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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2004**

John Michael Haefs, Jr., petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 25, 2009
Affirmed
Larkin, Judge**

Goodhue County District Court
File No. 25-KX-05-000455

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and

Stephen N. Betcher, Goodhue County Attorney, Erin L. Kuester, Assistant County Attorney, Goodhue County Justice Center, 454 West Sixth Street, Red Wing, MN 55066 (for respondent)

Considered and decided by Larkin, Presiding Judge; Ross, Judge; and Schellhas,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges the denial of his petition for postconviction relief, arguing that the postconviction court erred by denying his request for sentence modification. Appellant claims that the district court based its double-upward durational departure on invalid aggravating factors. Because the postconviction court did not abuse its discretion by denying appellant's petition, we affirm.

FACTS

On April 8, 2005, appellant John Michael Haefs, Jr., pleaded guilty to criminal sexual conduct in the first degree in violation of Minn. Stat. § 609.342, subd. 1(a) (2004). There was no agreement as to the sentence, and prior to Haefs's plea, the state indicated on the record that it may seek an upward departure at sentencing. The victim of the offense was Haefs's six-year-old daughter. During Haefs's plea, Haefs admitted that he sexually penetrated his daughter's vagina and buttocks with his finger, rubbed her body with his hand in a sexual manner, ejaculated in front of her, and then rubbed his semen on the front of her thighs.

As warned, the state requested an upward-durational departure at Haefs's sentencing hearing. The district court granted the request and imposed an executed sentence of 288 months, which constitutes a double-durational departure from the presumptive sentence. The district court judge stated: "[I]n my opinion a departure is warranted. This is one of the most heinous crimes I've been involved in . . . my experience as a Judge over 22 years." The district court stated that the departure was

based on the facts that (1) Haefs had a prior 1994 criminal sexual conduct offense that involved a juvenile family member; (2) the current offense involved multiple forms of penetration; (3) the victim of the current offense was particularly vulnerable because of her young age; (4) Haefs used his position of authority as the victim's father to get the victim to submit for his own sexual gratification; and (5) there was a second child present during some of the offense.

On March 25, 2008, Haefs filed a pro se motion entitled: "Motion For Reduction Or Correction of Sentence." Later, the public defender's office filed a petition for postconviction relief on Haefs's behalf requesting that the district court impose the presumptive sentence or some term less than 288 months.

The postconviction court denied Haefs's request for sentence modification based on its conclusion that the sentencing court's findings regarding multiple forms of penetration and the presence of another child during the offense were supported by the record and constituted valid grounds for an upward departure. This appeal follows.

DECISION

"This court will reverse a [district court's] postconviction decision only for an abuse of discretion, and while we give de novo review to its legal determinations, we will reverse its factual findings only if clearly erroneous. The district court abuses its discretion if it misinterprets or misapplies the law." *State v. Jedlicka*, 747 N.W.2d 580, 582 (Minn. App. 2008) (citation and quotation omitted).

A district court must order the presumptive sentence provided by the sentencing guidelines unless there are "substantial and compelling circumstances" that warrant an

upward departure. Minn. Sent. Guidelines II.D. Substantial and compelling circumstances are present when “the defendant’s conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question.” *State v. Misquadace*, 644 N.W.2d 65, 69 (Minn. 2002). The guidelines provide a nonexclusive list of aggravating factors that may justify a departure, such as the “[t]he victim was particularly vulnerable due to age,” “[t]he victim was treated with particular cruelty,” and “[t]he current conviction is for a [c]riminal [s]exual [c]onduct offense . . . and there is a prior felony conviction for a [c]riminal [s]exual [c]onduct.” Minn. Sent. Guidelines II.D.2(b)(1)-(3).

An appellate court must determine whether the district court’s stated reasons for a departure justify the departure. *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985). A departure is justified if the reasons stated are proper and if the severity of the sentence is within the district court’s broad discretion. *See State v. Shattuck*, 704 N.W.2d 131, 139-40 (Minn. 2005). The issue of whether a particular reason for an upward departure is permissible is a question of law. *State v. Jackson*, 749 N.W.2d 353, 357 (Minn. 2008).

Haefs argues that his sentence must be modified because (1) the victim’s age, multiple forms of penetration, and the offender’s position of authority are invalid aggravating factors because they form the basis for a dismissed offense; (2) Haefs’s prior conviction was an invalid aggravating factor because it was used to establish his criminal history score and to increase his conditional release term; and (3) the presence of another child was an invalid aggravating factor because the child was not harmed and the child’s presence was not proven beyond a reasonable doubt. We limit our review to Haefs’s

arguments regarding multiple forms of penetration and the presence of another child because those were the only aggravating factors relied upon by the postconviction court.

Multiple Forms of Penetration

Haefs argues that multiple forms of penetration is an invalid aggravating factor under *Taylor v. State*, 670 N.W.2d 584 (Minn. 2003). In *Taylor*, the defendant admitted to sexually assaulting a child on one occasion and to sexually assaulting the same child on another occasion. *Id.* at 585-86. The district court sentenced the defendant to an upward-durational departure based, in part, on the fact that there were multiple incidents of abuse. *Id.* at 586. The Minnesota Supreme Court reduced the sentence, in part because the departure was based on an offense that was not part of the charge and of which the defendant had not been convicted, which is impermissible. *Id.* at 588, 590. The supreme court differentiated the defendant's case from cases involving multiple acts of sexual contact and penetration that "were a part of the offense of which the defendant was charged and convicted." *Id.* at 588. Thus, *Taylor* is factually distinguishable from the present case; here, the upward departure is based on multiple forms of penetration that occurred during commission of the offense for which Haefs was charged and convicted. *Taylor* is therefore not dispositive.

