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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1500**

State of Minnesota,
Respondent,

vs.

Henry Hickman,
Appellant.

**Filed April 7, 2014
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 27-CR-11-5857

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota (for
appellant)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Hooten,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

Henry Hickman beat his wife to death with an aluminum baseball bat in the
couple's home. Their five- and eight-year-old sons heard the blows and screams.

Hickman lit his wife's body and the house on fire while she was still alive and sent his sons, who were watching this, to the basement. Hickman pleaded guilty to second-degree intentional murder, and the district court sentenced him to forty years in prison, an upward durational sentence departure. Because Hickman's plea was valid, we affirm the conviction, and because Hickman killed his wife in the presence of his children, we affirm the upward sentencing departure.

FACTS

Henry Hickman resided with his estranged wife in Brooklyn Park despite a restraining order prohibiting the cohabitation. He came home drunk and affected by multiple illegal drugs, and he found cards and flowers that another man had addressed to his wife. He confronted her in the bedroom. She admitted to having another sexual relationship. Hickman grabbed an aluminum baseball bat from the corner of the room. And he began hitting her in the head with the bat.

Hickman's two sons, ages five and eight, had been sleeping in different bedrooms. They heard the loud thumping of the bat on their mother's head and the sound of her screaming. The eight-year-old went into the hallway and saw his father holding the bat.

Hickman picked up the offending greeting cards, lit them on fire, and threw them on the mattress beside his bludgeoned, unconscious wife. She was still alive. The older boy saw him set the fire. Hickman disabled the smoke detectors and sent the boys down to the basement. Then he left the house as his wife burned.

Hickman called two relatives and confessed. He drove to the hospital and told a nurse, "I think I hurt my wife. I killed her." He then revealed that he had left the children

inside the house. Police arrived and found the children, who emerged from the basement, uninjured (physically). They also found Hickman's wife, dead and partially charred, in the bedroom.

A grand jury indicted Hickman for first-degree murder, arson, attempted first-degree murder, terroristic threats, and child endangerment. Hickman's attorney negotiated a plea agreement with the state: If Hickman would plead guilty to second-degree intentional murder and waive his *Blakely* rights to a jury hearing on aggravating-sentencing factors, the state would dismiss all other charges. Hickman agreed and entered his guilty plea. The district court granted the state's motion for an upward durational sentencing departure from the presumptive 306-month sentence, citing particular cruelty and the presence of children. It sentenced Hickman to 480 months in prison.

Hickman appealed his guilty plea and sentence but moved to stay the appeal so he could seek postconviction relief. We granted his stay motion. He petitioned for postconviction relief, but the district court denied his petition. We issued a reinstatement order to review all issues, including those raised in the denied postconviction petition. We now address the stayed appeal.

D E C I S I O N

When an appellant files a direct appeal and then stays that proceeding to seek postconviction relief, we review the postconviction decision under the same standard of review we apply in a direct appeal. *State v. Maurstad*, 733 N.W.2d 141, 146 (Minn. 2007). Hickman asserts that his guilty plea was invalid and that the district court erred by

finding aggravating sentencing factors that warrant an upward durational departure. The arguments fall between meritless and frivolous.

I

Hickman pleaded guilty to intentional murder in the second degree. He is guilty of that offense if he “cause[d] the death of a human being with intent to effect the death of that person . . . without premeditation.” *See* Minn. Stat. § 609.19, subd. 1(1) (2010). Hickman maintains that his guilty plea was invalid. A plea is invalid if it was not accurate, voluntary, and intelligent. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). We review the validity of a guilty plea de novo. *Id.* Hickman challenges each element, and each challenge fails.

Accurate Plea

Hickman contends that his guilty plea was not accurate. We will hold the plea accurate if the record contains sufficient evidence that “would support a jury verdict” that Hickman “is guilty of at least as great a crime as that to which he pled guilty.” *See Lussier v. State*, 821 N.W.2d 581, 588–89 (Minn. 2012) (quotation omitted).

