STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1308

Donovan Dejuan Brown, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 16, 2012
Affirmed
Stoneburner, Judge

Ramsey County District Court
File No. 62CR088469

David W. Merchant, Chief Appellate Public Defender, Rachel Foster Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

Considered and decided by Klaphake, Presiding Judge; Stoneburner, Judge; and Cleary, Judge.

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

STONEBURNER, Judge

Appellant was convicted of four counts of terroristic threats; first-, second-, and third-degree assault; and second-degree attempted murder arising out of an assault with a

box cutter on his estranged wife committed in the presence of three children. In this appeal from the denial of postconviction relief, appellant asserts that he is entitled to postconviction relief because (1) the state failed to prove terroristic-threats charges pertaining to the children; (2) the district court erred by submitting an uncharged, nonincluded first-degree assault charge to the jury; (3) the district court erred by not instructing the jury on first-degree heat-of-passion manslaughter; and (4) six of eight aggravating factors relied on for the upward sentencing departure were invalid and the departure was tainted by judicial bias and hostility such that his sentence must be reduced to the presumptive sentence or reversed and remanded for resentencing before a different judge. We affirm.

FACTS

Appellant Donovan Dejuan Brown and S.R. were married in early 2006. They have two children together, D.R., born in 1999, and T.R., born in 2005. S.R. has another son, C.G., born in 2003. The family lived in Illinois until November 2006, when S.R. and the children moved to Minnesota to get away from Brown and the abuse he inflicted on them.

Brown followed his family to Minnesota and moved into S.R.'s apartment in December 2006. The abuse continued. Brown told S.R. that she was "playing with fire" and that he would "do something to her" if she kept asking him to leave.

Brown moved out of the apartment in March 2008 and was homeless for several months. He occasionally slept in S.R.'s car. He also kept a set of keys to the apartment.

On August 2, 2008, S.R. woke up to find Brown slamming kitchen drawers in the apartment. Brown told S.R. that he was tired of living in her car and was moving back to Chicago. Brown also told S.R. that, because there was an order prohibiting him from having contact with C.G., she and the children should leave the apartment and live with her mother so he could have the apartment. S.R. refused to let Brown have the apartment because she paid the rent. S.R. then left the apartment with C.G. to go to the bank with her mother.

The argument resumed when S.R. returned and began cleaning the apartment and listening to music. Brown got angry and broke the compact disc S.R. was listening to. S.R. repeatedly asked Brown to leave, but he refused and again insisted that she and the children go live with her mother. S.R. told Brown again, in a louder voice, that she would not move out of the apartment. Brown told S.R. to be quiet because he did not want anyone to know that he was in the apartment, and he threatened to kill her if she opened the door for the police.

The argument continued, and Brown said "[Y]ou don't think I'll kill you here?" S.R. asked him to leave again. Brown responded by slashing S.R.'s face with a box cutter. S.R. called out for help as Brown continued to slash her face, neck, back, legs, and wrists. Brown held S.R.'s head for all or part of the attack. S.R. managed to get away from Brown, and he ran toward the bedroom. He jumped through a closed window to get out of the apartment.

Before he physically attacked S.R., Brown had sent the three children to the bedroom. During the attack, one of the children opened the door and all three were in the

hallway outside the bedroom when Brown made his escape. D.R. testified that he saw Brown holding his mother by the hair in the kitchen and slashing her. By the time Brown left, all three children were screaming and crying in the hallway outside the bedroom.

S.R.'s mother, who lived across the street, was outside at the time of the attack and heard S.R.'s screams. She tried to kick down S.R.'s door to help but was not able to get the door open. S.R. managed to unlock the door and open it after Brown left. S.R.'s mother applied pressure to S.R.'s neck wound while a neighbor called the police. When police arrived, D.R. told them what had happened and which way Brown went.

S.R. was taken to the hospital where she received emergency treatment for her wounds. Medical personnel determined that the wound near S.R.'s mouth "penetrated muscle and could have resulted in substantial bleeding that, in turn, might have caused asphyxiation and death." The wounds on S.R.'s neck were close to her carotid artery and airway, and one was so close that it could have caused death by asphyxiation.

After fleeing the apartment, Brown called the police and told the 911 operator that he and S.R. had a fight, that she tried to cut him, and that he defended himself. Brown then went to the police station, where he repeated his story. He was taken to the hospital for treatment of injuries to his hand and was then arrested.

