STATE OF MINNESOTA
IN COURT OF APPEALS
A11-733

State of Minnesota,
Respondent,

vs.

Emmanuel Garmodhem Myles,
Appellant.

Filed April 23, 2012
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CR-10-49745

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

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

David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Bjorkman, Judge; and Randall, Judge.*

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

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

BJORKMAN, Judge

Appellant challenges his aggravated sentence for aiding and abetting second-degree intentional murder, arguing that there was insufficient evidence to support application of one departure ground and that the other ground is inapplicable as a matter of law. We affirm.

FACTS

Appellant Emmanuel Myles was charged with aiding and abetting second-degree intentional murder and aiding and abetting second-degree unintentional murder based on his role in the death of J.G. After the district court ordered Myles, who was 17 years old at the time of the offense, to stand trial as an adult, Myles waived his right to a jury trial and submitted the charges to the district court on the following stipulated facts.

On July 10, 2010, Myles encountered 17-year-old J.G. while Myles was waiting to catch a bus to meet his friends L.B., age 17, and N.I., age 15. Myles persuaded J.G. to join him, and the four met at L.B.'s house. Myles believed that J.G. had participated in murdering his cousin and wanted to "get even." He told L.B. and N.I. about the murder, and the three decided to "jump" J.G. into the Bloods gang.[1]

The four left L.B.'s house and took a bus toward N.I.'s house. They exited the bus near Theodore Wirth Park, and L.B. told N.I. to get a shovel from his house. L.B. also asked N.I. if he knew of a good place for the "jump," and N.I. pointed toward a wooded

[1] The record suggests that J.G. agreed to be "jumped" into the gang, an initiation ritual that involves submitting to a brief assault, but the other three intended this as a ruse to get J.G. into a secluded area so that Myles could "get even."

area in the park near a pond. Myles, L.B., and J.G. then walked toward the park, while N.I. went to get a shovel. L.B. told N.I. to start digging a hole, which he did. Meanwhile, Myles and L.B. began hitting and kicking J.G. J.G. initially tried to fight back, then tried to escape. L.B. grabbed J.G. and held him on the ground. Myles approached, shouted, "You killed my cousin, you're gonna die, you got to pay," and hit J.G. with his fists. L.B. told N.I. to join in, and N.I. kicked J.G. and stomped on his head. At this point, N.I. believed that J.G. was dazed but still breathing. L.B. then dragged J.G. farther into the park, and Myles, L.B., and N.I. continued kicking him in the head and stomach for "a couple minutes" until he was unconscious. They covered J.G. with branches, logs, and other debris, and went to N.I.'s house to clean themselves up.

Three or four hours later, the three returned to the park to check on J.G. They uncovered him, and N.I. heard J.G. gurgling and wheezing. L.B. told Myles to "finish him off" and gave Myles the shovel. Myles poked at J.G.'s head and body. L.B. then grabbed the shovel and struck J.G. in the head at least twice. After that, N.I. could no longer hear J.G. breathing.

Believing J.G. to be dead, Myles, L.B., and N.I. returned to N.I.'s house and discussed what to do with the body. Myles called a friend for a ride. When the friend arrived, Myles and L.B. described what they had done to J.G., admitted that they believed they had killed him, and said that they needed to go to a store to get something to assist them in getting rid of the body. The friend drove everyone to Home Depot, where they purchased shovels, then drove the three to N.I.'s house.

Myles, L.B., and N.I. returned to the park with the shovels and started digging a hole. After making little progress in 30 minutes, they devised another plan to dispose of the body. They retrieved extension cords, a bungee cord, and a car battery from N.I.'s house, used the cords to attach the battery to J.G.'s legs, and submerged his body in the nearby pond. His body was discovered approximately one week later.

The district court found Myles guilty on both counts. The state sought an upward durational departure, arguing that (1) Myles and his accomplices treated J.G. with particular cruelty, and (2) Myles committed the crime as part of a group of three or more persons, all of whom actively participated in the crime. Myles waived his right to a sentencing jury, and the district court found facts establishing both departure grounds. The district court sentenced Myles to 380 months' imprisonment for his conviction of second-degree intentional murder, an upward departure from the presumptive range of 261-367 months. This appeal follows.

D E C I S I O N

A district court must impose the presumptive guidelines sentence unless there are "identifiable, substantial, and compelling circumstances" to warrant an upward departure from the presumptive sentence. Minn. Sent. Guidelines II.D. (2008). "'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).

