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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0201**

State of Minnesota,
Respondent,

vs.

Isaiah Kalub Newberry,
Appellant.

**Filed January 14, 2013
Affirmed
Halbrooks, Judge**

Mower County District Court
File No. 50-CR-11-1788

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

Kristen Nelsen, Mower County Attorney, Jeremy Clinefelter, Assistant County Attorney,
Austin, Minnesota (for respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and
Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals
by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HALBROOKS, Judge

In this sentencing appeal following his conviction of first-degree assault, appellant challenges the district court's imposition of an aggravated sentence after he waived the right to a jury's determination of facts to support an aggravated sentence. Appellant argues that (1) the admissions he made on the record do not support an aggravated sentence and (2) the district court's basis for imposing an aggravated sentence is invalid. Because appellant admitted the existence of facts supporting an aggravated sentence and because the district court's basis for imposing an aggravated sentence is valid, we affirm.

FACTS

On July 12, 2011, appellant Isaiah Kalub Newberry gave M.B. \$300 to purchase marijuana for him. After he did not receive the marijuana, Newberry became concerned about getting his money back and made several attempts to locate M.B. On July 14, Newberry received a call from M.B., instructing Newberry to meet him on "the 420 bridge" in Austin. When he got to the bridge, Newberry got out of his truck, concealing an unsheathed eight-inch knife in his left pocket. As he advanced toward M.B., another man, D.T., approached Newberry. A physical altercation ensued and Newberry stabbed D.T. multiple times. D.T. was transported to a hospital and survived the assault after extensive medical treatment.

Newberry was charged with attempted first-degree premeditated murder, attempted second-degree murder, and first-degree assault. Newberry reached a plea agreement with the state that called for Newberry to (1) plead guilty to first-degree

assault, (2) waive a jury trial on the existence of facts to support an aggravated sentence (a *Blakely* waiver), and (3) agree to an aggravated sentence of 135 months. In his plea petition, Newberry stated that his reason for waiving his right to a *Blakely* trial and agreeing to an aggravated sentence was because of the “seriousness of the injuries suffered by [D.T.]” In his rule 15 petition regarding an aggravated sentence, Newberry agreed to “tell the judge about the facts which support an aggravated sentence.”

At his plea hearing, Newberry testified that he stabbed D.T. He explained that when he arrived at the “420 bridge,” a large man, D.T., confronted him. Newberry testified that after D.T. punched him, Newberry ran while removing the knife from his pocket. D.T. caught up to Newberry and hit him again. Then, while D.T. had Newberry pinned to the ground, Newberry stabbed him “several times.” During examination by his attorney, Newberry acknowledged that he injured D.T. and caused him great bodily harm and that D.T. continued to suffer medical repercussions at the time of the hearing. Newberry denied knowing whether D.T. was walking with a cane. In the state’s examination, Newberry further admitted that D.T. came close to dying and that his injuries were more serious than typical great bodily harm:

Q [Y]ou realize that [D.T.] literally came within a few minutes of dying that evening; that’s how serious his wounds were?

A Yeah. Agreed.

Q And that’s why you’re agreeing to the departure and the waiver [of a jury trial] on the aggravating factor, because it was so serious, these injuries, beyond what normally is considered great bodily harm? Do you understand that?

A Yeah.

On appeal, the state mistakenly asserts that Newberry also admitted that a doctor would have testified that D.T. was stabbed five times. Newberry in fact refused to admit that, stating that he knew “nothing about that” testimony. The district court accepted Newberry’s guilty plea, his petition outlining the plea agreement, and his *Blakely* waiver.

On the day of the plea hearing, the state filed a motion in district court for an aggravated sentence. The motion included a copy of D.T.’s medical records from the Mayo Clinic and requested a jury determination on the aggravating factor of particular cruelty on the ground that D.T.’s injuries exceeded great bodily harm.

