STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1102

State of Minnesota,
Respondent,

vs.

Joseph Thomas Saari,
Appellant.

Filed June 28, 2021
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge

St. Louis County District Court
File No. 69DU-CR-18-4166

Keith Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Johnson, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

On remand from the supreme court, appellant Joseph Thomas Saari argues that his convictions for nonconsensual dissemination of private sexual images must be reversed because Minn. Stat. § 617.261 (2016) is unconstitutionally vague on its face. Alternatively,

Saari argues that the district court abused its discretion by imposing two sentences for his convictions for nonconsensual dissemination of private sexual images because the state failed to prove that the offenses involved separate behavioral incidents. We affirm Saari's convictions but reverse and remand for resentencing.

FACTS

The supreme court remanded this matter to address issues that were not decided in Saari's direct appeal when this court reversed his convictions for nonconsensual dissemination of private sexual images on the ground that the statute was unconstitutionally overbroad. *State v. Saari*, No. A19-1102, 2020 WL 3172657, at *6 (Minn. App. June 15, 2020), *rev'd* (Minn. Feb. 16, 2021) (mem.). The facts are set forth in detail in our prior opinion. The following summarizes facts relevant to the remanded issues.

The state charged Saari by amended complaint with the following offenses against A.C., with whom he was in a relationship: felony domestic assault, two counts of threats of violence, one count of harassment/stalking, and two counts of nonconsensual dissemination of private sexual images. The state also charged Saari with two counts of aggravated first-degree witness tampering. At trial, A.C. testified that, in September 2018, after Saari had assaulted her, she discovered that Saari had posted two videos of their sexual activities on a pornography website—PornHub. One video depicted A.C. fellating Saari, and the other depicted them engaging in sexual intercourse. A.C.'s face and tattoos are visible. In a recorded interview, A.C. told police that one video was made at A.C.'s house and one was made in Saari's parent's garage. Although A.C. consented to Saari recording the videos, she did not consent to his posting the videos, and she did not know when he

posted them. Saari stipulated that he posted the two videos to PornHub between July and August 2018 but did not recall exactly when. Saari also stipulated that the images depicted sexual acts, that A.C. is identifiable, and that A.C. resided in St. Louis County.

A jury found Saari guilty of all counts. The district court entered judgments of conviction for domestic assault, one count of aggravated first-degree witness tampering, and two counts of nonconsensual dissemination of private sexual images. Based on trial testimony regarding the order in which the offenses were committed, the district court imposed sentences of 19 and 21 months' imprisonment for the two convictions for nonconsensual dissemination of private sexual images, 27 months' imprisonment for the assault conviction, and 158 months' imprisonment for the aggravated witness tampering conviction, with the sentences to run concurrently.

Saari appealed. We concluded that Saari had forfeited his argument that the district court erred by refusing to sever the nonconsensual-dissemination-of-private-sexual-images charges from the other charges and that Saari was not entitled to have his conviction for aggravated witness tampering reduced to first-degree witness tampering. *Saari*, 2020 WL 3172657, at *4, *6. But we reversed Saari's convictions for nonconsensual dissemination of private sexual images based on our decision in *State v. Casillas*, 938 N.W.2d 74, 77 (Minn. App. 2019), *rev'd*, 952 N.W.2d 629 (Minn. 2020), in which we held that the statute was unconstitutionally overbroad. *Id.* at *6. Because we reversed Saari's nonconsensual-dissemination-of-private-sexual-images convictions, we did not reach his vagueness challenge to the statute or his sentencing argument. *Id.* The supreme court granted the state's petition for review, denied Saari's petition, and stayed further proceedings pending

its final disposition in *Casillas*. After issuing its decision in *Casillas*, the supreme court reversed our decision reversing Saari's convictions for nonconsensual dissemination of private sexual images and remanded with the instruction to address the remaining issues. We then reinstated this appeal.[1]

DECISION

I. Minn. Stat. § 617.261 is not unconstitutionally vague on its face.

Saari argues that section 617.261 is unconstitutionally vague on its face under U.S. Const. amend. I and Minn. Const. art. 1, § 3. Saari did not challenge the constitutionality of the statute in district court. "The law is clear in Minnesota that the constitutionality of a statute cannot be challenged for the first time on appeal." *State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980). Nevertheless, reviewing courts may address constitutional or other issues "when the interests of justice require their consideration and when doing so would not work an unfair surprise on a party." *State v. Williams*, 794 N.W.2d 867, 874 (Minn. 2011). The state fully briefed the vagueness issue and did not argue that Saari forfeited it by failing to raise it in district court. We will, therefore, consider Saari's vagueness challenge despite his failure to raise it in district court.

