

NOT DESIGNATED FOR PUBLICATION

No. 124,604

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JUAN MANUEL RIOS,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; CHRISTINA DUNN GYLLENBORG, judge. Opinion filed June 16, 2023. Affirmed.

Corrine E. Gunning, of Kansas Appellate Defender Office, for appellant.

Jacob M. Gontesky, assistant district attorney, *Stephen M. Howe*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before BRUNS, P.J., CLINE and HURST, JJ.

PER CURIAM: Juan Manuel Rios appeals the imposition of an upward durational departure sentence. He alleges the nonstatutory aggravating factors the district court relied on to impose his sentence were not supported by substantial competent evidence and its reliance on those factors violated his right to due process. After reviewing the record, we see no error in the court's decision and affirm his sentence. We decline to consider Rios' due process arguments because they are unpreserved.

FACTS

On September 30, 2018, Rios spent much of the day drinking, beginning early in the morning. Later in the day, he wanted to drive to a liquor store. A family member—the victim here—offered to take him since Rios had prior DUIs and she did not want him to drive. After the liquor store stop, the pair went to a local restaurant where Rios used to work. They sat at the bar, where Rios continued drinking.

At one point, the victim got up to use the restroom. While she was waiting outside an occupied restroom, Rios approached and told her he could show her another restroom on the other side of the kitchen that she could use without having to wait. He grabbed her hand and lead her to the other restroom.

The victim entered the other restroom alone, closing the door behind her. While she was urinating, Rios entered and closed the door. As she tried to leave, Rios grabbed her and pinned her against the wall. He then put his hands on her neck, breasts, and thighs. He pulled her pants down to her ankles, forcefully spread her legs, and placed his mouth on her vagina. He then inserted his fingers into her vagina. During the attack, she told Rios to "[s]top" and pushed him away. She continued to resist, punching him in the face multiple times. Rios then slammed her against the wall, trying to get her to stop hitting him. She was eventually able to strike Rios with enough force that he stumbled and fell back onto the floor. As she tried to leave the restroom, Rios continued to try to hold her down and slammed her against the wall. The fight continued until she escaped and called law enforcement. She had a split knuckle from striking Rios in the mouth, as well as bruises on her hands, elbows, back, knees, and thighs.

Rios was charged with rape and criminal restraint. The State amended these charges twice and eventually he pleaded no contest to two counts of aggravated sexual battery. As part of this plea agreement, the parties agreed the State would request an

upward durational departure sentence of 95 months' imprisonment and Rios would waive his procedural and statutory rights to a jury finding on departure. They also agreed Rios would be free to request a durational departure but not a dispositional departure sentence. The district court accepted Rios' plea and found him guilty of two counts of aggravated sexual battery.

When it came time for sentencing, Rios requested that he be sentenced within the presumptive range of 31 to 34 months for each count and that the court run the sentences concurrent. This would have the effect of Rios being sentenced to time served since he had been in custody for almost 36 months. While he acknowledged that his plea agreement prevented him from seeking a dispositional departure to probation, Rios argued the district court should impose a "border box" sentence for his crimes of conviction and run his sentences concurrent because sex offender specific treatment, which was recommended in his adult sex offender evaluation, was likely to be more effective than imprisonment. Rios asked that he be allowed to pursue treatment on his own while on postrelease supervision.

Consistent with the plea agreement, the State sought an upward departure sentence of 95 months. First, it argued the impact of Rios' crimes of conviction was greater than what is typically seen with these crimes. Second, because of the familial status of the victim, the State believed departure was appropriate. Third, based on the findings in his adult sex offender evaluation, Rios presented a risk of recidivism and he was not amenable to treatment or rehabilitation since he denied committing the offenses and denied that he had an alcohol or sexual abuse problem.

The district court followed the State's sentencing request. It concluded the three nonstatutory aggravating factors cited by the State, as well as the statutory factor of excessive brutality to the victim not normally present in an offense of this nature, formed a substantial and compelling basis to impose an upward durational departure sentence.

