STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1990

State of Minnesota,
Respondent,

vs.

Daniel L. Conley,
Appellant.

Filed October 6, 2009
Reversed and remanded
Connolly, Judge

Ramsey County District Court
File No. K5-03-1055

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

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

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

CONNOLLY, Judge

This case involves appellant Daniel Conley's conviction of first-degree criminal sexual conduct and subsequent sentencing based on the aggravating factor of the presence of children during the commission of the crime. After we affirmed his conviction, the supreme court decided *State v. Vance*, 765 N.W.2d 390 (Minn. 2009), and our decision was reversed on the issue of whether the district court erred when it imposed an upward sentencing departure based on the *Blakely* jury's finding that the children were present in the home and remanded to this court for further proceedings. Because we now conclude that the district court erred in the way it drafted the special verdict interrogatory, we reverse and remand for a new *Blakely* trial on this aggravating factor.

FACTS

We described the relevant facts in our original opinion, *State v. Conley*, No. A07-1990 (Minn. App. Feb. 3, 2009). We summarize briefly. On March 22, 2003, appellant sexually assaulted his girlfriend. First, appellant forced the victim to take off her clothes. As she was disrobing, her children came in the back door of the house and saw her.[1] She stood in front of them in her bra and pajama pants. Appellant called her a "bitch" in front of the children, and she started to cry. Appellant told the children that they would hear their mother cry out, but that she would be alright. While the children were still present, appellant yelled at the victim that he had not told her to stop taking off her clothes. By

[1] One daughter was four years old and her sister was five years old.

the time the children went upstairs, their mother was naked. Appellant proceeded to sexually assault the victim.

Following the assault, appellant refused to let the victim leave the apartment. The victim felt that appellant would have killed her had she attempted to leave. The following night, however, the victim notified the police of the assault because her children were in the house and she felt that she needed to seek help.

In 2003, after a jury trial, appellant was convicted of first-degree criminal sexual conduct, third-degree criminal sexual conduct, second-degree assault, and solicitation to practice prostitution. After a separate *Blakely* trial, appellant was sentenced to an upward durational departure of 300 months in prison on the first-degree criminal sexual conduct conviction.[2] This upward durational departure was based upon the jury's affirmative answer to the question: "Were [the victim's] children present in the home during the sexual assault?"

This court affirmed the upward durational departure. *State v. Conley*, No. A07-1990 (Minn. App. Feb. 3, 2009). The supreme court granted appellant's petition for further review, and stayed proceedings pending its decision in *State v. Vance*. On June 30, 2009, the supreme court reversed this court's decision and remanded the case for further review in light of its decision in *Vance*.

[2] The presumptive guidelines sentence was 158 months in prison.

D E C I S I O N

I. The jury's finding based on its answer to the special verdict interrogatory that children were present in the home during the sexual assault was not specific enough to support an upward departure under the sentencing guidelines.

The special verdict asked the jury to answer the following question: "Were [the victim's] children present in the home during the sexual assault?" Appellant did not object to this question.[3] "It is well established that a failure to object to a special verdict form prior to its submission to the jury constitutes a waiver of a party's right to object on appeal." *Kath v. Burlington N. R.R. Co.*, 441 N.W.2d 569, 572 (Minn. App. 1989), *review denied* (Minn. July 27, 1989). "However, an appellate court may review . . . the composition of special verdict questions to determine whether there is an error of fundamental law or controlling principle . . . ." *Estate of Hartz v. Nelson*, 437 N.W.2d 749, 752 (Minn. App. 1989), *review denied* (Minn. July 12, 1989).

In *State v. Vance*, the supreme court noted that it has previously recognized two circumstances in which the presence of children may be used to support an aggravated sentence. 765 N.W.2d at 393. First, it has "recognized that the presence of children is an aggravating sentencing factor when the offense is committed in the actual presence of children." *Id.* It has "also suggested that the presence of children may be an aggravating factor when the victim is particularly vulnerable due to a child's presence in the home."

[3] Appellant did voice his displeasure with the question, arguing that he did not "believe that this mere presence of children necessarily constitutes an aggravating factor in every circumstance." It does not appear that he intended to make a formal objection.

Id. In light of that history, the supreme court expanded on the actual presence of the children requirement, stating:

> The mere presence of children in the home, 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. A proper instruction would indicate that the 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.

Id. at 394.

In this case, the special verdict interrogatory, which only required a determination of whether or not the children were in the home, was not specific enough to support an upward departure. Nor did the district court instruct the jury along the lines articulated in *Vance.* Because there was no finding by the jury that the children actually saw, heard, or otherwise witnessed the offense, or that the victim was particularly vulnerable because her children were present, the upward departure was improper.

We note that there appears to be evidence in the record that the children witnessed their mother undressing and that appellant believed that they would hear their mother cry out.[4] Furthermore, there also appears to be evidence indicating that the victim felt particularly vulnerable, and would not flee the apartment, because the children would be left behind. But, it is not the province of this court to make these findings in place of the

[4] It also appears to us that if the rationale behind this aggravating factor is to impose greater punishment because children are traumatized by witnessing such events, the rationale would still apply if the children in this case witnessed a portion of the offense even if they did not actually see the sexual penetration of their mother by appellant.

jury. *See State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009) ("After *Blakely*, we no longer independently review the record for evidence to justify a departure because the issue of whether additional facts exist to support the departure is a question of fact for a *Blakely* jury . . . . Instead, when the facts found only support an improper or inadequate reason for departure, we have generally remanded for further proceedings.").

We are well aware that by remanding this case for another *Blakely* trial, we are requiring the victim to testify for a third time since there have already been two trials. Nevertheless, because we are bound to apply the law, we see no other alternative.

Reversed and remanded.