State of Minnesota, Respondent, vs. Brian Patrick Merkt, Appellant.

STATE OF MINNESOTA

IN COURT OF APPEALS

C8-97-1664

State of Minnesota,

Respondent,

vs.

Brian Patrick Merkt,

Appellant.

Filed April 28, 1998

Affirmed

Short, Judge

Scott County District Court

File No. 9605000

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Considered and decided by Huspeni, Presiding Judge, Short, Judge, and Willis, Judge.

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

SHORT, Judge

A jury convicted Brian Patrick Merkt of second-degree murder in the death of three-year-old MacKenzie Bussiere. On appeal, Merkt argues the trial court: (1) abused its

discretion in evidentiary rulings; (2) abused its discretion in upwardly departing from the sentencing guidelines; and (3) erred in requiring him to submit a DNA sample and register as a sexual offender. We affirm.

D E C I S I O N

Rulings on evidentiary matters and sentencing decisions are left to the sound discretion of the trial court, and those decisions will not be reversed on appeal absent an abuse of that discretion. **See State v. Naylor**, 474 N.W.2d 314, 317 (Minn. 1991) (evidentiary matters); **State v. Kindem**, 313 N.W.2d 6, 7 (Minn. 1981) (sentencing decisions). By contrast, the interpretation and constitutionality of statutes are questions of law, which we review de novo. **State v. Behl**, 564 N.W.2d 560, 566 (Minn. 1997).

I.

Merkt argues the trial court erred in admitting his pre-**Miranda**, farmhouse statements because the police officers intended to hold him, he was not free to move around, and he was a suspect. However, the record demonstrates: (1) after voluntarily going to the police station, Merkt was returned to his farmhouse; (2) Merkt never asked or attempted to leave his farmhouse, and the officers never told Merkt that he had to stay at the farmhouse; and (3) police officers restricted movement in the farmhouse only to preserve the crime scene. Because Merkt was not restrained to the degree associated with a formal arrest, he was not "in custody" within the meaning of **Miranda**. **See State v. Palm**, 299 N.W.2d 740, 741-42 (Minn. 1980) (holding although investigation may focus on suspect and interrogation may possibly have coercive aspects, no **Miranda** warning required where suspect was not in custody or deprived of freedom of action in any significant way); **State v. Larson**, 346 N.W.2d 199, 201 (Minn. App. 1984) (concluding presence of uniformed officers in suspect's home not enough of restraint on suspect's freedom of movement to bring questioning under **Miranda**). Because Merkt was not "in custody" at the farmhouse, we need not reach the **Scales** issue. **See State v. Scales**, 518 N.W.2d 587, 592 (Minn. 1994) (holding custodial interrogations shall be recorded where feasible).

II.

Merkt also argues the trial court abused its discretion in admitting evidence obtained from the warrantless search and seizure of his clothing. We disagree. Where police officers have lawful custody of a defendant, they are entitled to take, examine, and preserve that defendant's clothing when it becomes apparent the articles of clothing constitute evidence of the crime. **United States v. Edwards**, 415 U.S. 800, 806, 94 S. Ct. 1234, 1238 (1974). The record demonstrates, while in custody, Merkt voluntarily surrendered the clothing he wore at the time of the crime. Moreover, Merkt failed to offer any evidence the officers did not provide him with alternative clothing or seized his clothing in a way that caused

embarrassment. Under these circumstances, the trial court properly admitted the evidence obtained from the search and seizure of Merkt's clothing. **See State v. Dill**, 277 Minn. 40, 46, 151 N.W.2d 413, 416-17 (1967) (holding evidence obtained from scientific examination of defendant's clothing procured while defendant in custody was admissible where defendant wearing same clothing, voluntarily surrendered clothes and was provided alternative clothing at time when it could be done, without any embarrassment to defendant); **see also Golliher v. United States**,362 F.2d 594, 601 (8th Cir. 1966) (concluding patently unjust result to keep from jury bloody shirt worn into police station by murder suspect).

Merkt also argues the trial court abused its discretion in admitting evidence obtained from the warrantless swabbing of his legs and genital area. However, the trial court found: (1) Merkt voluntarily consented to the swabbing, and swabbed himself; (2) the evidence obtained through the swabbing was "evanescent" because cleansing of the area would have eliminated the evidence; and (3) the police had probable cause to arrest Merkt based on the doctor's report that the victim was physically assaulted and bleeding from her vaginal and rectal areas. After a careful review, we conclude those findings are amply supported by the record. Under these circumstances, we cannot say the trial court abused its discretion in admitting the swabbing evidence. **See, e.g.**,**State v. Riley**, 303 Minn. 251, 253-55, 226 N.W.2d 907, 909-10 (1975) (holding in-custody, close range inspection of defendant's penis not violative of Fourth Amendment where overwhelming independent justification existed and facts established ample probable cause for defendant's arrest); **State v. Emerson**, 266 Minn. 217, 221, 123 N.W.2d 382, 385 (1963) (holding defendant suffered no hardship offending court's sensibilities and no due process violation where defendant tacitly agreed to be subjected to photographs, x-rays, and physical examination).

