

NOT DESIGNATED FOR PUBLICATION

No. 125,279

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JIMMY DEAN LANDIS,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; RACHEL L. PICKERING, judge. Opinion filed September 22, 2023. Affirmed.

Hope E. Faflick Reynolds, of Kansas Appellate Defender Office, for appellant.

Jodi Litfin, deputy district attorney, *Michael F. Kagay*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., GREEN and HILL, JJ.

PER CURIAM: Jimmy Dean Landis appeals his upward durational departure sentence. In June 2021, Landis caused an injury car crash while driving intoxicated and proceeded to physically resist a blood test. Shortly before his trial was set to begin, Landis pleaded guilty to nine counts of various felonies and misdemeanors.

Both parties filed dueling departure motions, but the district court agreed with the State that (1) the victims were particularly vulnerable due to their age, (2) Landis violated a fiduciary duty owed to the victims, (3) Landis created a great risk of death to multiple

people, (4) Landis interfered with law enforcement to avoid prosecution, and (5) Landis committed aggravated battery by driving under the influence (DUI) of alcohol in an especially heinous manner. It thus imposed an upward durational departure sentence of 318 months' imprisonment. We affirm Landis' sentence because the district court did not abuse its discretion in finding a substantial and compelling basis to depart and substantial competent evidence supported the five aggravating factors.

FACTS

On Father's Day 2021, Landis drove intoxicated with his two children in the car. Landis ultimately caused a crash, and both of his children were injured. Both children were in the backseat wearing seatbelts but were not in the correct booster seats. Although his son had only minor injuries, his daughter was permanently paralyzed. His daughter also suffered from other medical complications. After the car crash, Landis threatened and attacked law enforcement and physically resisted a blood test.

That same month, the State charged Landis with (1) two counts of aggravated battery by DUI, (2) two counts of aggravated child endangerment, (3) one count of interference with law enforcement, (4) one count of attempted battery against a law enforcement officer, (5) one count of DUI (fourth or subsequent), (6) one count of driving while suspended (third or subsequent), and (7) one count of a child passenger restraint violation.

In November 2021, the State moved for an upward durational departure sentence, citing five statutory aggravating factors. First, the State argued the victims were particularly vulnerable due to age, infirmity, or reduced physical or mental capacity. Next, the State argued the offense involved a fiduciary relationship between Landis and the victims. Third, the State argued that Landis knowingly or purposely created a great risk of death to more than one person. Fourth, the State contended that Landis interfered

with law enforcement to avoid or prevent a lawful arrest or prosecution. Lastly, the State argued that Landis acted in an especially heinous manner.

In January 2022, Landis pleaded guilty to all nine charges against him. As part of this plea agreement, Landis waived his right to a jury finding on upward departure factors.

In April 2022, Landis moved for a downward departure sentence, requesting either a dispositional or durational departure. At the very least, Landis requested his sentences be run concurrently. In his motion, he noted that (1) he accepted responsibility for his actions, (2) he felt deep remorse and would work to remain sober, (3) he was in the midst of improving himself, (4) felony DUI treatment is typically done as part of probation, (5) he had strong support from family and friends, and (6) he would be better able to support his family with a departure sentence.

The State responded to Landis' motion shortly afterwards. According to the State, apart from the car crash, Landis was "belligerent[t]" towards medical personnel and law enforcement. He was also apparently lewd towards female medical staff and called law enforcement officers profane names. Likewise, he threatened violence against them. Landis even tried to kick one of the officers when they attempted to draw his blood. After four officers held him in place to draw his blood, "he told them he would pray for their daughters to get raped." The State further noted that Landis had six previous DUI convictions. The State then asserted that Landis had "a long history of committing drug crimes, disorderly conduct, theft, and repeated traffic crimes driving while suspended."

The State contended that while aggravating factors existed, mitigating factors did not. It then reiterated the five aggravating factors from its departure motion. Ultimately, the State requested a controlling sentence of 332 months' imprisonment with \$2,660 in fines.

In April 2022, the district court sentenced Landis to an upward durational departure sentence of 318 months' imprisonment. It agreed with the State and found that (1) the victims were particularly vulnerable due to their age, (2) Landis violated a fiduciary duty owed to the victims, (3) Landis created a great risk of death to multiple people, (4) Landis interfered with law enforcement to avoid prosecution, and (5) Landis committed aggravated battery by DUI in an especially heinous manner.