The state charged Brown with seven offenses: (1) attempted second-degree murder in violation of Minn. Stat. § 609.19, subd. 1(1) (2008); (2) second-degree assault with a dangerous weapon in violation of Minn. Stat. § 609.222, subd. 1 (2008); and (3) five counts of terroristic threats for threats against S.R., her mother, and the three children, in violation of Minn. Stat. § 609.713, subd. 1 (2008). The state withdrew the

terroristic-threats charge with regard to S.R.'s mother, and the district court submitted first-degree assault and third-degree assault to the jury as lesser-included offenses of second-degree attempted murder.

Brown testified at trial that S.R. attempted to block his path out of the bedroom, and they began arguing. He then testified that S.R. cut his hand with a box cutter. Brown told the jury that he was acting in self-defense when S.R. was injured. The jury found Brown guilty of all eight offenses submitted.

The jury also considered aggravating factors that would justify an upward durational departure during sentencing. The jury found that (1) Brown committed the crime in S.R.'s zone of privacy; (2) D.R. was present when Brown attempted to murder his mother; (3) C.G. was present when Brown attempted to murder his mother; (4) T.R. was present when Brown attempted to murder her mother; (5) D.R. was particularly vulnerable due to his age; (6) C.G. was particularly vulnerable due to his age; (7) T.R. was particularly vulnerable due to her age; and (8) Brown failed to abide by two court orders on the date of the offense.[1]

The district court imposed a twenty-year sentence for the conviction of attempted second-degree murder, an upward durational departure from the 172-month presumptive sentence. The district court also imposed three consecutive one-year-and-one-day sentences for the convictions of terroristic threats against the children. During sentencing the district court engaged in inappropriate name-calling, but the district court cited the

[1] One order prohibited Brown from having any contact with C.G., and the other permitted Brown to be in S.R.'s presence only so long as he could remain law-abiding.

jury's findings on zone of privacy, the presence of the children, and the particular vulnerability of the children as justification for its upward departure.

Brown appealed his conviction, but after the parties submitted their briefs and the case was set for oral argument, he voluntarily dismissed his appeal. He then petitioned for postconviction relief. The district court denied the petition, and this appeal followed.

D E C I S I O N

I. Brown's petition for postconviction relief is not barred by *Knaffla*, and the standard of review is the standard applied to a direct appeal.

Respondent State of Minnesota argues that, because Brown could have presented all of the claims raised in his petition for postconviction relief in the appeal that he filed but voluntarily dismissed, the claims should be considered barred by the rule announced in *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). We disagree. *Knaffla* held that, if a postconviction-relief petition follows a direct appeal from a conviction, any claims that arose in the direct appeal, as well as any claims the defendant knew or should have known at the time of that appeal, are procedurally barred. *Id*.

The Minnesota Supreme Court has held that "a petitioner . . . who merely files a direct appeal, but whose claims do not receive actual appellate review" is not barred from later bringing a petition for postconviction relief. *Rairdon v. State*, 557 N.W.2d 318, 322 (Minn. 1996). Because Brown dismissed his appeal before it received appellate review, the postconviction court correctly rejected the state's argument that Brown's petition for postconviction relief is *Knaffla*-barred.

This court applies the standard of review for direct appeals to appeals from denial of postconviction relief in cases where a defendant first files a direct appeal and subsequently chooses to pursue postconviction relief prior to proceeding with the appeal. *See Santiago v. State*, 644 N.W.2d 425, 439 (Minn. 2002) (stating that in similar circumstances, "even though this is a postconviction petition, the standard of review normally applied to [appellant's] direct appeal issues is the standard to be used here").

II. The evidence was sufficient to support convictions of terroristic threats against the children.

Brown argues that the state failed to present evidence sufficient to support his convictions of terroristic threats against the children. In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant is guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Minn. Stat. § 609.713, subd. 1 (2008), makes it a crime to "threaten[], directly or indirectly, to commit any crime of violence with [the] purpose to terrorize another . . . , or in a reckless disregard of the risk of causing such terror." Such threats may be made through words or actions. *State v. Murphy*, 545 N.W.2d 909, 914-16 (Minn. 1996). The threats must also be "to commit a *future* crime of violence which would terrorize a victim." *Id.* at 916.

