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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2078**

Jason Anford Jenstead, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed November 4, 2008
Affirmed as modified
Lansing, Judge**

Clay County District Court
File Nos. 14-K3-97-001861, 14-K5-97-001862

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Considered and decided by Minge, Presiding Judge; Lansing, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

LANSING, Judge

In this postconviction appeal, Jason Jenstead challenges the district court's denial of his petition to modify his 1998 sentence on two counts of first-degree criminal sexual conduct. We conclude that the district court did not abuse its discretion when it upheld the double durational departure on the first count because it is justified by substantial and compelling circumstances. But, because the combination of the double durational departure and a consecutive sentence is disproportionate to the criminality of the offense, we reduce the 263-month sentence to 172 months.

FACTS

A district court found Jason Jenstead guilty of two counts of first-degree criminal sexual conduct based on evidence that Jenstead had sexually abused his daughter at least thirty-one times between June 1, 1996 and November 8, 1997. Jenstead's daughter, MJ, was eight years old when the abuse began.

Jenstead received a 172-month sentence on the first count. This sentence was a double durational departure from the presumptive guidelines sentence of 86 months. On the second count, he received a sentence of 91 months, which was within the presumptive range. The district court ordered that the sentences be served consecutively.

The district court based the first count's double durational departure on five aggravating factors: (1) MJ was particularly vulnerable because of her age and the fact that she was dealing with her parents' marital dissolution, (2) Jenstead acted with particular cruelty by increasing the frequency and severity of the abuse over time,

(3) Jenstead committed the acts in the presence of his son, who was MJ's brother, (4) the sexual conduct involved multiple forms of penetration, and (5) Jenstead abused his position of trust and authority.

Jenstead did not file a direct appeal of his sentence, but he petitioned for postconviction relief in July 2007. He argued that the sentencing court abused its discretion when it imposed both a double durational departure and a consecutive sentence because it improperly based the departure on factors that were elements of the offenses and failed "to distinguish [Jenstead's] case from other sexual abuse cases involving a child."

The postconviction court denied Jenstead's petition to modify the double durational departure and the consecutive sentence. The postconviction court agreed with Jenstead that, in departing from the guidelines, the sentencing court had improperly relied on factors that were elements of the offenses, namely, the victim's age and the fact that Jenstead abused his position of trust. But the court determined that the double durational departure was nevertheless justified because Jenstead had acted with particular cruelty by increasing the frequency and severity of the abuse over time, had committed the criminal acts in the presence of his son, had taken advantage of MJ's particular vulnerability, and had committed multiple types of penetration. The court also concluded that the consecutive sentence was justified because Jenstead "committed criminal sexual conduct on multiple occasions and [the two separate convictions] represented separate and distinct acts." Jenstead appeals from the denial of his petition for postconviction relief.

DECISION

In reviewing a postconviction order, our function is to determine whether the record sustains the findings and whether the decision constitutes an abuse of discretion. *Brown v. State*, 746 N.W.2d 640, 641-42 (Minn. 2008). We will not reverse the district court's findings if they are supported by sufficient evidence, but we make an independent determination of the law as it applies to the facts. *Hannon v. State*, 752 N.W.2d 518, 521 (Minn. 2008). Jenstead challenges the postconviction court's decision to uphold the imposition of the double durational departure on the first count and the consecutive term on the second count. We address each of these challenges.

I

A district court may depart from the presumptive sentence when a defendant's offense involves "substantial and compelling" circumstances. Minn. Sent. Guidelines II.D (1996); *State v. Thao*, 649 N.W.2d 414, 421 (Minn. 2002). The decision to depart is reviewed under the abuse-of-discretion standard and will be affirmed if sufficient evidence exists in the record to justify the departure even though the stated reasons may be improper or inadequate. *Id.* Generally, an upward departure is not an abuse of discretion if it is supported by at least one aggravating factor, *State v. O'Brien*, 369 N.W.2d 525, 527 (Minn. 1985), making the conduct involved significantly more serious than the conduct that ordinarily occurs in the commission of the particular crime, *Thao*, 649 N.W.2d at 421. But the departure may not be based on factors that are themselves elements of the underlying crime. *Taylor v. State*, 670 N.W.2d 584, 589 (Minn. 2003).