Landis timely appeals.

ANALYSIS

Did the district court abuse its discretion in imposing an upward durational departure sentence?

Landis argues on appeal that the district court erred in imposing an upward durational departure sentence and the aggravating factors were not supported by substantial competent evidence. The State disagrees and argues the district court did not err.

Standard of Review

Interpretation of a sentencing statute presents a question of law, and the standard of review is unlimited. *State v. Moore*, 309 Kan. 825, 828, 441 P.3d 22 (2019).

Either party may appeal a departure sentence. K.S.A. 2022 Supp. 21-6820(a). Appellate review is generally limited to determining whether the sentencing court's findings of fact and reasons justifying a departure are supported by the evidence and constitute substantial and compelling reasons to depart. K.S.A. 2022 Supp. 21-6820(d); *State v. Montgomery*, 314 Kan. 33, 36, 494 P.3d 147 (2021).

Our Supreme Court recently created a three-step framework when analyzing departure sentences. First, when a sentencing court grants a departure based on a nonstatutory factor, appellate courts determine whether that factor can be a factor as a matter of law under K.S.A. 2022 Supp. 21-6815(c). Because this first step involves a legal question, review is unlimited. Next, appellate courts decide whether substantial competent evidence supports the factor's existence. *State v. Morley*, 312 Kan. 702, 711, 479 P.3d 928 (2021). Substantial competent evidence "possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved." *In re D.D.M.*, 291 Kan. 883, 893, 249 P.3d 5 (2011). Finally, appellate courts determine whether the sentencing court acted reasonably when it concluded there was a substantial and compelling reason to depart based on that factor by itself or collectively with other statutory or nonstatutory factors cited by the sentencing court. *Morley*, 312 Kan. at 711.

In other words, appellate courts review departure sentences for an abuse of discretion. "A district court abuses its discretion if its decision is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. [Citation omitted.]" *State v. Moore*, 302 Kan. 685, 692, 357 P.3d 275 (2015).

Although the *Morley* court analyzed a downward departure sentence, this three-step framework has also been used when considering an upward departure sentence. See *State v. Rios*, No. 124,604, 2023 WL 4038597, at *2 (Kan. App. 2023) (unpublished opinion) (considering nonstatutory aggravating factors under *Morley* framework), *petition for rev. filed July 17, 2023*; *State v. Moore*, No. 123,984, 2022 WL 1510173, at *3 (Kan. App. 2022) (unpublished opinion) (same), *rev. denied* 317 Kan. __ (March 30, 2023). This panel should note, however, that because the analysis at hand involves statutory factors, the first step in *Morley's* three-step framework becomes largely irrelevant.

Analysis

Under K.S.A. 2022 Supp. 21-6815(a), presumptive sentences are imposed absent a substantial and compelling basis for departure. "Substantial" means something real, not imagined, and of substance, not ephemeral. *State v. Reed*, 302 Kan. 227, 250, 352 P.3d 530 (2015). "Compelling" means that the court is forced, by the facts of the case, to leave the status quo and go beyond the ordinary. 302 Kan. at 250. To justify a departure sentence, only one substantial and compelling reason is needed. A departure sentence is also justified if the factors "collectively" constitute a substantial and compelling basis for departure. *State v. Brown*, 305 Kan. 674, 694, 387 P.3d 835 (2017).

The Victims' Ages

We begin our analysis with the victims' young ages. The district court found that the victims were particularly vulnerable due to their youth. It noted that older children would have been able to refuse their father's request to get in the car.

First, a substantial and compelling reason for upward departure exists when "[t]he victim [is] particularly vulnerable due to age, infirmity, or reduced physical or mental capacity which [is] known or should [be] known to the offender." K.S.A. 2022 Supp. 21-6815(c)(2)(A). Age is thus an appropriate aggravating statutory factor in departure sentences. See *Brown*, 305 Kan. at 697 (child abuse victim's particular vulnerability due to young age supported upward departure sentence).

Second, evidence of the victims' ages can be found within the State's probable cause affidavit. Also, the victims' mother confirmed their ages through her testimony. This affidavit along with the victims' mother's testimony is no doubt both relevant and substantive. The victims' ages are thus supported by substantial competent evidence.