A vagueness challenge to a statute is grounded in the Due Process Clause. *See United States v. Williams*, 553 U.S. 285, 304, 128 S. Ct. 1830, 1845 (2008) (citing U.S. Const. amend. V). A statute that imposes criminal liability "must meet due process

[1] In the order reinstating this appeal, we gave the parties an opportunity to submit supplemental briefs updating their research on the remaining issues. The parties have not submitted supplemental briefs.

standards of definiteness" under the federal and state constitutions. *State v. Newstrom*, 371 N.W.2d 525, 528 (Minn. 1985). "The void-for-vagueness doctrine requires that 'a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *State v. Bussmann*, 741 N.W.2d 79, 83 (Minn. 2007) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858 (1983)).

Ordinarily, a defendant whose conduct is proscribed by a statute cannot challenge the vagueness of the statute as applied to the conduct of others, but, when a defendant challenges the statute on First Amendment grounds, as Saari does, a facial challenge is permitted. *Williams*, 553 U.S. at 304, 128 S. Ct. at 1845; *see also State v. Campbell*, 756 N.W.2d 263, 269 (Minn. App. 2008) (stating defendant may challenge statute that purports to regulate First Amendment rights, "even if the statute is neither vague nor overbroad as applied to the defendant"), *review denied* (Minn. Dec. 23, 2008). The constitutionally of a statute is a question of law that we review de novo. *See State v. Cox*, 798 N.W.2d 517, 519 (Minn. 2011).

In *Casillas*, on remand from the supreme court, we concluded that section 617.261 is not unconstitutionally vague. *State v. Casillas*, No. A19-0576, slip op. at 9 (Minn. App. June 14, 2021). In our analysis, we observed that the supreme court determined in that case that the state has a compelling interest in preventing the nonconsensual dissemination of so-called "revenge porn" and that section 617.261 is "narrowly tailored" and "the least restrictive means" for serving that compelling interest. *Id.* at 6 (citing *Casillas*, 952 N.W.2d at 642-44). We further observed that, in so holding, the supreme court relied on the fact

that the statute explicitly defines the conduct that is prohibited, contains a mens rea requirement, and sets out seven enumerated exemptions from liability. *Id.* at 6-7. We reasoned that this analysis by the supreme court "significantly undermines" the argument that section 617.261 is unconstitutionally vague. *Id.* at 7. We concluded that a "reasonable and sensible construction of that statute's language conveys a sufficiently definite warning of the prohibited conduct" to "a person of common intelligence." *Id.* at 9.

Saari makes virtually identical arguments to those made by Casillas. We reject Saari's arguments for the same reasons that we rejected Casillas's and conclude, as we did in *Casillas*, that section 617.261 is not unconstitutionally vague. We, therefore, affirm Saari's convictions for nonconsensual dissemination of private sexual images.

II. The state failed to prove that the two counts of nonconsensual dissemination of private sexual images arose from separate behavioral incidents.

Saari alternatively argues that the district court erred by imposing multiple sentences for his convictions for nonconsensual dissemination of private sexual images. "[I]f 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." Minn. Stat. § 609.035, subd. 1 (2020). With a few exceptions, section 609.035 bars multiple sentences for crimes arising from a single behavioral incident. *State v. Bookwalter*, 541 N.W.2d 290, 293 (Minn. 1995). The question of whether multiple offenses are part of a single behavioral incident is a mixed question of law and fact: The appellate court reviews the district court's findings of historical fact under the clearly erroneous standard but reviews the application of the law to those facts de novo. *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014).

The supreme court uses different tests to determine whether two crimes arose from a single behavioral incident, and "[w]hich test applies depends on whether the crime at issue contains an intent element." *State v. Bauer*, 792 N.W.2d 825, 827-28 (Minn. 2011). Nonconsensual dissemination of private sexual images has an intent element—it requires a defendant to "intentionally" disseminate the image. *Casillas*, 952 N.W.2d at 643. To determine whether two intentional offenses are part of a single behavioral incident, courts consider "factors of time and place . . . [and w]hether the segment of conduct involved was motivated by an effort to obtain a single criminal objective." *Bauer*, 792 N.W.2d at 828 (quoting *State v. Johnson*, 141 N.W.2d 517, 525 (Minn. 1966)). "The application of this test depends heavily on the facts and circumstances of the particular case." *Id.* "The state bears the burden of establishing by a preponderance of the evidence that the conduct was not a single behavioral incident." *State v. Degroot*, 946 N.W.2d 354, 365 (Minn. 2020).