We review a district court's decision to depart from the presumptive sentence for an abuse of discretion. *State v. Stanke*, 764 N.W.2d 824, 827 (Minn. 2009). It is an

abuse of discretion for the district court to base an upward departure on an improper factor or one not factually supported by the record. *State v. Weaver*, 796 N.W.2d 561, 567 (Minn. App. 2011), *review denied* (Minn. July 19, 2011). We review de novo whether a particular basis for departure is proper, *id.*, but we will not disturb the district court's factual findings unless they are clearly erroneous, *see Asfaha v. State*, 665 N.W.2d 523, 526 (Minn. 2003). If the facts found support at least one valid departure ground, we will uphold the departure. *State v. Mohamed*, 779 N.W.2d 93, 97 (Minn. App. 2010), *review denied* (Minn. May 18, 2010); *see also Stanke*, 764 N.W.2d at 828.

I. The district court did not abuse its discretion in departing from the presumptive sentence based on the particular-cruelty ground.

When a defendant treats a victim with particular cruelty, that fact can constitute a basis for an upward durational departure. Minn. Sent. Guidelines II.D.2.b.(2). Particular cruelty "involves the gratuitous infliction of pain and cruelty of a kind not usually associated with the commission of the offense in question." *State v. Rourke*, 773 N.W.2d 913, 922 (Minn. 2009) (quotations omitted).

The district court concluded that Myles treated J.G. with particular cruelty based on several facts: (1) Myles and his accomplices used multiple forms of violence against J.G. and continued to assault J.G. while he was helpless; (2) Myles and his accomplices took affirmative steps to conceal J.G.'s dead and/or dying body; and (3) Myles and his accomplices did not call for medical aid at any time during or after the incident. We address each of these factual bases in turn.

Multiple forms of violence against a helpless victim

This court has recognized that both the use of prolonged and extreme violence and continuing to attack a helpless victim can indicate particular cruelty and warrant an aggravated sentence. *See Weaver*, 796 N.W.2d at 571 (stating that "a defendant's multiple attacks on a single victim with different deadly instruments is a valid departure reason"); *State v. Valentine*, 630 N.W.2d 429, 437 (Minn. App. 2001) (observing that continuing to inflict more harm on a victim who is "down and helpless" would be significantly more egregious than a typical attempted first-degree murder), *review denied* (Minn. Aug. 22, 2001); *State v. Anderson*, 370 N.W.2d 703, 707 (Minn. App. 1985) (holding that prolonged beating and stamping on the victim's head and body constituted an act of particular cruelty), *review denied* (Minn. Sept. 19, 1985).

Myles does not challenge our jurisprudence, but argues that consideration of these factors is inappropriate here because J.G.'s cause and time of death could not be identified precisely, making it possible that some of the acts occurred after J.G.'s death. We are not persuaded.

First, there is record evidence that Myles and his accomplices kicked, punched, and struck J.G. with a shovel over a prolonged period of time while J.G. was alive. Although there is medical evidence that the signs of breathing J.G. exhibited could have been post-mortem, caused by residual breath leaving the lungs when the body was moved, the record also supports a finding that J.G. was still, if barely, alive during the attack. N.I. indicated that he heard J.G. gurgling and wheezing when the group returned after several hours to check on J.G. The medical examiner testified that the sounds N.I.

described "usually go[] along with dying," suggesting that J.G. was in the process of dying at that time. Accordingly, the district court's implicit finding that J.G. was alive and helpless at the time of the final assault with the shovel is not clearly erroneous.[2]

Second, Myles's argument that there must be proof beyond a reasonable doubt that J.G. was alive throughout the prolonged attack overstates the state's evidentiary burden. While there must be proof beyond a reasonable doubt of any fact that is necessary to support an aggravated sentence, *Rourke*, 773 N.W.2d at 919, it is the fact that J.G. *may* have been alive and that Myles and his accomplices believed he was alive throughout the entire duration of the assault that supports a determination that Myles acted with particular cruelty. *See State v. Gurske*, 424 N.W.2d 300, 305 (Minn. App. 1988) (noting that burning a victim's body while the victim, whom the defendant believed was dead, "could have been alive" was particularly cruel). On this record, the district court did not abuse its discretion in applying the particular-cruelty departure ground based on the multiple forms of violence Myles and his accomplices used against a helpless J.G.

