aware of the upward departure. The petition regarding aggravated sentence expressly states, "I understand the

prosecution is seeking a sentence greater than that called for in the sentencing guidelines. I understand that the sentence in this case will be 240 months or will be left to the judge to decide." Ornes testified at the plea hearing that he reviewed both petitions with his attorney and signed them. And he testified that he and his attorney had discussed the fact that evidence would be submitted concerning aggravating sentencing factors at trial.

Third, Ornes claims that his pleas were not intelligently entered because the district court imposed the mandatory conditional-release term, even though his rule 15 petition did not contain any reference to conditional release. He argues that the district court violated his plea agreement by imposing a conditional-release term that was not contained in the original plea agreement or discussed at the plea hearing. But his argument fails in light of *State v. Rhodes*, in which the supreme court declined to grant relief in situations where the mandatory conditional-release term was imposed at sentencing without objection, even though it was not mentioned in the plea agreement. 675 N.W.2d 323, 327 (Minn. 2004) (noting that the statutory requirement of a conditional-release term was added years before Rhodes entered his plea and stating that the postconviction court could infer from Rhodes's failure to object at the sentencing hearing that Rhodes understood that the conditional-release term would be a mandatory addition to his plea bargain). As in *Rhodes*, Ornes had notice that conditional release would be part of his sentence because the law mandating conditional release for sex offenders was enacted many years before Ornes entered his pleas in 2006. Moreover, Ornes entered his pleas two years after the supreme court's decision in *Rhodes*. And like the defendant in *Rhodes*, Ornes failed to object to the imposition of the conditional-

release term at sentencing or to the presentence investigation report containing the recommendation of the conditional-release term.[2] This failure negates his claim that his pleas were not intelligently entered and that imposition of the release term violated the plea agreement.

Ornes has failed to point to a proper reason justifying the withdrawal of his pleas. Therefore, the district court did not abuse its discretion by denying Ornes's motion to withdraw his pleas of guilty.

II.

Ornes next claims that he did not validly waive his right to a jury determination under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). We review *Blakely* legal issues de novo. *State v. Hagen*, 690 N.W.2d 155, 157 (Minn. App. 2004).

In *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000), the United States Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely*, the Court applied *Apprendi* to sentencing guidelines and held that, under the Sixth Amendment, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303, 124 S. Ct. at 2537. And the Minnesota Supreme Court has subsequently held that

[2] At sentencing, Ornes claimed that he never received the presentence investigation report. But the district court found that the record clearly reflected that a notice of filing from court administration and a copy of the document were sent to Ornes's counsel on January 22, 2007. Ornes has not shown that this finding was incorrect.

"under the Minnesota Sentencing Guidelines[,] imposition of the presumptive sentence is mandatory absent additional findings." *State v. Shattuck*, 704 N.W.2d 131, 141 (Minn. 2005). The district court need not empanel a sentencing jury if the accused "expressly, knowingly, voluntarily, and intelligently waive[s] his right to a jury determination" of the aggravating sentencing factors. *State v. Dettman*, 719 N.W.2d 644, 650 (Minn. 2006).

Ornes contends that his waiver of his right to a jury determination was not explicit. We disagree. Ornes stated that he was waiving his right to a jury trial during an exchange with his attorney and during questioning by the district court. His attorney asked Ornes about his constitutional rights, explained that at a trial there would be evidence of aggravating sentencing factors, and asked him about if he waived his right to a jury trial.

> DEFENSE ATTORNEY: If you wanted to have a trial that would involve the drawing of a jury of twelve people, we have got the right to help select the members of the jury, the jury would consist of twelve people usually, plus some alternates. At trial the Prosecutor has to go first, call his witnesses, present his evidence and testimony. The jury would be instructed to presume you innocent, not find you guilty unless every element of the crime is proven beyond a reasonable doubt. You have the right to confront and cross-examine witnesses called by the Prosecutor. You would have the right to put on a defense, to call witnesses and to subpoena witnesses who may not wish to voluntarily appear. To find you guilty all members of the jury would have to act unanimously; right?
> ORNES: Yes.
> DEFENSE ATTORNEY: You understand all of those Constitutional Rights; is that correct?
> ORNES: Yes.