On appeal, Jenstead presents two arguments against the double durational departure. First, he contends that the postconviction court abused its discretion because it relied on factors that were elements of the underlying crime, specifically, the factors of multiple types of penetration and increased frequency and severity of abuse. Second, he argues that the double durational departure was unjustified because his conduct was not significantly more serious than the conduct that ordinarily occurs in the commission of first-degree criminal sexual conduct. Neither of these arguments provides a basis for reversing the postconviction court's determination.

Jenstead's first argument lacks merit because neither multiple types of penetration nor increased frequency and severity of abuse, which are the bases for the departure on the first count, are elements of Minn. Stat. § 609.342, subd. 1(h)(iii) (1996). Under Minn. Stat. § 609.342, subd. 1(h)(iii), a person is guilty of first-degree criminal sexual conduct if he "has a significant relationship to the complainant, the complainant was under 16 years of age at the time of the sexual penetration, and . . . the sexual abuse involved multiple acts committed over an extended period of time."

Thus, although the plain language of Minn. Stat. § 609.342, subd. 1(h)(iii), requires multiple *acts* of abuse, it can be committed without engaging in multiple *types* of penetration. *See State v. Adell*, 755 N.W.2d 767, 774 (Minn. App. 2008) (applying Minn. Stat. § 609.342, subd. 1(g) (2002)). The statute can be violated by committing multiple acts of abuse that involve only a single type of penetration. Similarly, a conviction does not require a showing of increased frequency or severity because it only requires that the acts occurred "over an extended period of time." Minn. Stat. § 609.342, subd. 1(h)(iii).

This element of the crime says nothing about the extent to which the abuse might become more severe or frequent as time passes. Consequently, we reject Jenstead's argument that multiple types of penetration and increased frequency and severity of abuse are elements of Minn. Stat. § 609.342, subd. 1(h)(iii). *See State v. Casady*, 392 N.W.2d 629, 635 (Minn. App. 1986) (upholding double durational departure for violation of statute requiring that "sexual abuse involved multiple acts committed over an extended period of time," in part, because of multiple types of penetration), *review denied* (Minn. Sept. 24, 1986).

Jenstead's second argument, that the conduct involved in his case was not significantly more serious than the conduct that ordinarily occurs in the commission of first-degree criminal sexual conduct, is also unpersuasive because it is not supported by the record.

The evidence supporting the first conviction establishes that, over a period of seventeen months, Jenstead sexually abused his daughter at least thirty different times. The abuse began shortly after Jenstead and MJ's mother dissolved their marriage in June 1996 and when MJ was only eight years old. Under the parents' visitation arrangement, MJ and her brother stayed at Jenstead's apartment for two-week intervals over the summer and every other weekend during the school year. During these visits, Jenstead engaged in repeated sexual acts with MJ. These acts included fellatio and cunnilingus. Jenstead also slightly penetrated MJ's genital opening with his penis and his fingers. While Jenstead was engaging in this abuse of MJ under a blanket, Jenstead's four-year-

old son would sometimes walk into the room. MJ testified that, when her brother came into the room, her father would pull up the covers to hide the abuse.

Based on this evidence, the postconviction court did not abuse its discretion in determining that Jenstead's conduct was significantly more serious than conduct that is typical of first-degree criminal-sexual-conduct cases. The record shows two factors in particular that are sufficient to constitute substantial and compelling aggravating circumstances. First, the court specifically noted that Jenstead committed multiple types of penetration, including fellatio and cunnilingus. *Casady*, 392 N.W.2d at 635 (upholding double durational departure for first-degree criminal sexual conduct in part because there were multiple types of penetration). Second, Jenstead increased the intensity and severity of his abuse over time, and the court did not abuse its discretion in finding that this methodical approach to the abuse was particularly cruel. *See Kilcoyne v. State*, 344 N.W.2d 394, 397 (Minn. 1984) (upholding finding of particular cruelty based on abuser's ongoing psychological manipulation of victim). We note that under Minn. Stat. § 609.342, subd. 1(a) (1996), conviction for a single act of abuse, such as Jenstead's conviction on count two, would be enough to make him eligible for the presumptive sentence for first-degree criminal sexual conduct. *See id.* (criminalizing single act of sexual contact when complainant is less than thirteen years of age and actor is more than thirty-six months older).