Merkt further argues the trial court committed reversible error in admitting the out-of-court statements of the victim's 5-year-old sister because those statements failed to follow the **Spreigl** requirements. **See generally State v. Spreigl**, 272 Minn. 488, 496-97, 139 N.W.2d 167, 173 (1965) (establishing rules for admissibility of character evidence). However, **Spreigl** evidence is admissible to show motive, intent, preparation, or plan when the state's case is inadequate without the evidence. **See** Minn. R. Evid. 404(b) (enumerating proper purposes for **Spreigl** evidence); **State v. Stagg**, 342 N.W.2d 124, 127 (Minn. 1984) (allowing admission of prior bad acts evidence when direct or circumstantial evidence on issue is weak or inadequate). Moreover, **Spreigl** evidence is properly admitted if it: (1) is relevant and material to the state's case; (2) is clear and convincing; and (3) has probative value outweighing its potential for unfair prejudice. **State v. Filippi**, 335 N.W.2d 739, 743 (Minn. 1983). The record

shows: (1) the victim was unavailable to testify about the alleged abuse because she was dead; (2) the child's statements alleging Merkt sexually abused her were relevant and material to the state's allegation that Merkt sexually abused the victim; (3) the time, content, and circumstances of the child's statement were similar to the state's version of events surrounding the victim's death; (4) the physician who examined the child, testified at trial, and was cross-examined by defense counsel; (5) that physician testified to a reasonable degree of medical certainty that the child had been abused in the manner described by the child during the examination; and (6) the child testified at trial, but was not asked by the prosecutor or defense counsel about Merkt's conduct toward her. Under these circumstances, the child's statements were properly admitted. **See State v. Wermerskirchen**, 497 N.W.2d 235, 240 (Minn. 1993) (concluding closer the relationship, in terms of time, place, and modus operandi between charged crime and other crimes, the greater relevance or probative value of evidence and lesser likelihood evidence will be used for improper purpose); **State v. Beard**, 574 N.W.2d 87, 91-92 (Minn. App. 1998) (holding evidence defendant abused other child in her care properly admissible under **Spreigl**). Contrary to Merkt's assertions, the trial court was not required, under **Spreigl**, to delay its ruling on this evidence until the close of the state's case-in-chief. **See State v. Bolte**, 530 N.W.2d 191, 196-97 (Minn. 1995) (outlining procedural requirements for **Spreigl** evidence).

III.

A trial court may depart from the presumptive sentence set forth in the Minnesota Sentencing Guidelines when "substantial and compelling circumstances" are present, which make the facts of a particular case different from a typical one. Minn. Sent. Guidelines II.D.; **State v. Peake**, 366 N.W.2d 299, 301 (Minn. 1985). The particular vulnerability of the victim and the cruelty of the defendant's acts may provide aggravating circumstances justifying departure from the sentencing guidelines. **State v. Steinhaus**, 405 N.W.2d 270, 271 (Minn. App. 1987); **see also State v. Partlow**, 321 N.W.2d 886, 887 (Minn. 1982) (concluding cruelty practiced upon child may be demonstrated by nature and extent of child's physical injuries). We will not reverse a trial court's sentencing decision absent a clear abuse of discretion. **Kindem**, 313 N.W.2d at 7.

Merkt argues the trial court abused its discretion in sentencing him to double the presumptive sentence because, in departing from the guidelines, the trial court relied on the required elements of his second-degree murder conviction, and therefore, there were no "substantial and compelling circumstances" to support its departure. **See** Minn. Stat. § 609.19, subd. 2(1) (1996) (defining second-degree murder); **see also State v. Brusven**, 327 N.W.2d 591, 593 (Minn. 1982) (concluding