Thus, it sentenced Rios to 95 months' imprisonment with a lifetime postrelease supervision term.

ANALYSIS

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

Rios argues on appeal that the district court abused its discretion in imposing an upward departure sentence. He claims the court's factual findings were not supported by substantial competent evidence and the departure factors it relied on were not substantial or compelling.

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

Both the State and a criminal defendant may appeal a departure sentence. K.S.A. 2018 Supp. 21-6820(a). But appellate review is 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. 2018 Supp. 21-6820(d); *State v. Montgomery*, 314 Kan. 33, 36, 494 P.3d 147 (2021).

K.S.A. 2018 Supp. 21-6815(c)(2) lists statutory aggravating factors a sentencing court may consider when determining whether an upward departure is justified. But this statutory list is nonexclusive and appellate courts review nonstatutory factors for an abuse of discretion. *State v. Morley*, 312 Kan. 702, 711, 479 P.3d 928 (2021) (explaining the three-step review and noting how it parallels the abuse of discretion tests for error of law, error of fact, and reasonableness).

Although the Kansas Supreme Court has not specified a framework for analyzing nonstatutory *aggravating* factors, it has set out a framework for analyzing a downward departure based on nonstatutory *mitigating* factors. When a sentencing court grants a departure based on a nonstatutory factor, appellate courts first determine whether the factor identified by the sentencing court constitutes a legally permissible reason to depart under K.S.A. 2018 Supp. 21-6815(c)(1). Because this first step involves determining whether the sentencing court abused its discretion by making a legal error, our review is unlimited. Second, appellate courts decide whether the factor is supported by the record. This step analyzes whether the sentencing court abused its discretion by committing a factual error, so we look at whether substantial competent evidence supports the nonstatutory factor's existence. 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 nonstatutory factor by itself or collectively with other statutory or nonstatutory factors cited by the court. *Montgomery*, 314 Kan. at 36. We see no reason not to apply this framework when analyzing nonstatutory aggravating factors, as well.

Aside from this framework, a departure from the presumptive guideline sentence must be supported by substantial and compelling reasons. "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. Only one substantial and compelling reason is needed to justify a departure sentence. Moreover, a departure sentence is 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).

Abuse of trust

One of the reasons the district court imposed an upward departure sentence was it found Rios had abused the victim's trust when he committed his crimes. This reason or

factor is not set out in K.S.A. 2018 Supp. 21-6815(c)(2), so it constitutes a nonstatutory aggravating departure factor. In the past, our Supreme Court has taken an abuse of trust into consideration when analyzing whether a departure sentence was justified. It noted, however, that a "substantial ongoing relationship" should be present for this nonstatutory factor to apply. See *State v. Gideon*, 257 Kan. 591, 627, 894 P.2d 850 (1995) (An abuse of trust may occur, for example, between a boy scout leader and a child.). Thus, we find an abuse of trust is an appropriate nonstatutory aggravating factor to support an upward departure.

Turning next to whether substantial competent evidence supported the district court's finding that an abuse of trust occurred, the State argued at Rios' sentencing that this case presented a "complete and utter betrayal of trust." It noted that the victim and her family took Rios into their home and "over the course of months and years loved him and nurtured him and made him a part of their family" despite Rios' drug and alcohol abuse. Indeed, the State noted that the victim even offered to drive Rios because of his alcohol abuse on the day of the attack.

While Rios claims the district court simply based its decision on the familial relationship between Rios and the victim, there was more to it. The victim's mother spoke at Rios' sentencing and described how her family had opened their home and hearts to Rios, and they saw him like a big brother. And the victim's statement at Rios' sentencing was even more impactful:

". . . I'm trying. I'm very traumatized severely. That traumatized to having change jobs in order to feel safe, to not wanting to leave the house, not be trusting people that I should be able to trust. I struggle every day. Tracking online to make sure that he were still in, and if he were on parole I don't know if I would be able to move on. If he were to spend some time behind bars and get help, I would be able to maybe move forward. I will never get over this. But I'm just ready to move on. It's been three years of my life, and I just want him to pay for what he's done because he destroyed me. He broke me down, and if

someone that you felt was family could do this to you, how do we know that he won't go back out and do this to someone that he didn't care about."