Brown asserts that the only evidence of a threat against the children argued by the state was the *act* constituting attempted second-degree murder committed against their mother, which could not be a threat to commit *future* violence. Brown asserts that the prosecutor's closing argument misled the jury about whether his *acts* constituted a threat of future violence. The prosecutor said:

> The elements [of a terroristic-threats charge] are that the defendant threatened to commit a crime of violence. And in this case he committed the crime of violence. A crime of violence is defined as the Judge will give it to you. Attempted Murder in the Second Degree is a crime of violence. The threat doesn't have to be words alone. A threat can be by actions. A threat can be by words. It is – you look at both. And in this case you have both. He carried out that threat, and so that threat is real.

The district court, however, in its final instructions to the jury, clarified the elements of terroristic threats under Minn. Stat. § 609.713, subd. 1:

> So the elements of making a terroristic threat are: First, the defendant threatened directly or indirectly to commit a crime of violence.
>
> Attempted Murder in the Second Degree, Assault in the First, Second and Third Degrees are crimes of violence which have been defined elsewhere for your consideration. It

> need not be proved that the defendant had the actual intention of carrying out the threat.
>
> Second . . . that the defendant made the threat with the intent to terrorize . . . or . . . in reckless disregard of the risk of causing such terror to [the children]. It need not be proved that those individuals actually experienced extreme fear.

From our painstaking review of the record, we conclude that the evidence was sufficient to support Brown's convictions of terroristic threats against the children. The evidence established that the apartment where events occurred was small—the distance from the kitchen where the assault occurred to the bedroom where the children were sent by Brown was described as about four feet, or "a little farther than the length of your arm." S.R. testified that after Brown sent the children to the bedroom he said, "[Y]ou don't think I'll kill you here?" before attacking her with the box cutter. Given the escalating nature of the argument and the proximity of the children to Brown and S.R. when the death threat was made, the jury could have found that Brown made the threat with reckless disregard for the risk that the children would hear the threat and that it would cause terror in the children, or that the children perceived Brown's pre-assault conduct as a threat of future violence against their mother. The evidence is sufficient to support the challenged convictions.

III. Any error in instructing the jury on first-degree assault was not reversible error.

The district court instructed the jury on first-degree assault as a lesser-included offense of second-degree attempted murder. Brown correctly asserts that first-degree assault is not a lesser-included offense of attempted second-degree murder. *See State v. Gisege*, 561 N.W.2d 152, 156 (Minn. 1997) (stating that because great bodily harm is an

element of first-degree assault, "[f]irst-degree assault . . . is not a lesser-included offense of either attempted first-degree murder or attempted second-degree murder"). We agree with Brown that the district court erred by instructing the jury on first-degree assault as a lesser-included offense. But we conclude that the error was not reversible error in this case.

"Typically, the failure of an indictment or complaint to include the crime with which the defendant was convicted is an error of fundamental law." *Id.* at 158. When such fundamental error occurs, this court will examine the merits of appellant's claim under the doctrine of reversible error. *Id.* at 159. We will reverse the conviction only if the variance deprived appellant "of a substantial right, namely, the opportunity to prepare a defense to the charge against him." *Id*. "Ultimately, we must ask whether the erroneous charge denied the defendant the opportunity to prepare an adequate defense." *Id*. In this case, the state notes that before trial began the parties discussed the possibility that the jury would be asked to consider the charge of first-degree assault, even though it was not included in the complaint. Brown does not argue that he was unaware of the possibility of an instruction on first-degree assault but nonetheless argues that his questions to S.R.'s treating physician were focused on trying to show that S.R.'s injuries were not lethal rather than whether the injuries constituted great bodily harm. The state points out that Brown's questions of S.R.'s doctor dealt with whether S.R.'s injuries created "a high probability of death," one of the ways to show great bodily harm. *See also* Minn. Stat. § 609.02, subd. 8 (2008) (defining "great bodily harm" as "bodily injury which creates a high probability of death, or which causes serious permanent

disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm").

We conclude that, because Brown was aware of the possibility of the instruction on first-degree assault, had the opportunity to question S.R.'s doctor on great bodily harm, and, in fact, questioned the doctor on one aspect of great bodily harm, the district court's error in instructing the jury on the nonincluded offense is not reversible error in this case.

IV. The district court did not err in failing to instruct the jury sua sponte on first-degree heat-of-passion manslaughter.

