STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0553

Gary Michael Crawford, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 22, 2008
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 00035281

Mary M. McMahon, Special Assistant State Public Defender, McMahon & Associates Criminal Defense, Ltd., 670 Commerce Drive, Suite 110, Woodbury, MN 55125 (for appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Mike Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Considered and decided by Lansing, Presiding Judge; Ross, Judge; and Johnson, Judge.

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

JOHNSON, Judge

In 2000, Gary Michael Crawford was sentenced to life in prison after a Hennepin County jury found that he had kidnapped and raped a woman in the front seat of her car in the parking lot of a Bloomington restaurant. He did not appeal his conviction or sentence.

In 2006, Crawford filed a postconviction petition in which he argued that (1) the district court erroneously admitted evidence of three prior incidents in which he engaged in conduct similar to the charged offense, (2) the evidence was insufficient to support a conviction for kidnapping, and (3) the consecutive sentence for the kidnapping conviction was improper. The district court denied the petition on each ground, and Crawford reiterates his arguments on appeal. We conclude that there was no error at his trial or his sentencing hearing and no error in the district court's denial of his postconviction petition and, therefore, affirm.

FACTS

Crawford's conviction arose from an incident that occurred on January 21, 2000. Crawford met K.H. in the bar area of a Bloomington restaurant. After talking for a while, Crawford kissed K.H. twice. When K.H. prepared to leave, she and Crawford agreed that he would walk her to her car. As K.H. and Crawford left the restaurant, Crawford kissed her again and said, "Let's get a hotel room." K.H. declined the invitation.

When she arrived at her car, K.H. turned around to say good-bye to Crawford, but she did not see him. She believed that he had left. As she opened the car door and sat

down in the driver's seat, Crawford opened the passenger door and entered the car. K.H. testified that she had not invited him into the car and did not want him to be in the car. Soon thereafter, Crawford lifted K.H.'s shirt and attempted to unfasten her belt buckle. She pushed him away, saying, "No, no, I'm going home now. You don't do that." He again tried to unfasten her belt buckle, and she again tried to push him away. Crawford pushed K.H. down onto the passenger seat. K.H. objected again. K.H. then saw a man walking nearby, and she tried to get his attention by honking the horn and attempting to roll down the windows, but Crawford pushed her feet away from the horn and her hands away from the window controls.

Crawford grabbed K.H.'s neck while holding her down. Crawford pulled his other hand back, making a fist near the side of K.H.'s head, and said, "You know I'm strong, right?" K.H. tried to sit up, but she was unable to do so because Crawford held her down. She pleaded with him not to kill her, to which he replied, "Do what I say and I won't."

Crawford then pulled down K.H.'s jeans, hosiery, and underwear. He then attempted, unsuccessfully, to have intercourse with her as she lay across the front seat. Crawford then sat up and told K.H. to get on top of him. She did as he demanded, and Crawford accomplished vaginal penetration with his penis. He then pushed her aside, told her to remove her sweater and bra, and said, "Suck me." She did as he demanded and put his penis in her mouth. This continued for some time while K.H. continued to look for assistance from someone outside the car.

K.H. eventually saw two women walking near the car. She quickly exited the driver's side of the car while completely nude. She yelled to the women that she was

being raped and asked them to help her, but they screamed and ran away. K.H. then ran toward an approaching hotel shuttle bus. The driver of the bus opened the door and pulled K.H. inside. A passenger covered K.H. with an overcoat. The driver made contact with a 911 dispatcher. Some of the passengers of the bus and a bystander retrieved K.H.'s clothing from her car, which allowed her to get dressed. Crawford was arrested later that night at his apartment after the police responded to a domestic assault report made by his fiancée.

At Crawford's trial in June and July of 2000, the state initially sought to introduce evidence of eight prior incidents in which Crawford engaged in sexually assaultive conduct toward other women. Outside the jury's presence, the district court heard testimony from three witnesses regarding three prior incidents. The district court ruled that the evidence of those three incidents was admissible.

