STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1683

State of Minnesota,
Respondent,

vs.

Ryan Scott Brown,
Appellant.

Filed June 23, 2014
Reversed and remanded
Connolly, Judge

St. Louis County District Court
File No. 69DU-CR-12-3765

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

Mark S. Rubin, St. Louis County Attorney, Jessica J. Fralich, Assistant County Attorney, Meaghan Glisczinski (certified student attorney), Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Amy Lawler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Schellhas, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant challenges his four sentences for possession of pornographic work involving minors, arguing that (1) the district court erred when it sentenced him on all four counts when the state did not prove that there were four behavioral incidents or four victims and (2) the court erred by calculating his sentence under the method set forth in *State v. Hernandez*, 311 N.W.2d 478 (Minn. 1981). We reverse and remand.

FACTS

H.G. and appellant, Ryan Brown, were involved in a romantic relationship. After the relationship ended, H.G. discovered several pornographic images of children on a cell phone that appellant left at her home. An investigator examined the computer in H.G.'s home and located approximately 21,997 images and 85 videos of child pornography. An examination of the cell phone revealed 82 images and 3 videos of child pornography.

Appellant admitted that he possessed the child pornography discovered on both the computer and the cell phone. On October 29, 2012, the state charged him with 13 counts of possession of pornographic work involving minors in violation of Minn. Stat. § 617.247, subd. 4(a) (2012). On April 22, 2013, appellant pleaded guilty to counts one through four in the complaint.

Probation completed a presentence investigation (PSI) report prior to sentencing, which contained appellant's presumptive-guidelines sentence under the Minnesota Sentencing Guidelines. The sentencing worksheet attached to the PSI indicated that appellant had a criminal-history score of four. It recommended that the sentences for

each of the four convictions be calculated under the method set forth in *State v. Hernandez*, 311 N.W.2d 478 (Minn. 1981), so that appellant would receive an additional criminal-history-score point for each conviction. Based on this calculation, appellant's criminal-history score would be seven when sentenced on the last count. According to the PSI, appellant's presumptive middle-of-the-box sentence after *Hernandizing* his convictions was 87 months in prison.

The district court sentenced appellant on all four counts. Appellant received a 59-month sentence for the first count, a 77-month sentence for the second count, an 84-month sentence for the third count, and an 84-month sentence for the fourth count, which are all concurrent.[1]

D E C I S I O N

Appellant argues that the district court erred by imposing sentences for each of his four convictions of possession of pornographic work involving minors because the state did not show that they were separate behavioral incidents. We agree.

Under Minn. Stat. § 609.035, subd. 1 (2012), "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." In reviewing whether multiple offenses arise from a single behavioral incident under section 609.035, we consider "whether the conduct (1) shares a unity of time and place and (2) was motivated by an effort to obtain a single criminal

[1] The district court sentenced appellant to 84 months in prison for count four, which is lower than the middle-of-the-box sentence of 87 months but still within the presumptive range, because appellant returned to Minnesota from Nebraska to turn himself in when he learned that there was a Minnesota warrant for his arrest.

objective." *State v. McCauley*, 820 N.W.2d 577, 591 (Minn. App. 2012) (quotation omitted), *review denied* (Minn. Oct. 24, 2012). "Whether multiple offenses arise out of a single behavior[al] incident depends on the facts and circumstances of a particular case." *State v. Hawkins*, 511 N.W.2d 9, 13 (Minn. 1994). The state has the burden to show by a preponderance of the evidence that the conduct underlying the offenses arose from multiple behavioral incidents. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000). When facts are not in dispute, we review de novo "whether multiple offenses form part of a single behavioral act." *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001).