Brown contends that the district court committed plain error by failing to instruct the jury sua sponte on a lesser-included offense of attempted first-degree heat-of-passion manslaughter under Minn. Stat. § 609.20(1) (2008). *See State v. Johnson*, 719 N.W.2d 619, 625 (Minn. 2006) (stating that first-degree heat-of-passion manslaughter is a lesser-included offense of second-degree intentional murder). "[W]hen a defendant fails to request a lesser-included offense instruction warranted by the evidence, the defendant impliedly waives his or her right to receive the instruction." *State v. Dahlin*, 695 N.W.2d 588, 597-98 (Minn. 2005). "Thus, absent plain error affecting a defendant's substantial rights, a trial court does not err when it does not give a warranted lesser-included offense instruction if the defendant has impliedly . . . waived that instruction." *Id.* at 598 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). Plain error requires error that is plain and that affected a defendant's substantial rights. *Id.*

"The determination of what, if any, lesser offense to submit to the jury lies within the sound discretion of the [district] court, but where the evidence warrants an instruction, the [district] court must give it." *Bellcourt v. State*, 390 N.W.2d 269, 273 (Minn. 1986).

> An intentional killing may be mitigated to first-degree manslaughter if two elements are present: (1) the killing must be done in the heat of passion, and (2) the passion must have been provoked by words and acts of another such as would provoke a person of ordinary self-control under the circumstances.

Johnson, 719 N.W.2d at 626 (quoting *State v. Kelly*, 435 N.W.2d 807, 812 (Minn. 1989). Whether the district court erred by failing to give the instruction hinges on whether there was a rational basis for a jury to conclude that both elements of the heat-of-passion defense were present. *Id.*

The first element of attempted first-degree heat-of-passion manslaughter is subjective and requires an examination of the defendant's emotional state at the time of the attempt. *Id.* The court must determine whether "a heat of passion . . . cloud[ing] a defendant's reason and weaken[ing] his willpower" existed at the time of the attempted killing. *Id.* "Anger alone is not enough." *Id.*

Brown testified at trial that he was angry with S.R. before he slashed her. Brown also testified that he was "fearful for [his] life" when, as he testified, his wife came at him with a box cutter. He then testified that he grabbed the box cutter from her hand and slashed at her because he "didn't know if she was going to go get another knife or if she had another one and was fittin' to turn around and stab [him]." He also testified that,

once he saw the children in the hallway, he ran to the bedroom and jumped out the window. None of this testimony indicates that any heat of passion clouded Brown's reason during the time he spent slashing S.R.

The second element of attempted first-degree heat-of-passion manslaughter is objective and requires an analysis of "whether the passion was provoked by such words or acts of another as would provoke a person of ordinary self-control under like circumstances." *Id.* at 627. A person of ordinary self-control will generally not attack a spouse during an ordinary domestic dispute. *See State v. Brocks*, 587 N.W.2d 37, 41 (Minn. 1998) (determining that a lesser-included-offense instruction on heat-of-passion manslaughter was not warranted because an ordinary person in the defendant's position would not shoot another man for walking the defendant's girlfriend home after she and the defendant had a fight).

Brown testified that, before any of the slashing began, the parties first argued about C.G.'s presence in the home when Brown was barred from being around him and then argued about a topic that Brown could not remember. Brown testified that S.R. blocked his way and came at him with the box cutter first. On appeal he argues that these alleged actions were sufficient to provoke him into excessive passion. He does not address why, even if S.R. came at him first and he disarmed her, a person of ordinary self-control would act as he did and continue slashing her even though she no longer had a weapon.

Because there is no rational basis for a jury to conclude that the heat-of-passion elements were present in this case, we conclude that the district court did not err by

failing to, sua sponte, give an instruction on first-degree heat-of-passion manslaughter. Because there is no error, we need not address the additional factors in a plain-error analysis.

V. The record supports the sentence imposed.

Brown challenges his sentence, arguing that at least six of the eight aggravating factors found by the jury were invalid or improper to support an upward departure, the remaining two elements were insufficient to support the departure, and his sentence was "tainted by judicial bias and inappropriate personal hostility."

A district court must order the presumptive sentence specified in the sentencing guidelines unless there are "identifiable, substantial, and compelling circumstances" to warrant an upward departure from the presumptive sentence. Minn. Sent. Guidelines II.D. (2011). "Substantial and compelling circumstances are those showing that the defendant's conduct was significantly more or less serious than that typically involved in the commission of the offense in question." *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). Whether a particular reason for an upward departure is permissible is a question of law, which is subject to de novo review. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). A district court's decision to depart from the sentencing guidelines based on permissible grounds is reviewed for an abuse of discretion. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003); *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001).