After 13 days of testimony, including testimony by Crawford, the jury found Crawford guilty on four counts: (1) criminal sexual conduct in the first degree, with fear of great bodily harm, in violation of Minn. Stat. § 609.342, subds. 1(c), 2 (1998); (2) criminal sexual conduct in the first degree with personal injury, in violation of Minn. Stat. § 609.342, subd. 1(e)(i) (1998); (3) criminal sexual conduct in the third degree, in violation of Minn. Stat. § 609.344, subd. 1(c) (1998); and (4) kidnapping to facilitate the commission of a felony, in violation of Minn. Stat. § 609.25, subd. 1(2) (1998). The jury acquitted Crawford on a charge of kidnapping to commit great bodily harm or terrorize, in violation of Minn. Stat. § 609.25, subd. 1(3) (1998). The district court sentenced Crawford to life in prison pursuant to Minn. Stat. § 609.109, subd. 3 (1998), on count 2.

Counts 1 and 3 merged with count 2 pursuant to Minn. Stat. § 609.035 (1998). On count 4, the district court imposed a consecutive sentence of 48 months after finding aggravating circumstances. Crawford did not pursue a direct appeal.

In 2006, Crawford filed a petition for postconviction relief in the district court, arguing that (1) the admission of the evidence of other, similar incidents was unfairly prejudicial; (2) the evidence was insufficient to support a kidnapping conviction; and (3) the consecutive sentence was improper. The district court denied the petition on all grounds. Crawford appeals.

D E C I S I O N

We will not disturb the decision of a postconviction court absent an abuse of discretion. *Zenanko v. State*, 688 N.W.2d 861, 864 (Minn. 2004). Our review for an abuse of discretion on issues of fact is limited to determining whether the evidence is sufficient to support the postconviction court's findings. *Williams v. State*, 692 N.W.2d 893, 896 (Minn. 2005). We review the district court's application of law de novo. *Id*.

I. *Spreigl* Evidence

Crawford argues that the admission of the three prior similar incidents was error. Rule 404(b) states, in relevant part:

> Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith. It may however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In a criminal prosecution, such evidence shall not be admitted unless the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence.

Minn. R. Evid. 404(b). Evidence of other crimes or bad acts is known in Minnesota as "*Spreigl* evidence." *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998) (citing *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965)). The admission of *Spreigl* evidence lies within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996). To prevail, an appellant must show error and prejudice resulting from the error. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981).

The state initially sought to introduce evidence of eight prior incidents as *Spreigl* evidence. At a day-long hearing, the district court heard testimony from three women who testified about the first, fifth, and seventh incidents, respectively. At the conclusion of that hearing, the state narrowed its *Spreigl* proffer by abandoning the fourth incident. The state offered to prove the second and sixth incidents with two additional witnesses and proposed to prove the third and eighth incidents with certified copies of court documents demonstrating prior convictions.

The district court made a partial ruling concerning the first, fifth, and seventh incidents. The district court found that each of those incidents had a high degree of probative value because each was similar to the encounter with K.H., thus showing intent, motive, modus operandi, and a common scheme of violence indicating the unlikelihood of consent. The district court noted the possibility that additional witnesses might be necessary to prove Crawford's identity with respect to the first, fifth, and seventh incidents. The district court further noted that those additional witnesses

necessarily would reveal evidence of the second incident, evidence of Crawford's use of an alias, and evidence of one or more of Crawford's prior convictions. Crawford then stipulated that he was the person identified by each of the three women, which made it unnecessary for the state to buttress the testimony of the three witnesses. The district court then completed its ruling by limiting the state's *Spreigl* evidence to the first, fifth, and seventh incidents, as told by the three women who were directly involved in those incidents, and by excluding evidence of Crawford's alias or his prior convictions. The three incidents that were admitted into evidence are as follows.

A. Fairfax, California, 1980

B.S., a 34-year-old woman at the time of trial, testified that she met Crawford at a party in Fairfax, California, in 1980, when she was 14 years old and Crawford was approximately 20 years old. They had a friendly conversation, and as the party broke up, Crawford invited B.S. to leave with him and use cocaine. She agreed, and they drove to a wooded area where they sat and talked. B.S. left the car to urinate, and when she returned, Crawford was outside the car with his pants down, exposing an erection. Crawford grabbed B.S., pushed her to the ground, and pulled down her pants. He held her to the ground and attempted to insert his penis into her vagina. B.S. squeezed Crawford's genitals and screamed. Crawford stood up, apologized, and asked her not to tell anyone.