Because multiple types of penetration and increased frequency and severity of abuse constitute substantial and compelling aggravating factors and are not themselves

elements of Minn. Stat. § 609.342, subd. 1(h)(iii), the postconviction court did not abuse its discretion when it upheld the double durational departure.

II

Jenstead also argues that the district court abused its discretion when it imposed a consecutive sentence on count two. Generally, we will not reverse a district court's imposition of a consecutive term unless the sentence is disproportionate to the offense or unfairly exaggerates the criminality of the defendant's conduct. *State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007).

As a result of the combination of three factors, we conclude that the consecutive sentence in this case is disproportionate to the offense. First, the conduct charged in the second count is essentially the final act of abuse in a series of abusive acts. Jenstead began abusing MJ in June 1996, and the abuse continued until November 8, 1997. The November 8 act, which was separately charged, was not significantly removed in time nor significantly different from the other acts. Jenstead has not argued—and we do not suggest—that the charging decision was prosecutorial misconduct, that Jenstead's sentences violate the single-behavioral-incident statute, or that the convictions themselves are unlawful. *See State v. Suhon*, 742 N.W.2d 16, 24 (Minn. App. 2007) (determining that sentences for multiple counts of criminal sexual conduct under similar circumstances did not violate single-behavioral-incident statute and that charging decision was not abuse of prosecutorial discretion), *review denied* (Minn. Feb. 19, 2008). But, because the final act of abuse was largely indistinguishable from the other “multiple acts” of abuse that justified the first conviction under Minn. Stat. § 609.342, subd. 1(h)(iii), the

prosecutor's singling out the final act calls into question the fairness of imposing the consecutive term in addition to a double durational departure. *See State v. Pittel*, 518 N.W.2d 606, 608 (Minn. 1994) (indicating that, even when charging decision and sentencing departure are separately justifiable, they may be inappropriate in combination).

Second, the sentencing court did not find, and the record does not demonstrate, that additional aggravating factors support the consecutive terms. Since August 1, 1998, Comment II.F.04 in the Minnesota Sentencing Guidelines has said that, for convictions based on a series of largely indistinguishable acts of sexual abuse against a single victim, a defendant should not receive both an upward durational departure and a consecutive sentence unless additional aggravating factors exist to justify the consecutive sentence. *See Minn. Sent. Guidelines cmt. II.F.04* (1998) (stating that sentencing commission believes giving both durational departure and consecutive sentence when offenses "involve one victim and a single course of conduct can result in disproportional sentencing" unless additional factors exist). Before August 1, 1996, the guidelines contained a similar comment. *See Minn. Sent. Guidelines cmt. II.F.06* (1994) (stating that guidelines "intend[] to exclude consecutive sentences in domestic abuse and child abuse situations when there are multiple incidents perpetrated against a victim over time").

We recognize that Jenstead's March 6, 1998 sentence was imposed after the effective date of the pre-1996 Comment II.F.06 and before the effective date of the current Comment II.F.04. *See Minn. Sent. Guidelines III.F* (2006) (stating that

“[m]odifications to the [c]ommentary that relate to clarifications of existing policy will be applied to offenders sentenced on or after the specified effective date”). Nevertheless, the persistence of the caution that consecutive sentences be supported by additional aggravating factors weighs in favor of modifying Jenstead’s sentence.

We also recognize that this court in *Suhon* held that Comment II.F.04 did not preclude the imposition of a consecutive sentence. 742 N.W.2d at 24-25. This brings us to the third factor, which is also the principal reason for distinguishing this case from *Suhon*: Jenstead’s 263-month sentence for thirty-one acts of abuse committed over a period of eighteen months is comparatively disproportionate. In *Suhon*, a sentence of 278-months was found to be proportionate to three counts of criminal sexual conduct based on 832 acts of abuse over eleven years. *Suhon*, 742 N.W.2d at 23. *See also State v. Perleberg*, 736 N.W.2d 703, 706 (Minn. App. 2007) (upholding 432-month sentence for six counts of criminal sexual conduct based on approximately 250 acts of abuse over several years), *review denied* (Minn. Oct. 16, 2007).

The combination of these three factors supports a conclusion that the sentence was disproportionate, and we therefore modify Jenstead’s sentence on the second count by making it concurrent rather than consecutive. Accordingly, Jenstead’s total sentence is 172 months.

Affirmed as modified.