The victim's and her mother's statements establish a "substantial ongoing relationship" between Rios and the victim and provide substantial competent evidence to support the district court's finding that Rios' actions constituted an abuse of trust. See *Gideon*, 257 Kan. at 627. This evidence showed Rios and the victim were practically siblings, and she described Rios as an "[o]lder brother" whom she had known since she was "a little girl." She and her family also trusted Rios by taking him into their home.

In addition to this close familial relationship, the district court emphasized that the victim tried to take care of Rios that night because she was concerned about his safety and his issues with alcohol and driving. Rios' betrayal of the victim's trust was substantial and provided a compelling reason for the district court to depart from the presumptive sentence. The court's decision to consider his abuse of her trust was reasonable, and we do not find that it abused its discretion in relying on this factor to impose an upward durational departure sentence.

While we could stop our analysis here, because only one substantial and compelling reason is needed to justify a departure sentence, we believe another nonstatutory aggravating factor considered by the court—Rios' risk of recidivism—provided at least as much cause to depart.

Risk of recidivism

The district court found that, because Rios failed to take accountability for his alcohol and sex abuse problems, it was very likely he would continue to offend. We find a risk of recidivism is a legally appropriate nonstatutory aggravating departure factor. A

low risk of recidivism is considered by district courts when imposing a downward or dispositional departure and the inverse seems similarly relevant.

Next, substantial competent evidence supported the district court's finding that Rios lacked accountability and had a concerning risk of recidivism. At Rios' sentencing, the State pointed to his adult sex offender evaluation. According to this evaluation, Rios demonstrated a lack of concern for others, impulsivity, poor problem solving, sexual preoccupation, deviant sexual preferences, substance abuse, relational problems, denial of the offense, and a poor attitude towards intervention. Moreover, because Rios did not believe he had sex or alcohol abuse problems, he would most likely resist therapeutic intervention. The State thus argued that it would be risky to release Rios. Indeed, the State argued that imprisonment might motivate Rios to finally recognize and remedy his flaws.

At sentencing, Rios testified that he was "aware that alcohol was [his] mistake." He also testified to the following:

"I know that we were drinking, dancing, having fun. I'm sorry if I scared her, or if I did something to her. Because due to this mistake, I have lost a lot of things. Like being with my children, helping my family, I lost my job, lost my friends, and something that's worth a lot, which is my freedom, my liberty."

Rios' statement shows a lack of accountability. Rios focused on himself and what he has lost rather than the victim and what she has lost. The district court adopted the State's argument and relied on Rios' psychological evaluation to determine he had a great risk of recidivism because of his lack of accountability, both regarding alcohol abuse and sex abuse.

Rios' evaluation provides substantial and competent evidence to support the district court's conclusion on Rios' risk of reoffending, and it was not unreasonable for the court to rely on this factor to impose an upward durational departure.

Because either of these nonstatutory factors, standing alone, would support the district court's decision, we need not consider the other two factors the court mentioned to support its sentencing decision. But since the court did rely on one statutory factor, we feel it is prudent to address that aspect of its decision.

Excessive brutality in commission of crime

In listing its reasons for imposing an upward departure, the district court also mentioned Rios' excessive brutality to the victim in a manner not normally present in an offense of this nature. Excessive brutality is a statutory aggravating factor that can justify upward departure. K.S.A. 2018 Supp. 21-6815(c)(2)(B).