B. San Francisco, California, 1989

In the second incident, V.M., a 34-year-old woman at the time of trial, testified that she went to a nightclub in San Francisco, California, in 1989, when she was 23.

There she met Crawford, who was approximately 28 years old. After the club closed, Crawford walked with V.M. toward her car and asked her whether she wanted to get a motel room. V.M. told him that she merely wanted to find her car. Crawford then made sexual comments to V.M. and pushed her into the bushes off the curb. V.M. landed on her back, and Crawford got on top of her. V.M. screamed. Crawford held up his fist and told her to "shut up." He put his hand on her breast and crotch as she screamed and cried. He pointed his finger at her and told her that he would kill her if she did not shut up. She bit his finger, which allowed her to push him off her, and she ran and called the police.

C. Boca Raton, Florida, 1991

J.J., a 37-year-old woman at the time of trial, met Crawford at a bar in Boca Raton, Florida, in 1991, when she was approximately 28 years old and he was approximately 30 years old. They had a casual conversation. When the bar closed, she went to an outdoor pay phone to call her boyfriend for a ride home. She was unable to reach him. Crawford walked by and offered the use of the telephone at his nearby apartment.

Upon entering the apartment, Crawford told her that there was no telephone and that they were going to "get it on." J.J. attempted to leave, but Crawford blocked her way. As she climbed over the couch, Crawford struck her with the back of his hand, which knocked her to the floor. As she tried to get up, he pushed her down again, raising his fist and telling her he was going to "f--k" her or kill her. J.J. asked him not to hurt her and said that she would do what he wanted. She unbuttoned her pants at his direction, and he started to take off his pants as well. J.J. then saw a man walking by the window

and screamed for help. When the man looked in the window, Crawford walked to the door and told her to get out. J.J. ran from the apartment back to the pay phone, where she called the police.

D. Analysis

The supreme court has adopted a five-part test to determine whether *Spreigl* evidence is admissible:

> (1) the state must give notice of its intent to admit the evidence; (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and convincing evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material to the state's case; and (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

State v. Ness, 707 N.W.2d 676, 685-86 (Minn. 2006). Only the fifth part is at issue in this case.

Crawford argues that the admission of testimony regarding the three prior incidents was unfairly prejudicial because it was cumulative. In *Ture v. State*, 681 N.W.2d 9 (Minn. 2004), the supreme court expressed concern with the state's presentation of 24 witnesses to testify about a previous murder but, nonetheless, affirmed the conviction because Ture had failed to object. *Id*. at 16. The mere fact that the state's *Spreigl* evidence consisted of three incidents does not give rise to undue prejudice. The district court permitted the state to present only one witness with respect to each incident. *Cf. Ture*, 681 N.W.2d at 16 (affirming conviction despite state's presentation of 24 witnesses to testify about one previous murder). Furthermore, the supreme court previously has approved *Spreigl* evidence consisting of the same or a greater number of

prior incidents. *State v. Titworth*, 255 N.W.2d 241, 246 (Minn. 1977) (upholding the admission of evidence of four prior robberies); *see also State v. Wermerskirchen*, 497 N.W.2d 235, 241-43 (Minn. 1993) (upholding admission of three *Spreigl* incidents in child-sexual-abuse case). Thus, this is not a case in which a large number of *Spreigl* incidents were unduly cumulative.

The potential for prejudice must be measured against the probative value of the evidence. *Ness*, 707 N.W.2d at 686. *Spreigl* evidence has probative value if it has a sufficiently close relationship to the charged offense. *State v. Kennedy*, 585 N.W.2d 385, 390 (Minn. 1998). Such a relationship exists in this case. Crawford met all four women in social settings, where he engaged in friendly conversations with them. He contrived a means of being alone with each woman where his conduct would not be visible to others. After he was alone with each woman, he became threatening, engaged in sexual conduct, and used force. Crawford raised his fist with three of the women, including K.H. Because the prior incidents are very similar to the charged offense, the probative value of each of the three *Spreigl* incidents was high.