Hickman asserts that his plea was inaccurate because the factual basis was derived mostly from leading questions by his attorney. Although the supreme court has discouraged leading questions to establish the factual support for a guilty plea, pointing to the leading nature of the questioning is not enough to require reversal. *See State v. Ecker*, 524 N.W.2d 712, 717 (Minn. 1994) (discouraging the practice of leading questions but affirming the conviction where “an adequate factual basis was established in the record to support [the] plea of guilty”). Despite the leading nature of the exchange, Hickman

admitted that he swung the baseball bat and lit the fire intending to kill his wife. She died from the bat blows. The district court recognized the leading nature of the examination and remarked that Hickman had “been listening closely and answering truthfully even though [his] answers [we]re short.” It asked Hickman to explain “in [his] own words” what he did with the bat. Hickman responded that he hit his wife in the head with the bat multiple times. A jury obviously could have found Hickman guilty of intentional second-degree murder on these facts. The plea was accurate.

Voluntary Plea

Hickman’s plea was also voluntary. The voluntariness requirement of guilty pleas serves to avoid improperly induced guilty pleas. *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989). The inquiry generally focuses on the defendant’s competency, *see* Henry W. McCarr & Jack S. Nordby, 8 *Minnesota Practice* § 19:2 (4th ed. 2012), and whether he had adequate opportunity to discuss the plea with his attorney, *see State v. Danh*, 516 N.W.2d 539, 544 (Minn. 1994).

Hickman cites medication, extreme pressure, and stress to claim that he did not understand the guilty plea proceedings. He supports this claim only with an affidavit asserting that he did not understand the plea. The support is not compelling, and his plea-hearing testimony belies his claim. Hickman testified that he had been taking medication throughout the proceedings and while in custody, but when he was asked whether the medication had any effect on his understanding of the proceedings, he responded, “I understand clearly.” He also acknowledged that while he had had some clarity problems previously, “over the past several months [he] felt much better.” He indicated that he

could “comprehend clearly” the options that his lawyer discussed with him. The district court had also conducted a two-day competency hearing in January 2012 and found Hickman competent.

Hickman also contends that his plea was involuntary because his attorney never informed him of a heat-of-passion defense or a depraved-mind defense. Hickman’s argument is unavailing. He stated in his plea petition or at the plea hearing that he had sufficient time to discuss the case with his attorney, that he had discussed possible defenses with his attorney, that his attorney had fully advised him, and that he was not claiming various defenses. And in any event, the claimed defenses do not apply. The voluntary manslaughter theory does not fit because that crime entails murder in a heat of passion that “would provoke a person of ordinary self-control.” Minn. Stat. § 609.20(1) (2010). “[A] person of ordinary self-control” is not someone who, like Hickman, was voluntarily intoxicated. *Id.* § 609.20. The third-degree murder theory is groundless because that crime includes an *unintentional* killing, *State v. Wahlberg*, 296 N.W.2d 408, 417–18 (Minn. 1980), and ample evidence establishes that Hickman killed his wife intentionally. Hickman’s plea was voluntary.

Intelligent Plea

We also hold that Hickman’s plea was intelligent. Here we consider whether the defendant fully understood the charges against him, the rights he was waiving, and the consequences of his plea. *Raleigh*, 778 N.W.2d at 96. If the record indicates that the defendant originally made an intelligent decision, we will not reverse the plea unless the defendant submits additional factual support for his claim. *Williams v. State*, 760 N.W.2d

8, 15 (Minn. App. 2009), *review denied* (Minn. Apr. 21, 2009). Hickman contends that he did not understand the *Blakely* waiver or how a voluntary intoxication defense would operate. But our survey of the plea transcript demonstrates that Hickman understood the agreement that the attorneys negotiated for him, waived his constitutional rights to a jury trial and all related constitutional rights, and also specifically waived his *Blakely* rights. Hickman signed a *Blakely* waiver stating that he was fully informed of, understood, and waived the rights. He also acknowledged that he was waiving his right to a voluntary intoxication defense. In documents and testimony, Hickman proved that he understood the charges against him, the potential maximum sentence, and the agreed-upon sentence with an upward departure. Hickman's present argument does not overcome his statements on the record. His plea was intelligent.

We hold that Hickman's plea was valid.