> DEFENSE ATTORNEY: Now part of what would be submitted at trial would be evidence and argument concerning aggravating factors; is that right?
> ORNES: Yes.
> DEFENSE ATTORNEY: You and I discussed what that would be and what that might mean in your case; right?
> ORNES: Yes.
> DEFENSE ATTORNEY: Okay. And as an accommodation to resolve this case you have decided to waive your right to a trial and agree to this plea negotiation that I have read in to the record a few minutes ago; is that correct?
> ORNES: That's correct.

Then the district court told Ornes that he had the right to have a jury determine whether aggravating sentencing factors existed and asked him if understood that he was waiving his right to a jury trial.

> COURT: You understand, sir, with regards to these aggravating factors, which you have just admitted to, you would be entitled to have a right to a jury to determine whether or not aggravating factors exist; do you understand that, sir?
> ORNES: (No response.)
> COURT: You have a right to a jury trial in this case?
> ORNES: Yes.
> COURT: You are waiving your right to that jury; do you understand that?
> ORNES: Yes.
> COURT: Well, at this time, sir I am going to find that you have fully understood what your rights are, that you knowingly, willingly waived those rights, and that there is a sufficient factual basis to accept your Plea, I am going to accept your Plea.
>
> With regards to the aggravating factors, I am going to find that you have understood your rights with regards to your right to a jury on aggravating factors and on the trial itself, that you have waived those rights, sir, and that the State has demonstrated aggravating factors exist here . . . .

In addition, Ornes's petition regarding an aggravated sentence explains and waives the right to a jury determination on aggravating sentencing factors, and Ornes testified that he reviewed the petition with his attorney, understood it, and signed it.

Ornes claims that the petition regarding aggravated sentence is invalid because the requirements of Minn. R. Crim. P. 15.01, subd. 2, were not met. Ornes's argument, however, is not persuasive. Subdivision 2 requires that the defendant "be sworn and questioned by the court with assistance of counsel" on numerous issues "[b]efore the court accepts an admission of facts in support of an aggravated sentence." Minn. R. Crim. P. 15.01, subd. 2. Inquiries into the issues directed by Minn. R. Crim. P. 15.01 "are intended to insure that the plea is voluntary and intelligent, and that there is a factual basis for the plea." *State v. Bishop*, 545 N.W.2d 689, 691 (Minn. App. 1996). Although rule 15 requires an inquiry, a plea may be validly entered without strict compliance with the rule. *See State v. Christopherson*, 644 N.W.2d 507, 511 (Minn. App. 2002) (quoting the comment to the rule which states that "a failure to include all of the interrogation set forth in Rule 15.01 will not in and of itself invalidate a plea of guilty"), *review denied* (Minn. July 16, 2002). Moreover, Ornes testified that he reviewed the petition regarding aggravated sentence with his attorney, understood it, and signed it willingly and of his own accord without any threats or promises. In view of the entire record, we conclude that the petition regarding the aggravated sentence is valid.

III.

Ornes next argues that the district court erred by departing from the presumptive sentence.

Ornes was charged and pleaded guilty to first-degree criminal sexual conduct with a victim under 13 years of age, in violation of Minn. Stat. § 609.342, subd. 1(a), and second-degree criminal sexual conduct with a victim between 13-16 years old whom he held a position of authority over, in violation of Minn. Stat. § 609.343, subd. 1(b). Ornes testified that he selected his juvenile victims, in whole or in part, because of their ages. The victims' father explained how Ornes's crime had impacted the victims and their family, stating that Ornes had gained access to the victims by becoming their mentor; that the older victim had indicated "he wanted to die," "didn't even want to be alive," and "didn't care about life"; that both juvenile victims had "lost a lot of faith and trust in human beings"; and that Ornes had "wreck[ed] the entire structure of a family tree . . . [and] that [h]e has literally chopped the tree down." The district court found that aggravating sentencing factors existed, because the "victims . . . were intentionally selected because of their tender age," and sentenced Ornes to 240 months, which was an upward durational departure, for his conviction of first-degree criminal sexual conduct and 33 months for his conviction of second-degree criminal sexual conduct, with the sentences to run concurrently.

A district court may depart from the presumptive sentence provided by the guidelines only if "substantial and compelling" circumstances warrant a departure. Minn. Sent. Guidelines II.D; *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). "Substantial and compelling circumstances are those circumstances that make the facts of a particular case different from a typical case." *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985). The

Minnesota Sentencing Guidelines provides a nonexclusive list of aggravating sentencing factors that may justify a departure. Minn. Sent. Guidelines II.D.2.b.