Furthermore, the district court took steps to minimize the prejudicial effect of the *Spreigl* evidence. The district court prohibited the state from using any convictions that arose from the *Spreigl* incidents as well as any other prior convictions. The district court also prevented the state from introducing evidence of Crawford's alias. And before any *Spreigl* testimony was heard by the jury, the district court gave a standard limiting instruction. *See* 10 *Minnesota Practice*, CRIMJIG 2.01. These precautions minimized the prejudicial nature of the evidence.

Moreover, the *Spreigl* evidence in this case was not too stale. There is no bright-line rule for determining whether a bad act is no longer relevant due to its age. *See State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005). Rather, "a district court, when confronted with an arguably stale *Spreigl* incident, should employ a balancing process as to time, place, and modus operandi: the more distant the *Spreigl* act is in terms of time, the greater the similarities as to place and modus operandi must be to retain relevance." *Id*. at 202. In addition, relevance concerns about older incidents are reduced if

> (1) the defendant spent a significant part of that time incarcerated and was thus incapacitated from committing crimes; (2) there are intervening acts that show a repeating or ongoing pattern of very similar conduct; or (3) the defendant was actually convicted of a crime based on the prior bad act, thus reducing the prejudice of having to defend against claims of acts that occurred years before.

Ness, 707 N.W.2d at 689 (holding that district court erred by admitting *Spreigl* evidence of 35-year-old incident that was not markedly similar to the charged offense). Although one of the three prior incidents occurred in 1980, approximately 20 years before the charged offense, the other two incidents were not as old and served as intervening acts to show a pattern of very similar misconduct. Moreover, Crawford was convicted of crimes with respect to the 1989 and 1991 incidents. Thus, even the 1980 incident remains relevant. *Ness*, 707 N.W.2d at 686.

In sum, the district court did not err in admitting the state's *Spreigl* evidence or in rejecting Crawford's postconviction arguments.

II. Kidnapping Conviction

Crawford next argues that the evidence was insufficient to support a conviction for kidnapping to facilitate the commission of a crime, in violation of Minn. Stat. § 609.25, subd. 1(2) (1998). In considering a claim of insufficient evidence, this court determines whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach their verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989).

The relevant statute states, "Whoever, for any of the following purposes, confines or removes from one place to another, any person without the person's consent . . . is guilty of kidnapping: . . . [t]o facilitate commission of any felony or flight thereafter . . . ." Minn. Stat. § 609.25, subd. 1(2) (1998). Crawford argues that the evidence adduced at trial was insufficient because he did not confine or remove K.H. to the degree necessary to satisfy the statute's requirements.

Crawford relies on *State v. Welch*, 675 N.W.2d 615 (Minn. 2004), which is based on *State v. Smith*, 669 N.W.2d 19 (Minn. 2003), *overruled on other grounds by State v. Leake*, 699 N.W.2d 312 (Minn. 2005). In *Smith*, the supreme court held that the "confinement or removal must be criminally significant in the sense of being more than merely incidental to the underlying crime, in order to justify a separate criminal sentence." 669 N.W.2d at 32. The state argues that Crawford may not rely on the *Welch* and *Smith* cases because they were decided three and four years after Crawford's conviction, respectively. This contention raises the issue whether *Welch* and *Smith* should apply retroactively. The determination whether a decision applies retroactively is

a legal question that we review de novo. *State v. Baird*, 654 N.W.2d 105, 110 (Minn. 2002).

A. Retroactivity

The supreme court's decisions generally are given retroactive effect. *Id.*; *Baker v. State*, 590 N.W.2d 636, 640 (Minn. 1999). But if a case announces a "new rule" of criminal procedure, rather than merely applying or clarifying a pre-existing rule, that case will not be given retroactive effect. *Hutchinson v. State*, 679 N.W.2d 160, 161-62 (Minn. 2004).