In determining whether excessive brutality existed, the district court should consider whether the conduct went "beyond what is minimally needed to satisfy the elements of the offense." *State v. Vincent*, 258 Kan. 694, Syl. ¶ 5, 908 P.2d 619 (1995). Aggravated sexual battery required the State to prove that (1) Rios touched the victim (2) without her consent and that (3) Rios had the intent to arouse or satisfy the sexual desires of himself or someone else (4) while the victim was overcome by force or fear. See K.S.A. 2018 Supp. 21-5505(b)(1).

The State is correct in arguing that Rios did much more than "touch" the victim. Indeed, Rios slammed her against a wall, groped various parts of her body, and placed his mouth and fingers on and in her vagina. Apart from this, Rios became more aggressive once she fought back and she sustained various injuries as a result.

Rios argues the district court cannot consider the victim's defensive wounds, but as the State explains, the victim incurred those wounds defending herself against Rios' violent sexual assault. The court commented that Rios "slammed" the victim "against the wall," and it referenced the victim's testimony at the preliminary hearing about the attack. At that hearing, the victim described Rios forcefully spreading her thighs open and inserting his fingers into her vagina as she was fighting him off. She also mentioned him slamming her against the wall more than once—the first time after she hit him and then another time as she tried to get away.

When comparing Rios' conduct with other cases involving aggravated sexual battery, the State correctly notes that Rios' actions were more brutal than the circumstances present in the typical aggravated sexual battery. See *State v. Waddell*, 255 Kan. 424, 434-35, 874 P.2d 651 (1994) (criminal defendant removed victim's bra and fondled her breasts); *State v. Isley*, No. 115,199, 2017 WL 4321120 (Kan. App. 2017) (unpublished opinion) (criminal defendant coerced victim to manually stimulate him); *State v. Johnson*, No. 104,595, 2012 WL 686702, at *1 (Kan. App. 2012) (unpublished opinion) (criminal defendant approached victims in parking lots, grabbed them in bear hugs, and "humped" them); *State v. Mueller*, No. 67,046, 1992 WL 12944635 (Kan. App. 1992) (unpublished opinion) (criminal defendant grabbed victim in parking lot and squeezed her breast). We find the district court's conclusion that Rios' conduct was excessively brutal to the victim in a manner not normally present in an offense of this nature was supported by substantial competent evidence.

We see no abuse of discretion in the district court's sentencing of Rios. As the State notes, Rios' maximum presumptive sentence here was 68 months (up to 34 months for each count). The court departed by adding 27 months, for a 95-month controlling term which Rios knew the State intended to seek when he entered the plea agreement. Its decision was supported by substantial competent evidence and was both legally sound and reasonable.

Rios' unpreserved due process arguments

While Rios acknowledges the Legislature specified that the enumerated statutory aggravating factors in K.S.A. 2018 Supp. 21-6815(c)(2) were nonexclusive, he claims the use of nonstatutory aggravating factors to enhance his sentence violates his due process rights. The State contends we cannot consider Rios' arguments because they are unpreserved.

Generally, constitutional claims cannot be raised for the first time on appeal. *State v. Green*, 38 Kan. App. 2d 781, 789, 172 P.3d 1213 (2007) (criminal defendant could not argue departure framework was unconstitutional because he failed to raise it before district court). Rios admits he did not challenge the district court's use of nonstatutory aggravating factors to support its sentencing decision below. And he knew in the plea agreement that the State would seek an upward departure sentence of 95 months in prison. He also waived his jury trial right to findings for the departure sentence. Yet he asks us to consider his newly raised arguments on the grounds that the issue raises a purely legal question and consideration is necessary to serve the ends of justice and to prevent the denial of fundamental rights. See *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021).

The decision to review an unpreserved claim is a prudential one and we decline to exercise our discretion to consider Rios' new arguments on appeal. See *State v. Rhoiney*, 314 Kan. 497, 500, 501 P.3d 368 (2021). Rios' due process arguments are not properly before this court.

Affirmed.