inappropriate for sentencing court to use, as basis for departure, same facts relied on in determining presumptive sentence). However, in deciding on an upward departure from the sentencing guidelines, the trial court considered: (1) the victim's age and size; (2) the particular cruelty of the crime, including the extensive bruising and injuries found on the victim's body; (3) the horrible nature and extent of the injuries the victim suffered, as portrayed in pictures and testimony from numerous medical experts; (4) Merkt's failure to call for medical assistance when it was apparent the victim was injured; (5) the emotional impact of the incident on victim's 5-year-old sister; and (6) Merkt's violation of a position of authority and trust. Contrary to Merkt's allegations, the trial court specifically noted it did not consider the criminal sexual conduct allegations in imposing sentence. **Cf. State v. Womack**, 319 N.W.2d 17, 19-20 (Minn. 1982) (holding departure improper where defendant pleaded guilty to charged offense in exchange for dismissal of second charge, but trial court acted as fact finder and sentenced defendant as if convicted of both charges). Furthermore, the trial court's imposition of a 25-year sentence remains well below the maximum statutory sentence. **See** Minn. Stat. § 609.19, subd. 2(1) (providing maximum sentence of 40 years for second-degree murder conviction). Based on our experience, we conclude severe aggravating factors are present to support the departure. **See State v. Norton**, 328 N.W.2d 142, 146-47 (Minn. 1982) (holding when determining whether aggravating circumstances present, court must base decision on its collective, collegial experience in reviewing criminal appeals). Under these circumstances, we conclude the trial court did not abuse its discretion in making a double upward departure from the sentencing guidelines. **See, e.g.**, **Rairdon v. State**, 557 N.W.2d 318, 326-27 (Minn. 1996) (holding victim vulnerability, violation of position of trust, and particular cruelty may justify departure);**Partlow**, 321 N.W.2d at 887 n.1 (concluding vulnerability of two-year, ten-month-old child was proper aggravating factor); **State v. Profit**, 323 N.W.2d 34, 36 (Minn. 1982) (holding trial court justified in doubling maximum presumptive sentence where commission of crime in front of victim's children was particularly outrageous); **State v. Stumm**, 312 N.W.2d 248, 248-49 (Minn. 1981) (holding trial court's imposition of maximum prison sentence justified where defendant demonstrated indifference to child's medical needs after injurious blows inflicted); **State v. Pearson**, 479 N.W.2d 401, 404 (Minn. App. 1991) (holding defendant abused position of authority when he assaulted his seven-week-old daughter), **review denied**, (Minn. Feb. 10, 1992).

IV.

Merkt finally argues the trial court erred in interpreting Minn. Stat. § 243.166, subd. 1(a) (1996) to require him to register as a predatory offender and in interpreting Minn. Stat. § 609.3461, subd. 1 (1996) to require

him to provide a DNA sample because he was not convicted of an offense "arising out of the same set of circumstances." Although Merkt was charged with two counts of first-degree murder in violation of Minn. Stat. § 609.185(2), (5) (1996), two counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1 (1996), and second-degree murder in violation of Minn. Stat. § 609.19, subd. 2(1), he was convicted only of the second-degree murder charge. However, all charges arose out of his predatory conduct toward the victim. Under the plain language of the statute, Merkt was required to register as a predatory offender and to provide a specimen for DNA analysis. **See** Minn. Stat. § 243.166, subd. 1(a) (requiring registration as predatory offender when convicted of predatory offense or of an offense arising out of same set of circumstances); Minn. Stat. § 609.3461, subd. 1(1) (1996) (requiring DNA specimen when individual charged with criminal sexual conduct and convicted of offense arising out of same set of circumstances).

In the alternative, Merkt asks us to declare Minn. Stat. § 243.166, subd. 1(a) and Minn. Stat. § 609.3461, subd. 1 unconstitutional because the jury acquitted him of all offenses that would require registration or a DNA sample. However, sexual offender registration and the taking of a DNA sample are not punishment. **See, e.g.**, **Kruger v. Erickson**, 875 F. Supp. 583, 589 (D. Minn. 1995) (concluding Minn. Stat. § 609.3461 not penal in nature), **aff'd per curiam**, 77 F.3d 1071 (8th Cir. 1996); **In re Welfare of C.D.N.**, 559 N.W.2d 431, 433 (Minn. App. 1997) (concluding application of sex offender registration statute to juveniles is nonpunitive), **review denied** (Minn. May 20, 1997); **Snyder v. State**, 912 P.2d 1127, 1132 (Wyo. 1996) (concluding sex offender registration did not violate constitution because statute is regulatory measure and not punishment). Moreover, the statutes serve important regulatory purposes. **See Kruger**, 875 F. Supp. at 588 (concluding withdrawal of inmate's blood for DNA analysis pursuant to Minnesota statute of constructing DNA database of criminal sexual offenders assists in investigation and prosecution of sex crimes); **State v. Manning**, 532 N.W.2d 244, 248-49 (Minn. App. 1995) (holding sex offender registration statute not punitive because additional burden of registration not excessive in relation to important regulatory purpose served by registration), **review denied** (Minn. July 20, 1995). Because the statutes serve a reasonable and appropriate legislative purpose that is not punitive in nature, we conclude the registration statute is constitutional. We note our conclusion is consistent with a recent opinion of this court. **Cf. Boutin v. LaFleur**, No. C1-97-1490 (Minn. App. Jan. 13, 1998) (holding sexual offender registration statute constitutional), **review granted** (Minn. Mar. 19, 1998).

Affirmed.