II

Hickman contends that the upward durational departure from the presumptive guidelines sentence is unwarranted. A district court can depart from a presumptive guidelines sentence if it finds that substantial and compelling circumstances warrant the departure. *State v. Misquadace*, 644 N.W.2d 65, 68–69 (Minn. 2002). Substantial and compelling circumstances exist when “the facts of a particular case [are] different from a typical case” of the same type. *Taylor v. State*, 670 N.W.2d 584, 587 (Minn. 2003). We review the district court's decision to depart for an abuse of discretion. *State v. Jackson*, 749 N.W.2d 353, 356–57 (Minn. 2008). A district court abuses that discretion only when

there is insufficient evidence in the record to justify a departure or when the district court bases the departure on improper considerations. *Id.* at 357.

Hickman argues that his sentence unduly exaggerates the criminality of his conduct. The argument is baseless. The district court found that two obvious circumstances warranted the upward departure. We have no difficulty similarly recognizing that Hickman committed his crime with particular cruelty and in the presence of children.

Particular cruelty exists when the defendant gratuitously inflicts “pain and cruelty of a kind not usually associated with the commission of the offense in question.” *Tucker v. State*, 799 N.W.2d 583, 586 (Minn. 2011) (quotation omitted). We have held that inflicting serious harm and then lighting a body on fire constitutes particular cruelty that justifies an upward departure in a murder case. *State v. Gurske*, 424 N.W.2d 300, 305 (Minn. App. 1988) (“The fire and resulting mutilation of the body was an aggravating factor, particularly given the expert testimony that the victim could have been alive when the fire was started.”); *State v. Dircks*, 412 N.W.2d 765, 768 (Minn. App. 1987) (upholding a 2.3 times departure, in part because the defendant lit the victim’s body on fire while she was still alive), *review denied* (Minn. Nov. 24, 1987). Setting afire a living person rendered helpless by repeated bashing in the head with a baseball bat must be near the very top of the particular-cruelty category.

Hickman maintains that, because the children did not actually *see* him beat their mother, he did not commit the crime “in their presence.” Nonsense. A defendant commits a crime “in the presence” of children if the children “saw, heard, or otherwise witnessed

the offense.” *State v. Vance*, 765 N.W.2d 390, 394 (Minn. 2009). Hickman committed the crime “in the presence” of his children in every conceivable way. He committed it in such a fashion that they heard the blows and their mother’s screams, then they saw Hickman set her on fire, then they were ordered to the basement as their mother—still alive and upstairs—died of her head injuries while burning. And Hickman admitted at his plea hearing that both boys “saw a portion of the offense.” There is abundant evidence in the record to indicate that the crime occurred in the presence of children, justifying an upward departure.

Hickman cites as mitigating factors his intoxicated state, his emotional state, the fact he told the nurse that he thought he had killed his wife and that his children were still in the house, and his remorse and acceptance of responsibility. Voluntary intoxication is not a mitigating factor. *See* Minn. Sent. Guidelines II.D.2.a.(3) (2010). None of the other factors is particularly mitigating here, and even combined they certainly do not compel us to reverse the sentence.

Under these facts, it’s impossible to imagine any sentence within the bounds of the Eighth Amendment that could exaggerate the criminality of Hickman’s offense. Certainly a 480-month prison term does not exaggerate Hickman’s criminality. We affirm the sentence.

III

Hickman alleges in a pro se supplemental brief that he is entitled to relief because his counsel was ineffective. He claims that his attorney failed to inform him about his *Blakely* waiver, that waiving *Blakely* would result in a forty-year sentence, and that the

“heat of passion” and “third-degree murder” defenses were available to him. The pro se arguments have no factual or legal support. We add that Hickman fails to demonstrate how these alleged omissions would have changed his mind about pleading guilty, a gap in his ineffective-assistance argument that leaves us unable to find reversible prejudice even if Hickman had pointed to actual ineffective assistance. *See Hill v. Lockhart*, 474 U.S. 52, 59–60, 106 S. Ct. 366, 371 (1985); *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 2064 (1984). Because Hickman has failed to show that his attorney’s actions were outside the range of reasonably effective assistance or that he was prejudiced by those actions, his pro se arguments fail.

Affirmed.