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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1400**

State of Minnesota,
Respondent,

vs.

Jama Suleiman Ahmed,
Appellant.

**Filed April 9, 2012
Affirmed
Hudson, Judge**

Hennepin County District Court
File No. 27-CR-09-11525

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Michael K. Walz, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Larkin, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

In this sentencing appeal following his conviction of aiding and abetting first-degree aggravated robbery, appellant challenges the district court's imposition of an

upward durational departure based on the aggravating factor of committing an offense as one of three or more persons who actively participated in the crime. Because the record supports the district court's determination that the crime was committed by appellant as one of a group of three or more persons who actively participated in the offense, the district court did not abuse its discretion in imposing the upward durational departure, and we affirm.

FACTS

Appellant Jama Ahmed was charged with aiding and abetting first-degree aggravated robbery in violation of Minn. Stat. § 609.245, subd. 1 (2008), and Minn. Stat. § 609.905, subd. 1 (2008). A jury found appellant guilty and, on remand from this court, the district court sentenced appellant to 112 months, an upward durational departure, based on the aggravating factor of appellant committing the offense as part of a group of three or more persons who actively participated in the crime.

Appellant and two other men robbed C.J. at gunpoint on March 6, 2009. C.J. and J.T. were smoking marijuana on the way to an apartment building in Minneapolis when Ali Abdulkadir Mohamed asked C.J. and J.T. if they had any "weed." C.J. asked Mohamed how much he wanted. Mohamed replied a "half," and J.T. went into the apartment building to procure the marijuana. After about 20 minutes, J.T. called C.J. and said he would open the building's security door. C.J. entered the building to get the marijuana, and when he returned to the entryway, three men were waiting, one of whom was appellant. C.J. gave the marijuana to Mohammad Sharif Maye, who passed it to Mohamed. Maye then pulled a gun from his waistband and pointed it at C.J. Appellant

stated, “Oh, you’ve been robbed now,” and appellant and Mohamed went through C.J.’s pockets and took his wallet, money, marijuana, and two cell phones. Maye then pushed C.J. to the floor, and the three men stomped on him with their feet. Maye punched C.J. in the mouth while he lay on the ground, and appellant stated, “Let me shoot him, let me shoot him.” Appellant also hit C.J. in the mouth while the other men continued to kick C.J. The three men removed C.J.’s shoes and took his socks. Maye told C.J., “I’m going to let you go now, and if you say anything, I’m going to shoot you.” C.J. testified that the three men then ran into the building. C.J.’s only injury was a cut inside his mouth.

Appellant waived a sentencing jury on the issue of whether aggravating factors existed for an upward departure. The presumptive sentence for appellant’s offense was 88 months. The district court sentenced appellant to 112 months, finding that the aggravating factors of dangerous offender and three or more participants in the crime justified an upward departure. Appellant appealed his conviction and sentence. The court of appeals, by order, affirmed appellant’s conviction and reversed and remanded for resentencing because appellant did not satisfy the dangerous-offender definition in Minn. Stat. § 609.1095, subd. 1(c) (2008). On remand, the district court found that “the evidence did show that the offense was committed by a group of three or more people, all assisting each other and participating in the offense” and again sentenced appellant to 112 months. This appeal follows.

D E C I S I O N

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.1 (2008). Substantial and compelling circumstances demonstrate 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). A de novo review is conducted to determine if a valid ground for departure exists, which includes examining the factual findings that support the decision. *Dillon v. State*, 781 N.W.2d 588, 598 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). The district court's decision to depart from the sentencing guidelines, when based on permissible grounds, is reviewed for an abuse of discretion. *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001).

The sentencing guidelines provide a nonexclusive list of aggravating factors that may be considered when departing from the presumptive sentence. Minn. Sent. Guidelines II.D.2.b. The sentencing guidelines include committing a "crime as part of a group of three or more persons who all actively participated in the crime" as an aggravating factor that supports an upward departure. II.D.2.b.(10). The district court based its durational departure on this single factor.

Appellant argues that the district court abused its discretion in departing from the presumptive sentence because substantial and compelling circumstances did not exist to show that (1) his offense was more serious than the typical aggravated robbery or (2) he was more culpable than his two co-defendants.

Offense was no more serious than typical aggravated robbery

Appellant argues that his conduct is no more serious than that typically involved in aiding and abetting aggravated first-degree robbery because he was not armed, he did not threaten the victim, and the victim did not suffer any significant injury or atypical property loss.