On the day of Newberry’s sentencing hearing, the state filed two additional documents with the district court. One was the affidavit of Donald H. Jenkins, M.D., a trauma surgeon who treated D.T. at the Mayo Clinic, and the other was an incident report from the Mower County Sheriff’s Office. At Newberry’s sentencing hearing, the district court inquired about the purpose of these documents, asking whether they were to be “used during [that] hearing.” The state replied affirmatively and further recommended that they “supplement the record from the plea hearing.” Newberry’s attorney offered no objection to the state-offered documents and asked that the district court accept the plea agreement and sentence Newberry accordingly. The district court sentenced Newberry to 135 months’ imprisonment, an upward durational departure from the 86 months’ presumptive sentence and the top of the guidelines’ range of 103 months.

At sentencing, the district court explained on the record the grounds for its decision to depart. The district court referenced *State v. Dillon*, 781 N.W.2d 588 (Minn. App. 2010), *review denied* (Minn. July 20, 2010), and *State v. Felix*, 410 N.W.2d 398

(Minn. App. 1987), *review denied* (Minn. Sept. 29, 1987), for the proposition that an aggravated sentence for first-degree assault is permissible when a victim’s injuries meet not just one of the statutory definitions of “great bodily harm”—an element of first-degree assault—but all four definitions. The district court noted its reliance on Dr. Jenkins’s affidavit and the medical records in finding that D.T. suffered each of the four statutory types of great bodily harm. And, at points, the district court cited directly to Dr. Jenkins’s affidavit for its findings. The district court concluded that the victim (1) came “very, very close to death” and lived only due to medical intervention; (2) is seriously disfigured and sustained serious wounds at multiple locations in his body, one of which would never fully heal; (3) suffers permanent loss of muscle function; and (4) suffers from post-traumatic-stress disorder (PTSD). In its departure report, the district court cited the seriousness of the victim’s injuries and the atypical nature of the commission of the crime as its reasons for departing from the guidelines. This appeal follows.

D E C I S I O N

Newberry argues that his sentence constitutes an improper upward departure and must be reduced to a guidelines-prescribed sentence. A district court’s decision to depart from a presumptive sentence is reviewed for an abuse of discretion. *State v. Shattuck*, 704 N.W.2d 131, 140 (Minn. 2005). Negotiated plea agreements that include a sentencing departure are justified under the sentencing guidelines when substantial and compelling circumstances exist. *State v. Misquadace*, 644 N.W.2d 65, 71 (Minn. 2002). But a plea agreement standing alone does not create those circumstances in its own right.

State v. Petersen, 799 N.W.2d 653, 659 (Minn. App. 2011), *review denied* (Minn. Sept. 28, 2011). When reviewing a plea agreement that includes a sentencing departure, we must determine whether the offense of conviction reflects any aggravating or mitigating circumstances that warrant a departure. *Id.* This court examines the record to determine if the reasons given by the district court justify the departure. *Id.* If the reasons given justify the departure or if the reasons are inadequate but there is sufficient evidence in the record supporting a departure, we must uphold the aggravated sentence. *Id.*

I.

We first address Newberry's argument that his admissions on the record are insufficient to support an aggravated sentence. Any fact, other than the fact of a prior conviction, that is necessary to support an aggravated sentence must either be admitted by the defendant or proved to a jury beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 301, 303-04, 124 S. Ct. 2531, 2536, 2537 (2004). A sentencing court may impose an aggravated sentence based on facts admitted by the defendant only if the defendant validly waives the right to a jury trial on the particular factors that might support an aggravated sentence. *State v. Dettman*, 719 N.W.2d 644, 650-51 (Minn. 2006). Such a waiver requires that a defendant state the factual basis for an aggravated sentence. Minn. R. Crim. P. 15.01, subd. 2. An aggravated sentence is unconstitutional if it is based on a judicial finding of aggravating factors. *Shattuck*, 704 N.W.2d at 142.

Newberry sought to waive his right to a jury determination of the facts to support an aggravated sentence. Accordingly, for a valid waiver, Newberry was required to state on the record the existence of facts supporting an aggravated sentence.