In *Smith*, the supreme court held that "where the confinement or removal of the victim is completely incidental to the perpetration of a separate felony, it does not constitute kidnapping." 669 N.W.2d at 32. The *Smith* opinion was based on *State v. Morris*, 281 Minn. 119, 160 N.W.2d 715 (1968), where the supreme court described the scope of confinement or removal necessary to support a kidnapping conviction. In *Morris*, the victim was confined for approximately five minutes and removed a distance of only 100 or 150 feet. *Id*. at 121, 160 N.W.2d at 717. The court in *Smith* explained the *Morris* court's reservations with the kidnapping statute:

> We acknowledged [in *Morris*] that the more severe punishment available for kidnapping might not be warranted by the entire behavioral incident but "we [could not] say as a matter of law that the legislature did not intend the limited confinement and restraint which occurred in [*Morris*] . . . to constitute the crime of kidnapping." *Id*. at 123-24, 160 N.W.2d at 718. We expressed our concern in *Morris* that the statutory penalty for kidnapping might be unduly harsh for some behavioral incidents and we reminded "the prosecutor, the court, and the correctional authorities" of their duty "to modify the charge, the sentence, or the period of confinement

> so that it will be commensurate with the gravity of the crime and the harm or potential harm which is inflicted by the defendant." *Id*. at 124, 160 N.W.2d at 718. Importantly, we also noted that because the statute in force at the time permitted punishment only for the most serious crime resulting from one behavioral incident, the defendant was only sentenced for the kidnapping and not for the indecent assault.

669 N.W.2d at 31.

Two decades after *Morris*, the supreme court held that moving the victim from the living room into an adjacent bedroom was sufficient evidence of "confinement" or "removal" for a distinct kidnapping offense. *State v. Crocker*, 409 N.W.2d 840, 842, 845 (Minn. 1987). Similarly, five years later, in *Dunn v. State*, 486 N.W.2d 428 (Minn. 1992), the court upheld a conviction for kidnapping when the appellant had held down the victim during commission of an aggravated robbery, because it had previously "upheld convictions based on only small degrees of confinement or movement." *Id*. at 432.

Ten years later, in *Smith*, the supreme court referred to *Morris*, *Crocker*, and *Dunn* and summarized the reasoning that underlies that line of cases:

> We believe that confinement or removal must be criminally significant in the sense of being more than merely incidental to the underlying crime, in order to justify a separate criminal sentence. . . . We conclude that where the confinement or removal of the victim is completely incidental to the perpetration of a separate felony, it does not constitute kidnapping.

669 N.W.2d at 32. The following year, in *Welch*, the supreme court applied the standard set out in *Smith* to reverse Welch's kidnapping conviction. 675 N.W.2d at 620-21. The

supreme court held that "[n]o removal—let alone nonincidental removal—is even alleged. Further, the confinement that forms the basis of the kidnapping is the very force and coercion that supports the attempted second-degree criminal sexual conduct conviction." *Id*. at 620.

The *Smith* opinion was based on the principles articulated in three prior opinions decided over a period of nearly 35 years. The supreme court's holdings in *Morris*, *Crocker*, and *Dunn* presaged the holding in *Smith*. Thus, *Smith* did not announce a new rule but, rather, was a clarification of the supreme court's previous case law. Accordingly, Crawford may invoke *Smith* and *Welch* in his postconviction action.

B. Application of *Smith* and *Welch*

To determine whether the evidence was sufficient to support the conviction for kidnapping, we must determine whether Crawford's confinement of K.H. in her car was "criminally significant in the sense of being more than merely incidental to the underlying crime." *Smith*, 669 N.W.2d at 32. In *Smith*, the appellant blocked a doorway, thereby confining the victim only momentarily, which the court held was "completely incidental" to the murder of the victim and, thus, insufficient to support a kidnapping conviction. *Id.* In *Welch*, the appellant threw the victim to the ground, straddled her, slammed her head to the ground, grabbed her hair, and started to choke her. 675 N.W.2d at 616-17. The supreme court reversed the kidnapping conviction because the evidence proving the kidnapping was merely the force and coercion necessary to accomplish the offense of attempted second-degree criminal conduct. *Id*. at 620. The crime in *Welch*

occurred outdoors, in an open place within a city park, where there was no shelter or any other structure to which the victim was confined. *Id*. at 616-17.