The jury returned special verdicts finding that (1) Brown committed the crime in S.R.'s zone of privacy, (2)-(4) each child was present when Brown attempted to murder

their mother; (5)-(7) each child was particularly vulnerable due to age; and (8) Brown failed to abide by the court order prohibiting him from having any contact with C.G. and permitting him to be in S.R.'s presence only so long as he could remain law-abiding.

A. Zone of privacy

Invading a victim's zone of privacy can be an aggravating factor in a sentencing departure. *State v. Morales*, 324 N.W.2d 374, 377 (Minn. 1982). If, however, the victim invites the defendant into her zone of privacy, this factor is inappropriate for use in justifying an upward sentencing departure. *State v. Volk*, 421 N.W.2d 360, 366 (Minn. App. 1988), *review denied* (Minn. May 18, 1988). Brown argues that, although he was not invited into S.R.'s home on the day of the incident, he had previously lived there and S.R. knew he retained keys such that he did not violate her zone of privacy. But Brown fails to address evidence that S.R. repeatedly told him to leave the apartment before he attacked her. Even if Brown could have been considered to have been "invited" into the apartment on the day of the attack, he was uninvited when he was told to leave but chose to remain in S.R.'s zone of privacy. And Brown was subject to an order for protection that prevented him from having contact with C.G., who lived with S.R. An order prohibiting a former-resident defendant from being around a current resident of a home eliminates the former-resident defendant's expectation of privacy in a family home. *State v. Stephenson*, 760 N.W.2d 22, 26-27 (Minn. App. 2009). We conclude that this aggravating factor provides a valid basis for an upward sentencing departure.

B. Vulnerability of children

"Generally, a victim may be considered 'particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, which is known or should have been known to the offender.'" *State v. Mohamed*, 779 N.W.2d 93, 98 (Minn. App. 2010) (quoting *State v. Stanke*, 764 N.W.2d 824, 827 (Minn. 2009)), *review denied* (Minn. May 18, 2010). If this is the case, the victim's particular vulnerability due to age can constitute an aggravating factor that justifies an upward sentencing departure. Minn. Sent. Guidelines II.D.2(b)(1) (2008). Brown correctly argues that D.R., C.G., and T.R. were not victims of the attempted second-degree murder and, therefore, the district court could not use this factor as justification for the upward durational departure on that charge. Because, however, the jury's findings on the facts regarding the zone of privacy factor justify the upward durational departure, the district court did not abuse its discretion in imposing an upward durational departure during sentencing for Brown's attempted second-degree-murder conviction.

C. Additional factors

Brown argues that the district court erroneously relied on uncharged criminal conduct, the particular cruelty with which he slashed S.R., failure to render aid, and lack of remorse to support the upward departure. The district court mentioned all of these factors at sentencing, but the district court's stated reasons for imposing the upward departure were zone of privacy and the particular vulnerability of the children due to their ages. Although the particular-vulnerability factor does not justify the upward departure on the attempted second-degree-murder charge, the record contains sufficient evidence

that Brown committed the crime in S.R.'s zone of privacy to justify the upward departure. *See State v. Rodriguez*, 754 N.W.2d 672, 685 (Minn. 2008) (quoting *State v. Losh*, 721 N.W.2d 886, 896 (Minn. 2006), for the premise that this court will uphold a sentencing departure made on improper or inadequate grounds if the record contains sufficient evidence to justify the departure).

VI. Brown's sentence was not the result of judicial bias.

"Opinions formed by the judge on the basis of facts introduced or events occurring in the course of current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *State v. Adell*, 755 N.W.2d 767, 775 (Minn. App. 2008) (quoting *State v. Burrell*, 743 N.W.2d 596, 603 (Minn. 2008)). We presume that the district court judge will "set aside collateral knowledge and approach cases with a neutral and objective disposition." *Id*. To overcome this presumption, the party charging bias must "adduce evidence of favoritism or antagonism." *Id*.

Brown argues that the district court's characterization of him as a "leech" and a "bloodsucker on [his] wife" demonstrate judicial bias during sentencing. This court has held that comments by a district court judge may establish bias warranting reversal of a sentencing departure only if the court both subjects a defendant to inappropriate personal remarks and fails to articulate the findings justifying the departure. *State v. Simmons*, 646 N.W.2d 564, 569-70 (Minn. App. 2002). The remarks made by the district court judge in this instance were inappropriate and unacceptable. And although we do not condone the district court judge's unnecessary characterizations of Brown, because the

district court articulated jury findings sufficient to justify the departure imposed, reversal of the sentence based on the judge's remarks is not appropriate in this case.

Affirmed.