Concealment

Myles argues that his participation in concealing J.G.'s body does not make his conduct more severe than the typical second-degree intentional murder because "it is not extraordinary that a person who commits an intentional killing would do everything he or she could to avoid being caught." We disagree. A defendant's concealment of the

[2] The district court credited N.I.'s testimony and found that J.G. "was beaten by all three with their fists and feet, the unconscious body was left hidden in the woods, the three returned a few hours later to check on [J.G.]'s body, heard him wheezing and gurgling, and ultimately decided to 'finish him off' with the shovel."

victim's body may indicate particular cruelty, especially when combined with other cruel conduct. *See State v. Shiue*, 326 N.W.2d 648, 654-55 (Minn. 1982) (considering concealment "as an aggravating factor" when defendant covered the victim's body with branches, twigs, leafy matter, and brush, making it difficult to find the body); *State v. Murr*, 443 N.W.2d 833, 837 (Minn. App. 1989) (concluding that transportation of victim's body in car trunk, combined with "the manner of concealment of the body that [led] to its mutilation by coyotes," indicated particular cruelty), *review denied* (Minn. Sept. 27, 1989). One of the reasons concealment is considered particularly cruel is the impact it can have on family members both in terms of not knowing the victim's whereabouts and observing the victim's body in a deteriorated state. *See Shiue*, 326 N.W.2d at 655; *Murr*, 443 N.W.2d at 837.

The evidence amply establishes that Myles and his accomplices went to significant lengths to conceal J.G.'s body, eventually weighting it and submerging it in a pond. And it is undisputed that this concealment contributed to the concern of J.G.'s family from not knowing his whereabouts and from observing his body "in a horrible condition." On this record, the district court did not abuse its discretion in applying the particular-cruelty departure ground based on concealment of J.G.'s body.

Failure to render aid

Myles argues that the district court erred by relying on his failure to render medical aid to support its particular-cruelty determination. We agree. In *State v. Robideau*, we held that failure to render aid to the victim of second-degree intentional murder cannot constitute an aggravating factor because "[f]ailing to facilitate lifesaving

aid is a necessary part of engaging in intentionally life-ending conduct." 783 N.W.2d 390, 403 (Minn. App. 2010), *rev'd on other grounds*, 796 N.W.2d 147 (Minn. 2011). But the district court's error is harmless in light of our conclusion that Myles's concealment of J.G.'s body and use of multiple forms of violence against J.G. demonstrate particular cruelty.

II. The district court did not abuse its discretion in departing from the presumptive sentence based on the involvement of three or more active participants.

When a defendant commits a crime "as part of a group of three or more persons who all actively participated in the crime," that fact may support an upward sentencing departure. Minn. Sent. Guidelines II.D.2.b.(10). Myles argues that the imposition of an aggravated sentence based on this ground is improper because the participation of at least one other person is an element of the aiding and abetting offense of which he was convicted. *See Edwards*, 774 N.W.2d at 602 (precluding enhancement of a defendant's sentence based on a fact that is an element of the charged crime). We disagree. An aiding and abetting conviction requires only the intentional assistance of one other person in the commission of the crime, whereas the aggravating factor requires the active participation of at least two other people. *Compare* Minn. Stat. § 609.05, subd. 1 (2008), *with* Minn. Sent. Guidelines II.D.2.b.(10). Consistent with that distinction, the supreme court has applied this aggravating factor to those convicted as accomplices. *E.g.*, *State v. Losh*, 721 N.W.2d 886, 896 (Minn. 2006).

Myles further contends that "[t]he addition of one other person did not transform [his] conduct into something more serious than conduct typically exhibited in an aiding-

and-abetting-intentional murder case." The stipulated record supports the district court's finding to the contrary. The involvement of three actors in the attack on J.G. facilitated the use of the shovel, enabled Myles and his accomplices to more easily overcome J.G.'s attempts at self-defense and escape, and facilitated their concealment of the offense. We conclude that the district court did not abuse its discretion by departing upward based on the fact that Myles was one of three actors who all actively participated in the offense.

Because the record amply supports the district court's determination that Myles treated J.G. with particular cruelty and committed the offense as one of three active participants, we conclude that the district court did not abuse its discretion by imposing a modest upward departure.

Affirmed.