A. The affidavit and medical records

Newberry asserts that, as required under *Blakely*, he did not admit the facts upon which the district court based its departure—those facts asserted in Dr. Jenkins’s affidavit and D.T.’s medical records. We agree that Newberry did not testify as to the content or veracity of Dr. Jenkins’s assertions or D.T.’s medical records. And when asked, in his plea colloquy, whether he understood that “the doctor” would testify that D.T. had five stab wounds, Newberry responded that he knew “nothing about that.” Newberry did admit separately that he stabbed D.T. several times.

The state maintains, however, that it was not error for the district court to rely on the state’s exhibits in finding a basis to depart, because Newberry never objected to the admission of those documents and had previously reviewed them with his attorney. But these circumstances do not overcome the requirement that an aggravated sentence, pursuant to a *Blakely* waiver, be based upon facts admitted by the defendant. Contrary to what the state suggests, a defendant’s sworn admissions cannot be supplemented by judicially found facts or state-submitted documents for the purpose of supporting a sentencing departure when a defendant has waived his right to a jury determination of aggravating factors. That would violate *Blakely*.

The state also argues, in the alternative, that Newberry *did* agree “to the existence of [the] facts [in the affidavit and the medical records] pursuant to his plea agreement.” But, again, the record does not so reflect. And the state has failed to provide any citation to the record indicating when Newberry made these alleged admissions. Neither his plea petition nor the proceedings in district court show that Newberry agreed with, let alone

discussed, the assertions made in those documents. Newberry's plea petition merely states that his decision to plead guilty, waive a *Blakely* trial, and agree to 135 months' imprisonment was because of "the possibility [that he] could be convicted of a higher level charge if [he] proceed[ed] to trial as well as the seriousness of the injuries suffered by [D.T]." Furthermore, even though the state asserted that the affidavit was to be used "during [the sentencing] hearing," neither the state, Newberry's attorney, or the sentencing judge ever examined Newberry about that document.

Because Newberry did not admit the existence of the facts alleged in the state-offered documents, those facts cannot serve as the basis for his aggravated sentence.

B. Newberry's admissions

Consequently, we must determine whether the facts that Newberry did admit support an aggravated sentence. Newberry made the following sworn admissions concerning the circumstances of the assault: (1) Newberry stabbed and caused D.T. great bodily harm; (2) D.T. suffered continuing medical issues at the time of the hearing; (3) D.T. came within a few minutes of dying due to the severity of the injuries that Newberry inflicted; (5) D.T.'s injuries were more severe than what is typically considered great bodily harm; and (6) Newberry agreed to the *Blakely* waiver because of the severity of D.T.'s injuries. A district court may impose an aggravated sentence when evidence demonstrates that the defendant committed the crime in a particularly serious way. *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). The district court must determine whether the defendant's conduct was significantly more serious than conduct typically associated with the crime in question. *State v. Cox*, 343 N.W.2d 641, 643 (Minn. 1984).

Facts that are necessary to prove an element of the offense that is being sentenced cannot serve as the basis for a departure. *Edwards*, 774 N.W.2d at 602. First-degree assault makes it a crime to assault another and inflict great bodily harm. Minn. Stat. § 609.221, subd. 1 (2010). Great bodily harm is bodily injury that (1) creates a high probability of death, (2) causes serious permanent disfigurement, (3) causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or (4) causes other serious bodily harm. Minn. Stat. § 609.02, subd. 8 (2010).

Newberry maintains that the facts that he admitted do not show that his conduct was atypical of first-degree assault. But his admission to having stabbed D.T. “several times,” although not dispositive, tends to show that he committed the assault in a particularly serious way. His admission that D.T. came close to dying and continues to suffer medical problems reflects the severity of D.T.’s injuries. And his final admission—that he inflicted injury “beyond what normally is considered great bodily harm”—concedes that his conduct was more serious than what is proscribed under the first-degree-assault statute. In so conceding, Newberry admitted that his attack of D.T. involved an aggravating circumstance. Therefore, even though Newberry did not admit the facts asserted in the state-offered affidavit and medical records, Newberry did admit on the record the existence of facts to support an aggravated sentence.