Lastly, Landis argues that the district court misapplied the factor, contending that "[t]he question is not whether the children were vulnerable to Mr. Landis's actions," the question is "whether their age made them *particularly* vulnerable." Landis further asserts that "[a]ny passenger in the car with an impaired driver is vulnerable, regardless of age."

The State argues that, because of their young ages, the victims did not recognize their father's intoxication nor were they able to refuse his request to get in the car. Also, the State notes that older children and teenagers can recognize intoxication and refuse a parent's direction.

Landis' argument on appeal is repugnant to reason. As the district judge pointed out, both children were particularly vulnerable. And, as the judge noted, if the children were teenagers, they could have refused to get into the car. Indeed, if they were teenagers, they would have likely known about some of their father's previous DUI convictions. Thus, a very strong argument could be made that they would have refused to get in the car with their father because of his inebriated condition.

Also, a five-year-old child and a six-year-old child do not have the same capabilities as a teenager. While Landis is correct that any passenger in an intoxicated driver's car is in danger, youth can make such a passenger especially vulnerable—particularly one that still requires a booster seat. Youth brings with it a lack of knowledge, control, and capabilities. Indeed, for the most part, youths are taught very early in life that they are not to disobey their parents. The district court was thus reasonable in finding that the victims were particularly vulnerable and that a substantial and compelling basis for departure existed.

So, we affirm Landis' upward departure sentence on this ground alone. See *Brown*, 305 Kan. at 694 (one aggravating factor, whether statutory or nonstatutory, may justify upward departure sentence).

The Fiduciary Relationship

This analysis turns next to the fiduciary relationship between Landis and his victims. The district court found that such a relationship existed—and indeed was violated—and that this was a "strong" aggravating factor.

K.S.A. 2022 Supp. 21-6815(c)(2)(D) provides that a substantial and compelling reason for upward departure exists when "[t]he offense involve[s] a fiduciary relationship . . . between the defendant and the victim." Our Supreme Court recently reinforced the existence of such an aggravating factor. See *State v. Johnson*, 317 Kan. 458, 464, 531 P.3d 1208 (2023) (involving fiduciary trust relationship between child victim and adult). And, as both parties note, a fiduciary relationship exists between parent and child. *State v. Ippert*, 268 Kan. 254, Syl. ¶ 5, 995 P.2d 858 (2000).

Evidence that Landis is the victims' father can be found within the State's probable cause affidavit, as well as the victims' mother's testimony. Again, an affidavit and relevant testimony is substantial competent evidence, satisfying the second step in the *Morley* analysis.

Landis argues that something more than just the mere existence of a fiduciary relationship must exist—a violation or exploitation of such a relationship must also exist. Landis cites to *Ippert* in support of his argument, claiming that our Supreme Court requires the fiduciary relationship to impact the crime. The State, however, argues that existence of a fiduciary relationship is sufficient.

Our Supreme Court has found that a fiduciary relationship need only exist to warrant an upward departure sentence. A break of trust appears to be inherent in such a relationship when a crime is committed. See *State v. Martin*, 285 Kan. 735, 742, 175 P.3d 832 (2008) (fiduciary relationship between mother and teenage son warranted upward

departure sentence since she encouraged him to commit crime); *State v. Gould*, 271 Kan. 394, 415, 23 P.3d 801 (2001) (Abbott, J., dissenting) (fiduciary relationship "refers to any relationship of blood, business, friendship, or association in which one of the parties places special trust and confidence in the other"); *Ippert*, 268 Kan. at 262-63 (defendant father victimized his children who depended on him for support and protection); *State v. Sprinkle*, 31 Kan. App. 2d 45, 52, 59 P.3d 1039 (2002) (no fiduciary relationship because there was no direct, personal relationship of some duration).

Landis' position as the victims' father is precisely what affected the crime here. Landis put his children into the car and his children trusted his decision to do so—this trust is especially apparent when considering their young ages. Indeed, absent their familial relationship, it is extremely doubtful the children would have gotten into the car. Thus, the district court's finding in this regard was again reasonable and a substantial and compelling basis to depart existed in Landis' relationship with his children.

Thus, we affirm Landis' upward departure sentence on this ground alone.