In contrast, Crawford confined K.H. inside her car. Because of that confinement, the incident occurring inside the car was not visible to other persons in the parking lot. Crawford physically prevented K.H. from leaving the car by pushing her feet away from the horn when she tried to alert third parties and pushing her hands away from the car doors when she tried to open them. Crawford's conduct is similar to that of the defendant in *State v. Budreau*, 641 N.W.2d 919 (Minn. 2002), who lured the victim into a car and confined her while she was driven to a remote location where she was murdered. *Id.* at 930. The supreme court sustained a conviction of murder while committing a kidnapping. *Id.*

In addition, the length of time that Crawford confined K.H. inside the car supports the conviction. K.H. and Crawford left the bar at approximately 10:00 p.m. The driver of the shuttle bus testified that K.H. approached the bus at approximately 10:40 p.m. Crawford testified that he and K.H. were in the car for only five minutes, and his fiancée testified that he arrived home sometime between 10:15 and 10:30 p.m., but because of the verdict, this court must assume that the jury believed the state's witnesses. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The evidence shows that K.H. was confined to her car as long as 40 minutes, which is much longer than the brief incidents in *Smith* and *Welch*.

Thus, the evidence was sufficient to support the jury's verdict of guilty on the kidnapping charge, and the district court properly rejected Crawford's collateral attack on his conviction.

III. Consecutive Sentence for Kidnapping

Finally, Crawford argues that the postconviction court erred in holding that the consecutive sentence for kidnapping was proper. It appears that there are two parts to Crawford's argument: first, that the consecutive sentence unduly exaggerates the criminality of the offense and, second, that no aggravating factors were present. This court reviews consecutive sentencing under an abuse-of-discretion standard. *State v. Richardson*, 670 N.W.2d 267, 284 (Minn. 2003).

A. Undue Exaggeration

A court may impose a sentence for kidnapping that is consecutive to sentences for other crimes committed during the kidnapping so long as the kidnapping was not completely incidental to the other offense. *Smith*, 669 N.W.2d at 32; *State v. Swanson*, 498 N.W.2d 435, 440 (Minn. 1993). The standard applicable to the propriety of the sentence is the same as the standard applicable to the propriety of the conviction. *State v. Swanson*, 707 N.W.2d 645, 659-60 (Minn. 2006). The question is whether the kidnapping was "more than merely incidental to the underlying crime." *Smith*, 669 N.W.2d at 32. We have concluded that Crawford's kidnapping conviction is valid under *Smith* and *Welch*. *See supra* part II.B. Thus, the imposition of a consecutive sentence also comports with *Smith* and *Welch*. *See Swanson*, 707 N.W.2d at 659-60 (affirming consecutive sentence because evidence satisfied *Smith* and *Welch*).

B. Aggravating Factors

The district court's imposition of a consecutive sentence for the kidnapping conviction, which was imposed prior to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), is appropriate if aggravating circumstances existed and the district judge identified them at the time of sentencing. *State v. Butterfield*, 555 N.W.2d 526, 532 (Minn. App. 1996), *review denied* (Minn. Dec. 17, 1996); Minn. Sent. Guidelines II.F & cmt. II.F.04 (1999).

At the sentencing hearing, the district court identified three aggravating circumstances: (1) Crawford's particular cruelty in holding K.H. down by the neck, preventing her escape, and forcing her to flee in sub-zero weather; (2) the injuries and "severe mental anguish" suffered by K.H.; and (3) the multiple forms of penetration used by Crawford. In postconviction proceedings, the district court noted that the first and third items were improper bases for a departure from the presumed concurrent sentence because they were elements of the offenses of which Crawford was convicted. *See Taylor v. State*, 670 N.W.2d 584, 589 (Minn. 2003) (holding that age was improper basis for departure because age was an element of the offense).

The second aggravating factor, however, is a proper basis for departure. A sexual assault victim's emotional and psychological trauma may support a sentencing departure. *State v. Allen*, 482 N.W.2d 228, 233 (Minn. App. 1992), *review denied* (Minn. Apr. 13, 1992). K.H. testified that, after the assault, she had "significant weight loss," was unable to eat well, and had trouble sleeping. She stated that "the feeling of being in imminent danger of being killed has stayed with me almost every second of every day for several

months." She said that "there's been unending tears." She was unable to maintain employment during the six months between the assault and the trial. This testimony is comparable to the victim in *Allen*, who testified that, after her assault, she "had been depressed, her relationships had worsened, she had been having trouble sleeping," "had lost trust in other people," "had been receiving professional psychological therapy and had been taking antidepressant drugs." 482 N.W.2d at 233. Thus, the evidence of K.H.'s emotional and psychological trauma is sufficient to support the district court's imposition of the consecutive sentence.

Affirmed.