The postconviction court did not err in concluding that Haefs's multiple forms of sexual penetration constituted "substantial and compelling circumstances" that warranted an upward departure. Minn. Sent. Guidelines II.D. "Multiple penetrations alone will generally justify a double . . . upward departure." *State v. Mesich*, 396 N.W.2d 46, 52-53 (Minn. App. 1986) (affirming a double-upward departure based on penetration of the

victim's vagina and mouth), *review denied* (Minn. Jan. 2, 1987); *see State v. Griffith*, 480 N.W.2d 347, 351 (Minn. App. 1992) (affirming a 50-percent upward departure where “there were three different types of vaginal penetration—digital, cunnilingus, and intercourse”), *review denied* (Minn. Mar. 19, 1992), *superseded on other grounds as recognized by State v. Blevins*, 757 N.W.2d 698, 700-01 (Minn. App. 2008). Multiple forms of penetration justify an upward departure because it demonstrates that the defendant committed the assault in a particularly serious way. *Ture v. State*, 353 N.W.2d 518, 523 (Minn. 1984) (concluding that defendant “committed the offense in a particularly serious way” in part because the episode “involved multiple types of penetration”).

There is sufficient evidence to support the postconviction court's finding of multiple forms of sexual penetration given Haefs's plea admission that he penetrated his daughter's vagina and buttocks during the incident for which he was charged and convicted. *See* Minn. Stat. § 609.341, subd. 12(2)(i) (2004) (defining sexual penetration as “any intrusion however slight into the genital or anal openings . . . of the complainant's body by any part of the actor's body or any object used by the actor for this purpose”).

Haefs also admitted that he ejaculated in front of his daughter and rubbed his semen on her thighs. The postconviction court cited this conduct as a basis for departure, describing these acts as a form of penetration. This description was in error. *See id.* But the postconviction court's mischaracterization of the acts as “penetration” is not prejudicial because the acts demonstrate that “[t]he victim was treated with particular

cruelty,” which is a valid basis for departing upward. Minn. Sent. Guidelines II.D.2(b)(2). Particular cruelty exists when the type of cruelty is “of a kind not usually associated with the commission of the offense in question.” *State v. Norton*, 328 N.W.2d 142, 146 (Minn. 1982) (quotation omitted). And acts of cruelty are not limited to physical injury or physical danger but also include acts that place the victim in a particularly humiliating position and acts that demean the victim. See, e.g., *State v. Cermak*, 350 N.W.2d 328, 336 (Minn. 1984) (affirming sentencing departures based on particular cruelty where the defendant used threats of bodily harm to coerce the victims to submit to sexual abuse and photographed the victims during the sexual abuse); *State v. Cox*, 343 N.W.2d 641, 645 (Minn. 1984) (affirming sentencing departure based on particular cruelty where “the victim was not only raped but was [also] put in the particularly humiliating position of having to appear outside in a ‘partially naked’ state in order to obtain help” because the defendant took her clothing after the sexual assault); *Griffith*, 480 N.W.2d at 350-51 (affirming a sentencing departure based on particular cruelty where the defendant ejaculated on the victim’s face, which was deemed demeaning and humiliating beyond the humiliation associated with the underlying criminal sexual conduct offense).

Presence of Another Child

Haefs contends that the presence of another child did not warrant an upward departure because the other child was not harmed and did not understand what was occurring. This argument is unavailing. The Minnesota Supreme Court has held that a double-upward departure was not an abuse of discretion in part because “committing the

offense in front of . . . children was a particularly outrageous act and that while the children maybe were not technically victims of the crime, they were victims in another sense.” *State v. Profit*, 323 N.W.2d 34, 36-37 (Minn. 1982); *see State v. Cermak*, 344 N.W.2d 833, 840 (Minn. 1984) (concluding that a relevant fact for an upward departure is the fact that a child had to witness the sexual abuse of others). Thus, that the other child was not physically harmed or did not understand what was occurring is not determinative.

More recently, the supreme court has held that the mere presence of children in a home where a sexual assault occurred, absent any evidence that they saw or heard the offense, is not a substantial and compelling circumstance sufficient to support an upward departure. *State v. Vance*, 765 N.W.2d 390 (Minn. 2009). The supreme court held that the district court’s presence-of-children jury instruction at defendant’s sentencing trial materially misstated the law because it instructed the jury that the state did not have to prove that the children saw or heard the offense as long as they could have seen or heard it. *Id.* at 394. But the supreme court nonetheless affirmed the district court’s upward departure because the two remaining aggravating factors, multiple forms of penetration and particular cruelty, independently supported a double-upward departure. *Id.* at 395-96 (concluding that the district court would have imposed the same sentence absent reliance on the presence-of-children factor).

Haefs also asserts that the presence of another child was an invalid aggravating factor because it was not proven beyond a reasonable doubt. The sentencing and postconviction courts based their findings regarding the presence of another child on Haefs’s admission in the presentence investigation that another child was present.

Haefs's only briefing on the issue is to state: "[I]t is questionable given what was presented to the district court whether the state established this fact beyond a reasonable doubt." Assuming *arguendo* that the record is insufficient to establish that another child was present and saw or heard the offense, it is nonetheless reasonable to conclude that the district court would have imposed the same sentence absent reliance on the presence-of-another-child factor when the remaining aggravating factors, multiple forms of penetration and particular cruelty, are valid and provide independent support for the upward departure. *See id.*

We hold that the postconviction court did not abuse its discretion by denying Haefs's petition based on its conclusion that the record establishes valid departure grounds. Accordingly, we affirm.

Affirmed.

Dated: _____

The Honorable Michelle A. Larkin