Risk of Death

The district court also found that Landis knowingly or purposely created a great risk of death to multiple people. It concluded that the car crash occurred on a busy road and created a great risk of death to nearby cars and pedestrians. Also, the district court noted that the car crash occurred on Father's Day, increasing the likelihood of traffic.

Although not an aggravating departure factor under K.S.A. 2022 Supp. 21-6815(c)(2), an aggravating circumstance exists under K.S.A. 2022 Supp. 21-6624(b) when a defendant "knowingly or purposely kill[s] or create[s] a great risk of death to more than one person." See *State v. Astorga*, 299 Kan. 395, 403, 324 P.3d 1046 (2014) (finding aggravating circumstance after defendant shot firearm within feet of bystanders).

K.S.A. 2022 Supp. 21-6815(c)(2) provides a *nonexhaustive* list of aggravating factors. And K.S.A. 2022 Supp. 21-6624 is comparable to K.S.A. 2022 Supp. 21-6815(c)(2) as it involves aggravating circumstances which can intensify a sentence. K.S.A. 2022 Supp. 21-6624 thus provides appropriate upward departure factors.

The State's probable cause affidavit indicates that the car crash occurred on Burlingame Road on June 20, 2021. The district court noted the busy nature of Burlingame Road, and the record indicates that the car crash occurred on Father's Day. As a result, substantial competent evidence supports the district court's finding on this aggravating factor.

Landis argues that the district court erred and contends that every DUI would warrant an upward departure sentence under its reasoning. The State argues that the district court correctly noted that the car crash occurred on a busy road on a holiday, endangering multiple people.

Landis fails to adequately counter the State's argument that a car crash on a holiday poses a greater risk than on a non-holiday. The State correctly notes that it was mere chance no one else was injured.

So, we affirm Landis' upward departure sentence on this ground alone or collectively with the previous two factors.

Avoiding Prosecution

As to Landis' interference with law enforcement, the district court found that he attempted to avoid lawful prosecution by physically resisting a blood test.

K.S.A. 2022 Supp. 21-6624(e) provides that aggravating circumstances exist when a "defendant commit[s] the crime in order to avoid or prevent a lawful arrest or prosecution." See *State v. Bernhardt*, 304 Kan. 460, 482-83, 372 P.3d 1161 (2016) (aggravating circumstance existed where Bernhardt committed first-degree murder to avoid or prevent lawful arrest or prosecution).

Landis fails to counter the factual basis of this factor. The State points to the factual basis of the plea, and indeed, Landis pleaded guilty to interference with law enforcement. Evidence of Landis' behavior after the car crash can be found within the State's probable cause affidavit. Landis both attacked and threatened law enforcement, as well as medical personnel. Landis was then handcuffed and held down by four officers during his blood test.

Landis is correct that an aspect of a crime may only be used as a departure factor if the conduct is "significantly different" from the typical crime. K.S.A. 2022 Supp. 21-6815(c)(3). Indeed, the conduct must go "beyond what is minimally needed to satisfy the elements of the" crime. *State v. Cox*, 258 Kan. 557, 579, 908 P.2d 603 (1995). But if Landis' argument were to prevail, there would never be a time when this aggravating circumstance and interference with law enforcement would coexist. In this instance, Landis physically resisted a blood test to avoid another DUI conviction.

Landis argues that this confuses the elements of the crime with a basis to depart. He asserts that the "behavior while interacting with law enforcement [was] consistent with what one could reasonably expect from most impaired people." Simply put, by physically resisting the blood draw, he satisfied an element of interference with law enforcement.

The State argues that Landis' "belligerent behavior, threats to deputies and hospital staff, and use of physical violence to resist a blood draw was not consistent with what one

could reasonably expect from most impaired people." "All of these things, combined with Landis's numerous previous DUIs and history with law enforcement establishes that he committed the crime of interference in order to prevent a lawful arrest and prosecution for the aggravated battery based on his sixth DUI."

The district court's finding that Landis attempted to avoid lawful prosecution was more than reasonable because Landis threatened, fought, and harassed law enforcement as well as medical personnel after the car crash. He did not merely interfere with law enforcement—Landis went above and beyond in his efforts to avoid a further DUI investigation and prosecution. His actions after the car crash in combination with his criminal history and general belligerence created a substantial and compelling basis to depart.