A. Single behavioral incident

Appellant argues that possessing multiple pornographic images at the same time in the same place does not constitute multiple behavioral incidents. Under Minn. Stat. § 617.247, subd. 4(a), "A person who possesses a pornographic work or a computer disk or computer or other electronic, magnetic, or optical storage system or storage system of any other type, containing a pornographic work, knowing or with reason to know its content and character is guilty of a felony." At his plea hearing, appellant admitted that he downloaded one file that contained numerous pornographic images. In fact, when the prosecutor asked whether appellant admits "that there were at least four times that you individually downloaded files containing images of young children in sexual conduct," appellant responded that "it was one time I downloaded a large amount of files . . . in one file."

Recently, the Eighth Circuit addressed a similar issue in *U.S. v. Emly*, 747 F.3d 974 (8th Cir. 2014). In *Emly*, a special agent from the Bureau of Criminal Investigation

seized Emly's laptop, Secure Digital card (SD card), a compact disc, and a desktop computer tower. *Emly*, 747 F.3d at 976. There were approximately 629 images of child pornography located on the laptop. *Id.* The SD card contained 481 images that were copied off Emly's laptop. *Id.* The evidence suggested that Emly burned six to eight images from the laptop onto a CD and transferred the images to the desktop computer. *Id.* A federal grand jury returned an indictment charging Emly with one count of receipt of materials involving the sexual exploitation of children in violation of 18 U.S.C. § 2252(a)(2), and three counts of possession of materials involving the sexual exploitation of children, in violation of 18 U.S.C. § 2252(a)(4)(b) (making it a crime to "knowingly possess[ ] . . . 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction . . . if—(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (ii) such visual depiction is of such conduct."). *Id.* The district court sentenced him to 228 months' imprisonment on count one and 120 months' imprisonment on each remaining count, to run concurrently. *Id.* at 977.

On appeal, "Emly argue[d] that under § 2252(a)(4)(b), the three possession counts listed in the indictment are multiplicitous because they charge the same crime." *Id.* He argued that possessing copies of different files on different devices constitutes one violation of the charged statute. *Id.* The Eighth Circuit agreed and reasoned that although Emly "copied the images onto separate devices at different times, the images found on all three devices all originated from the same source, [Emly's laptop.]" *Id.* at 979. The court reasoned, "The significant fact is that Emly possessed all of the images

found on the separate devices on one medium prior to copying and transferring them onto the separate devices." *Id.* It went on to state "The act of copying or transferring files onto different devices in itself does not constitute an independent violation of the statute." *Id.*[2]

Here, the state argues that it has shown two behavioral incidents because the complaint indicates that appellant downloaded images to his cell phone and to his computer. *See State v. Schmidt*, 612 N.W.2d 871, 876 (Minn. 2000) (explaining that we may review the complaint to determine whether the charged offenses are part of a single course of conduct). We disagree.

Count one states that appellant "did possess a pornographic work or a computer disk or computer or other electronic, magnetic or optical storage system or a storage system of any other type, containing pornographic work." The offense sections for counts two through four also state that the images depicting child pornography were found on "computer disk or computer or other electronic, magnetic or optical storage system or a storage system of any other type." But, by cross-referencing the offense section with the probable-cause section of the complaint, it is evident that counts two through four are based on images obtained from appellant's cell phone. For example, the images in counts two, three, and four are labeled as "two kids," "rums," and "08 Missed 019," respectively. The probable-cause section of the complaint states that the investigator reviewed images from appellant's cell phone and discovered the images "two

[2] Although the federal statute in *Emly* is not at issue in this case, the Eighth Circuit's reasoning is instructive.

kids," "rums," and "08 Missed 019." After explaining in detail what these images depict, the complaint again states, "the above descriptions represent a small sampling of the 82 images found on the telephone." In contrast, neither the offense section nor the probable-cause section for count one identifies which images that count is based on or where those images were discovered. We therefore cannot determine whether this charge is based on the images obtained from the cell phone or from the computer.

