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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1590**

State of Minnesota,
Respondent,

vs.

Chia Yang,
Appellant.

**Filed June 11, 2012
Affirmed
Stauber, Judge**

Hennepin County District Court
File No. 27CR0942528

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Bradford William Colbert, Catherine Young Middlebrook, Legal Assistance to Minnesota Prisoners, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Cleary, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

Appellant challenges the district court's imposition of a double upward durational departure for his conviction of first-degree assault. Because we conclude that the district court did not abuse its discretion, we affirm.

FACTS

Appellant Chia Yang was charged with first-degree assault in violation of Minn. Stat. § 609.221 (2008), after he participated in an assault of N.B. that left the victim “in a permanent vegetative state.” Appellant pleaded guilty to the charged offense and agreed to allow the district court to determine whether there were aggravating factors justifying a departure from the presumptive sentence. The court found that there were four aggravating factors: (1) “the victim’s injuries were permanent and serious, substantially more than would normally be present even in a case where the State has to prove great bodily harm”; (2) the victim was treated with particular cruelty; (3) the assault was committed by a group of three or more; and (4) the assault was random. The court then sentenced appellant to 206 months in prison, a double upward departure from the presumptive sentence. This appeal follows.

DECISION

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 (2009). “‘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). But a district court's decision to depart from the sentencing guidelines based on permissible grounds is reviewed for an abuse of discretion. *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001); *Dillon*, 781 N.W.2d at 595–96.

The sentencing guidelines set forth a nonexclusive list of aggravating factors that the sentencing court can consider when departing from the presumptive sentence. Minn. Sent. Guidelines II.D.2.b. (2009). Although the factors justifying departure may be considered together, one factor on its own may be sufficient to justify a departure. *See, e.g., State v. O'Brien*, 369 N.W.2d 525, 527 (Minn. 1985) (holding departure justified when only one aggravating factor is present).

Here, the district court found that there were four aggravating factors and that these factors warranted the imposition of a double upward departure from the presumptive sentence. Appellant challenges each of these factors, arguing that none constitutes "substantial and compelling reasons justifying the departure." Thus, appellant argues that the district court abused its discretion by sentencing him to an upward durational departure of 206 months in prison.

We disagree. An aggravating factor can include that the "[t]he victim was treated with particular cruelty for which the individual offender should be held responsible."

Minn. Sent. Guidelines II.D.2.b.(2). Particular cruelty alone can justify a double upward departure. *State v. Harwell*, 515 N.W.2d 105, 109 (Minn. App. 1994), *review denied* (Minn. June 15, 1994).

“Cruelty is a matter of degree and it is not always easy to say when departure is or is not justified.” *Holmes v. State*, 437 N.W.2d 58, 59 (Minn. 1989). The question is whether appellant’s conduct was so significantly different from that of other people committing the same crime that an upward departure is justified. *See State v. Esler*, 553 N.W.2d 61, 64 (Minn. App. 1996), *review denied* (Minn. Oct. 15, 1996). The typical first-degree assault requires the infliction of great bodily harm, which can be either (1) a high probability of death; (2) serious permanent disfigurement; (3) permanent or protracted loss or impairment of the function of a bodily member or organ; or (4) other serious bodily harm. Minn. Stat. § 609.02, subd. 8 (2008). Satisfaction of all four factors is more gratuitous, severe, and cruel than satisfaction of only one. *See State v. Felix*, 410 N.W.2d 398, 401 (Minn. App. 1987), *review denied* (Minn. Sept. 29, 1987). An assault with a high probability of death does not always involve serious permanent disfigurement. Similarly, an assault resulting in a serious permanent disfigurement does not always result in a high probability of death. This assault left N.B. in a permanent semi-vegetative state, without the use of most of his bodily and cognitive functions and at an increased risk of death.

In *Dillon*, this court affirmed the district court’s consideration of the appellant’s particular cruelty as an aggravating factor. 781 N.W.2d at 601. Comparing the circumstances in *Dillon* to this case, the beating of N.B. was at least as gratuitous, was

perpetrated by a group of three people, and resulted in far more serious and permanent injuries. The supreme court attaches “particular significance” to the infliction of permanent injuries. *State v. Van Gorden*, 326 N.W.2d 633, 635 (Minn. 1992). Therefore, the district court did not err by finding that N.B. was treated with particular cruelty, and using this factor to justify the upward departure.

Because the district court properly concluded that particular cruelty was an aggravating factor justifying a departure, a conclusion with which we agree, we need not address the other three factors relied upon by the district court to support the sentencing departure. *See O’Brien*, 369 N.W.2d at 527 (stating departure justified when only one aggravating factor is present). Nonetheless, we note that we have reviewed the arguments addressing the remaining three aggravating factors and conclude that each of the other three factors constitute substantial and compelling circumstances justifying the upward departure. Accordingly, the district court did not abuse its discretion by sentencing appellant to a double upward departure from the presumptive sentence.

Affirmed.