Thus, we affirm Landis' upward departure sentence on this ground alone.

Especially Heinous

Finally, the district court found that Landis committed the crime in an especially heinous manner. It noted that it would not have found this aggravating factor had this been Landis' first DUI. It said that "[t]he heinous part is the totality of factors." Also, it said that Landis' driver's license was taken away for a reason, yet this car crash occurred despite this. Indeed, it found that "people can't even fathom" a sixth DUI. The district court also noted Landis' daughter's physical disfigurement, poor health, and long-term care requirements. Likewise, the district court said that "[t]he paralysis of the child is part of the heinous part."

K.S.A. 2022 Supp. 21-6624(f) provides that an aggravating circumstance exists when the crime is committed in an especially heinous, atrocious, or cruel manner. See *State v. McLinn*, 307 Kan. 307, 339, 409 P.3d 1 (2018) (finding aggravating circumstance

exists when victim suffered serious physical abuse or serious mental anguish before death).

Evidence of the car crash, the victims' injuries, and Landis' behavior after the car crash are found within the State's probable cause affidavit, as well as the victims' mother's testimony. As noted earlier, this is substantial competent evidence.

Landis argues the district court mischaracterized this factor, and that although the outcome was heinous and tragic, Landis did not commit the offense in a heinous manner. Additionally, Landis argues that his history of DUIs does not mean he behaved in a heinous manner. We disagree.

For example, before he crashed the car that day, Landis did the following:

1. He drank a significant amount of tequila which caused him to become inebriated that day.
2. He deliberately and selfishly chose to drive the car while inebriated that day.
3. He placed his five- and six-year-old children in a car with no booster seats although the law required the children of that age and size to be in booster seats that day.
4. He did not have a valid driver's license to operate a motor car on the public streets that day.
5. Because he had been previously convicted of six DUIs, he clearly was aware that Kansas' DUI laws prohibited him from operating or attempting to operate a motor car that day.

Because of his peculiar behavior and because of the actions he took before the crash occurred that day, Landis has no way of escape from the heinous way he committed these crimes.

Indeed, at sentencing, the State pointed to two aspects of the case which it found to be especially heinous. The State pointed to Landis' criminal history. Specifically, it noted that he has six prior DUIs, and that "[f]rankly, if there had been no injury, a seventh DUI is a heinous act." Additionally, each time Landis received a DUI conviction, he was ordered into alcohol recovery treatment. Also, the State argued that the aggravated battery by DUI resulted in a "life altering" injury—something far more serious than what is typical. Landis' daughter's life was "forever changed" by his actions, as were her family members' lives.

After the State presented this argument, the victims' mother gave a victim impact statement. She said that Landis had taken the sparkle from their daughter's eye and caused their son to have nightmares. Indeed, their daughter wrote a letter which said, "Why did you not love us enough, daddy?" And the month before Landis' sentencing, they learned their daughter would never walk again.

Landis caused this car crash after driving intoxicated, without a driver's license, and without putting his children in booster seats. His blood alcohol level was nearly three times the legal limit, and he was belligerent after the crash. He insulted both medical personnel and law enforcement. He attempted to kick an officer who executed a search warrant to draw his blood. Landis resisted so much that he was handcuffed and held down by four officers to draw blood. Landis' daughter was in the hospital for several months after the crash. And she will never regain the ability to walk. She needs help bathing and using the restroom. And she gets sad when she tries to play because she cannot run like she did before the crash.

Thus, Landis' selfish behavior and actions have imprisoned and encased his daughter within her own body due to her paralysis. As the district judge pointed out, this is a heinous act. Indeed, it is a heinous act because his daughter's paralysis will deprive her of a chance to grow up and play like many other young children her age.

While Landis is correct that departure sentences are the exception and not the rule, the tragic nature of this case provides new meaning to the term "heinous." See *State v. Eisele*, 262 Kan. 80, 90, 936 P.2d 742 (1997) ("departures should only be allowed in extraordinary cases"). As a result, we affirm Landis' upward departure sentence on this ground alone.

CONCLUSION

We affirm Landis' sentence. Each aggravating factor was not only supported by substantial competent evidence but also was substantial and compelling in its own right. Thus, the district court did not abuse its discretion in finding a basis to impose an upward durational departure sentence.

Affirmed.