A showing of circumstances that makes the particular facts of a case different from a typical case generally is required to impose an upward departure based on an aggravating factor. *State v. Robinson*, 388 N.W.2d 43, 46 (Minn. App. 1986), *review denied* (Minn. July 31, 1986). The few published cases addressing the aggravating factor of three or more participants, however, have affirmed an upward departure without an analysis of whether substantial and compelling circumstances existed. *See, e.g., State v. Losh*, 721 N.W.2d 886, 896 (Minn. 2006) (stating that “evidence in this case supports this aggravating factor” without substantial-and-compelling-circumstances analysis). We do not resolve this apparent discrepancy in the caselaw because we conclude that substantial and compelling circumstances existed to justify an upward departure.

The district court here determined that the evidence showed that appellant aided and abetted first-degree robbery with a group of three or more people. However, the district court failed to make findings that explained why the facts of this case differed from a typical one and were therefore substantial and compelling enough to warrant a departure. *See State v. Yaritz*, 791 N.W.2d 138, 144 (Minn. App. 2010) (stating that district court’s aggravating-factor findings provide reasons explaining substantial-and-compelling basis for departure), *review denied* (Minn. Feb. 23, 2011). But a reviewing

court may independently examine the record to determine if sufficient evidence exists to justify departure. *State v. Weaver*, 796 N.W.2d 561, 572–73 (Minn. App. 2011).

Aiding and abetting first-degree aggravated robbery is committed “if [a] person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures [another] to commit [aggravated robbery].” Minn. Stat. § 609.05 (2008). First-degree aggravated robbery occurs when someone uses a dangerous weapon or inflicts bodily harm upon another while committing a robbery. Minn. Stat. § 609.245, subd. 1 (2008). Therefore, some force or threat of force is contemplated when a person aids and abets first-degree aggravated robbery.

The record shows that appellant’s conduct related to robbing C.J. was excessive, and was made possible by the presence of three or more people participating in the robbery. First, appellant and the two other men stomped on C.J. *after* he had been robbed of his wallet, money, marijuana, and two cell phones. Because the robbery was complete when the stomping began, this force, which all three men participated in, constitutes a substantial and compelling circumstance justifying an upward departure. Second, the presence of three men participating in the robbery likely prevented C.J. from defending himself, particularly after the robbery was complete and he was pushed to the ground, stomped on, and kicked. Third, appellant and the two other men removed C.J.’s shoes and socks after taking his wallet, money, marijuana, and phones and subjecting him to violence. Given the district court’s discretion in sentencing departures and the presence of substantial and compelling circumstances, we conclude that the departure is appropriate.

Appellant also argues that, because additional aggravating factors were present in cases that have affirmed upward departures based on the aggravating factor of three or more participants, the factor must be found in conjunction with an additional factor. In support of this position, appellant cites *State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998), and *State v. Kujak*, 639 N.W.2d 878, 882–83 (Minn. App. 2002), *review denied* (Minn. Mar. 25, 2002). But neither case indicates that the three-or-more-participants factor must be found in conjunction with other aggravating factors. Moreover, caselaw supports the use of a single aggravating factor as a basis for an upward departure. See *Dillon*, 781 N.W.2d at 599 (stating departure justified where one aggravating factor present).

Appellant no more culpable than his two co-defendants

Finally, appellant argues that the district court abused its discretion by imposing a 24-month upward departure when his two co-defendants received upward departures of only 12 months for the same offense and aggravating factor. Appellant asserts that his conduct was no more serious, and may have been less serious, than that of his codefendants because he was not initially involved in the encounter with C.J. and did not possess the gun—justifying either imposition of the presumptive sentence or a shorter upward departure of 12 months.

We reject appellant’s assertion that he was no more culpable than his co-defendants and, therefore, deserves a shorter upward departure or none at all. On review, a sentence may be modified if it “is in the interests of fairness and uniformity.” *State v. Vazquez*, 330 N.W.2d 110, 112 (Minn. 1983). Fairness and uniformity involve more than

comparing the defendant's sentence with the sentence his accomplice received but also involve comparing the defendant's sentence with that of other offenders. *Id.* (comparing defendant's sentence with other defendants' and determining "that, given his conduct, defendant was not treated relatively harshly"); *see also State v. Lonergan*, 381 N.W.2d 51, 53 (Minn. App. 1986) (concluding codefendant's probationary sentence did not mandate a more lenient sentence for appellant). In examining sentences for other defendants also convicted of appellant's crime, we conclude that appellant was not treated harshly. Instead, his sentence reflected the presence of the aggravating factor, which justified an upward departure. *Cf. State v. Patricelli*, 357 N.W.2d 89, 91 (Minn. 1984) (affirming appellant's 36-month presumptive sentence for aiding and abetting aggravated robbery where no aggravating factors present). The district court did not abuse its discretion by imposing an upward departure that differed from that of appellant's co-defendants.

Affirmed.