Without citing any authority, the state argues that Saari cannot challenge the multiple sentences because he did not object at sentencing. But "an appellant does not waive claims of multiple convictions or sentences by failing to raise the issue at the time of sentencing." *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007).

The state also argues that multiple sentences are permitted because Saari posted two videos, each depicting a different sex act, "suggesting separate motivations" for showing A.C. involved in private sex acts and exposing A.C. "to continued victimization each time a user accesses one of the two videos." Saari does not dispute that he committed two separate acts or that the district court properly entered two convictions for both acts. Saari argues only that he cannot be sentenced for both offenses because the state failed to prove

that they arose out of separate behavioral incidents. He contends that "the state presented no evidence" regarding when the videos were posted to PornHub and that it is impossible to tell whether the videos were disseminated at different times or places.

The state agrees that the record does not include any information regarding "[t]he exact time and location" that appellant disseminated the videos to PornHub. From our review of the record, the only evidence regarding when the videos were disseminated is A.C.'s discovery of the videos in September 2018 and Saari's stipulation that the videos were posted between July and August 2018, before he assaulted, threatened, and harassed A.C. On this record, it is not possible to determine that Saari did not post the videos at the same time, from the same place. And, because Saari posted the videos before he began assaulting, harassing, and threatening A.C., it is unclear what his objective was for posting the videos or whether his objective for posting each video was different. *Cf. Jones*, 848 N.W.2d at 533(stating that 33 text messages sent during a two-and-one-half-hour period with the intent to harass demonstrated a single criminal objective). Because the state failed to prove a lack of unity of time and place between the acts and that the conduct was motived by different criminal objectives, the state did not meet its burden of showing that the offenses arose from separate behavioral incidents. The district court, therefore, erred by imposing sentences for both offenses.

The parties disagree about the appropriate remedy. Saari argues that one of the sentences must be vacated and, because the district court *Hernandized*[2] the sentences, "a

[2] *State v. Hernandez*, 311 N.W.2d 478, 480 (Minn. 1981); Minn. Sent. Guidelines 2.B.1.e (Supp. 2017) (stating that multiple offenses sentenced at the same time before the same

remand to the district court for resentencing is necessary to reduce his criminal history score." The state argues that, because Saari did not object to multiple sentences for nonconsensual dissemination of private sexual images, the state should have an opportunity to develop the record on remand to prove that the offenses arose from separate behavioral incidents.

In *State v. Outlaw*, we remanded to the district court for further development of the record and resentencing after we concluded that the state had failed to prove that the defendant's prior out-of-state convictions were felonies that should have been included in his criminal history. 748 N.W.2d 349, 356, 360 (Minn. App. 2008), *review denied* (Minn. July 15, 2008).[3] We disagree with the state's argument that it should have a similar opportunity to develop the record here. In *Outlaw*, the facts relevant to the defendant's criminal history would only have been proved at sentencing and, because the defendant did not challenge his criminal-history score, the state did not develop a record on the issue.

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court must be sentenced in the order in which they occurred, and, as each offense is sentenced, it is included in the criminal history on sentencing the next offense).

[3] The state relies on an unpublished opinion to support its argument. *State v. Brown*, No. A13-1683, 2014 WL 2807683, at *3 (Minn. App. June 23, 2014). We are not persuaded that this decision permits the state an opportunity to develop the record to support multiple sentences. Unpublished decisions are not precedential. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c). *Brown* is also distinguishable because it involved a guilty plea and not a trial, as here. *Brown*, 2014 WL 2807683, at *2-3. And our remand instructions did not say that the state should have the opportunity to develop the record on remand; instead, we held that "[t]he lack of a developed record prevents us from determining whether appellant's actions constitute a single behavioral incident," and we remanded for the district court to make that determination. *Id.* at *3. In another unpublished decision, our remand instructions expressly directed the district court to vacate one of the sentences. *State v. Owens*, No. A19-1871, 2020 WL 5361657, at *5 (Minn. App. Sept. 8, 2020), *review denied* (Minn. Dec. 15, 2020).

Here, the state was already put to its proof regarding the facts underlying the crimes, and the question of whether Saari's two criminal acts were committed in the same behavioral incident could have been answered by the state's evidence to prove guilt at trial. Permitting the state to introduce additional evidence on remand to show the time, place, and criminal objective of the offenses would give the state a second opportunity to introduce evidence relevant to guilt. We are not persuaded that the state should be permitted to introduce additional evidence on remand to show the time, place, and motive of the conviction offenses.

We, therefore, reverse and remand for the district court to vacate one of the sentences for nonconsensual dissemination of private sexual images. The district court will then need to resentence Saari on the remaining counts to reflect the change in his criminal history.

Affirmed in part, reversed in part, and remanded.