Whether to depart from the guidelines rests within the district court's discretion, and this court will not reverse the decision "absent a clear abuse of that discretion." *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). "Reversal is warranted only if the reasons for the departure are improper or inadequate and there is insufficient evidence to justify an aggravated sentence for the offense of which the defendant was convicted." *State v. Morales-Mulato*, 744 N.W.2d 679, 691 (Minn. App. 2008) (citing *Taylor v. State*, 670 N.W.2d 584, 588 (Minn. 2003)), *review denied* (Minn. Apr. 29 2008). And a departure will be affirmed if there is sufficient evidence in the record to justify the departure even though the reasons given for the departure were improper or inadequate. *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985).

Ornes argues that the victims' ages cannot properly support a departure because the ages are an element of the offense. Minnesota law supports his argument. *See, e.g.*, *Taylor*, 670 N.W.2d at 589 (stating that an upward departure should not be based on facts that "were already taken into account by the legislature in determining the degree of seriousness of the offense"); *State v. Herrmann*, 479 N.W.2d 724, 729-30 (Minn. App. 1992) (indicating that an upward departure cannot be based on conduct that constitutes an element of the crime), *review denied* (Minn. Mar. 19, 1992).

But the facts still support an upward departure because the district court found, based on Ornes's testimony, that he *selected* his victims based on their age, noting,

"Clearly, as stated by the defendant, he treated them like sons, he groomed them. He abused and used them because of their fragile age . . . ." Thus, Ornes's selection of his victims reveals that his crime was the product of planning and manipulation. Minnesota caselaw recognizes planning and manipulation as aggravating sentencing factors. *See, e.g.*, *State v. Kindem*, 338 N.W.2d 9, 17-18 (Minn. 1983) (citing planning as an aggravating factor); *State v. Sebasky*, 547 N.W.2d 93, 101 (Minn. App. 1996) (citing planning and manipulation as aggravating sentencing factors), *review denied* (Minn. June 19, 1996); *State v. Bates*, 507 N.W.2d 847, 854 (Minn. App. 1993) (holding that planning and manipulation, particularly when aimed at young victims, were valid bases for departure), *review denied* (Minn. Dec. 27, 1993).

We also note that the district court's departure report indicates that one of the reasons justifying departure in this case was the impact of the crime on the victims. "Psychological and emotional injury may justify upward departure." *State v. Allen*, 482 N.W.2d 228, 233, *review denied* (Minn. Apr. 13, 1992).

Given the planning involved in this crime and the impact on the victims, the district court did not abuse its discretion by departing upward.

IV.

Lastly, Ornes argues that the district court erred in denying his motion for a change of venue. Venue may be transferred to another county if it is impossible to have a fair and impartial trial in the original county. Minn. R. Crim. P. 24.03, subd. 1(a). A district court should grant a motion for change of venue or continuance when "the dissemination of potentially prejudicial material creates a reasonable likelihood" of an

unfair trial. Minn. R. Crim. P. 25.02, subd. 3; *State v. Blom*, 682 N.W.2d 578, 607 (Minn. 2004). We will not reverse a district court's denial of a motion for change of venue absent a clear abuse of discretion and actual prejudice to the defendant. *State v. Berkovitz*, 705 N.W.2d 399, 408 (Minn. 2005). An abuse of discretion occurs if the evidence is such that "a real possibility exists that a jury will not render an unprejudiced or unbiased verdict." *State v. Webber*, 292 N.W.2d 5, 12 (Minn. 1980) (quotation omitted).

Ornes has failed to demonstrate that he was prejudiced by the denial of his motion to change venue. He relies on several news articles from the spring and fall of 2006 regarding his case, but it is not clear that these articles would have affected potential jurors. *See State v. Kinsky*, 348 N.W.2d 319, 323 (Minn. 1984) ("Prospective jurors cannot be presumed partial solely on the ground of exposure to pretrial publicity."). Moreover, the mere fact that factual news reports were published does not establish that pretrial publicity was prejudicial. *State v. Salas*, 306 N.W.2d 832, 835 (Minn. 1981).

Affirmed.