Moreover, the district court did not determine whether appellant's offenses arose from a single course of conduct and the record concerning the time, place, and criminal objective is limited. The record does not show when the pictures were downloaded, where appellant was located when the pictures were downloaded, how the pictures were downloaded or transferred to the cell phone, or whether appellant had a single criminal objective. The state did not charge appellant with dissemination for transferring images between devices and, based on the reasoning in *Emly*, transferring or copying images between devices does not necessarily constitute a separate possession offense. The lack of a developed record prevents us from determining whether appellant's actions constitute a single behavioral incident. We conclude that the state's burden to prove by a preponderance of the evidence that the possession offense did not occur as part of a single behavioral incident has not been met. Consequently, we remand to the district court to determine whether appellant's offenses arose from a single course of conduct.

B. Multiple-victim exception

Appellant next argues that the state has not met its burden of showing that there were more than two victims depicted in the images in counts two through four. We

agree. The well-established multiple-victim exception permits a district court to impose multiple sentences for convictions arising out of a single behavioral incident if (1) the offenses involve multiple victims and (2) multiple sentences do not unfairly exaggerate the criminality of the defendant's conduct. *State v. Marquardt*, 294 N.W.2d 849, 850-51 (Minn. 1980). But if a defendant commits multiple offenses against the same victim during a single behavioral incident, the defendant may be sentenced on only one of those offenses. *State v. Bookwalter*, 541 N.W.2d 290, 293 (Minn. 1995). We have held, as a matter of law, that possession of multiple items of child pornography involving different minors satisfies the multiple-victim exception to Minn. Stat. § 609.035, subd. 1. *State v. Rhoades*, 690 N.W.2d 135, 140 (Minn. App. 2004). We review whether the multiple-victim exception applies de novo. *State v. Skipintheday*, 717 N.W.2d 423, 426 (Minn. 2006).

Appellant argues that the state identified only two separate victims in the complaint, reasoning that the boy described in count two must be a different victim than the female victims described in counts two through four. There was no discussion on the record concerning the identity of the minors depicted in each image. Count two describes the victims as "prepubescent children, a girl and a boy." Count three describes the victim as "a young girl, approximately five-years-old." And count four describes the victim as "a young girl approximately ten-years-old."

The complaint offers some guidance by listing the instances in which an image depicts a victim that has already been identified in another image and when the same victim is involved in several images. But the complaint does not state whether the

victims in counts two through four are the same victim or different victims except for distinguishing male and female victims. Because we cannot determine based on the record whether counts two through four depicted one female victim or multiple female victims, we remand to the district court to determine whether the multiple-victim exception applies.

II.

Appellant next argues that even if the multiple-victim exception applies, the district court erred by applying *State v. Hernandez*, 311 N.W.2d 478 (Minn. 1981) to calculate his sentence, and thereby unfairly exaggerated the criminality of his offense. We will reverse a district court's exercise of discretion regarding sentencing only if "the discretion is not properly exercised and the sentence is unauthorized by law." *State v. Noggle*, 657 N.W.2d 890, 893 (Minn. App. 2003) (quotation omitted). A court "may at any time correct a sentence not authorized by law." Minn. R. Crim. P. 27.03, subd. 9 (2014). Under the rule set forth in *Hernandez*, when a district court sentences an offender for several offenses on the same day, the court may count each conviction in the offender's criminal-history score. *Hernandez*, 311 N.W.2d at 481.

But, in sentencing for a single behavioral incident with multiple victims, the district court is limited in its use of the sentences to enhance an offender's criminal-history score. Minn. Sent. Guidelines 2.B.1.d(i), (ii) (2014). "When multiple current convictions arise out of a single course of conduct in which there were multiple victims, weights are given only to the two offenses at the highest severity levels." Minn. Sent. Guidelines 2.B.1.e(2) (2014). We conclude that appellant's sentence is dependent on the

district court's findings regarding whether the offenses constitute a single behavioral incident and whether multiple victims were involved. We therefore reverse appellant's sentence and remand to the district court to recalculate appellant's criminal-history score.

Reversed and remanded.