II.

Having determined that Newberry’s admissions support an aggravated sentence, we turn to Newberry’s argument that the district court’s reason for departing was

invalid.¹ Whether a particular reason for an upward departure is permissible is a question of law, which we review de novo. *State v. Grampre*, 766 N.W.2d 347, 350 (Minn. App. 2009), *review denied* (Minn. Aug. 26, 2009). Departures are warranted only when substantial and compelling circumstances are present. *State v. Jones*, 745 N.W.2d 845, 848 (Minn. 2008). The Minnesota Sentencing Guidelines provide an advisory, nonexclusive list of factors that may be used as reasons to depart. *State v. Rourke*, 773 N.W.2d 913, 920 (Minn. 2009).

Here, the district court departed from a guidelines-prescribed sentence because of the seriousness of the victim's injury. Newberry challenges this reason on multiple grounds. First, he argues that serious victim injury is an invalid reason to depart because the Minnesota Supreme Court has never held that first-degree assault involving all four types of great bodily harm warrants an aggravated sentence. But Newberry offers no explanation as to why such a holding is required.

Second, Newberry argues that serious victim injury is an invalid reason to depart because it is not listed in the sentencing guidelines. But the district court is not limited to only those factors enumerated in the sentencing guidelines when determining whether there is a reason to depart from a presumptive sentence. Minn. Sent. Guidelines. II.D.2 (2010) (providing a "nonexclusive" list of mitigating and aggravating factors).

Third, Newberry seems to argue that an aggravated sentence for first-degree assault is permissible only when an aggressor is found to be "particularly cruel." This

¹ Newberry's related arguments that the district court's reason for departing was inadequate and unsupported by the record are duplicative of the arguments and issues already addressed.

argument is unavailing. Newberry cites *Dillon* and *Felix* to support his theory. In both cases, the sentencing court imposed aggravated sentences based on “particular cruelty” because the victims of those first-degree assaults had been seriously injured. *Dillon*, 781 N.W.2d at 601; *Felix*, 410 N.W.2d at 401. Here, the district court did not cite particular cruelty as its reason for departing. Newberry fails to explain his theory why victim injury may serve as a reason to depart from the sentencing guidelines only when an aggressor is “particularly cruel” in the commission of a crime. The law imposes no such requirement.

Fourth, Newberry challenges the district court’s finding that D.T.’s post-traumatic-stress disorder constitutes serious bodily harm. *See* Minn. Stat. § 609.02, subd. 8(4) (defining the fourth type of great bodily harm as “other serious bodily harm”). We reiterate that Newberry admitted that he inflicted serious bodily injury on D.T.—he admitted to stabbing and nearly killing D.T., and he acknowledged that D.T.’s injuries were serious. Furthermore, we discern nothing requiring that D.T.’s injuries meet each definition of great bodily harm in order to sustain Newberry’s sentence. The law does not require, as Newberry implies, that an aggravated sentence based on serious victim injury be proven by meeting every great-bodily-harm definition. While such proof may be sufficient to establish an aggravating circumstance in first-degree assault, *see Dillon*, 781 N.W.2d at 601, and *Felix*, 410 N.W.2d at 401, it is not necessary.

In sum, serious victim injury is a legally permissible reason for a sentencing court to impose an aggravated sentence. Provided that there are sufficiently proven factual circumstances, nothing prevents a district court from imposing an aggravated sentence for this reason. As discussed, Newberry admitted the existence of aggravating circumstances

in this case. He admitted on the record that his conduct was more severe than what is prohibited by first-degree assault because his victim's injuries went beyond typical great bodily harm. For these reasons, we affirm Newberry's aggravated sentence based on serious victim injury.

Affirmed.