STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1156

State of Minnesota,
Respondent,

vs.
Arturo Macarro Gutierrez,
Appellant.

Filed August 16, 2021
Affirmed in part, reversed in part, and remanded
Bratvold, Judge

Ramsey County District Court
File No. 62-CR-18-7965

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John Choi, Ramsey County Attorney, Alexandra Meyer, Assistant Ramsey County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Connolly, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this direct appeal from final judgments of conviction for two counts of first-degree criminal sexual conduct entered after a jury trial, appellant argues that the district court erred by (1) admitting relationship evidence, (2) improperly framing

special-verdict interrogatories for the sentencing phase, (3) imposing a sentence that is a greater-than-double upward-durational departure from the sentencing guidelines without sufficient findings, and (4) entering convictions on lesser-included offenses. Because the district court did not abuse its discretion by admitting relationship evidence, and because the special-verdict interrogatories did not prejudice appellant, we affirm in part. But because the district court imposed a greater-than-double departure without finding a severe aggravating factor, and because the convictions for lesser-included offenses must be vacated, we reverse in part and remand for resentencing.

FACTS

The respondent State of Minnesota charged appellant Arturo Macarro Gutierrez with four counts of criminal sexual conduct: first-degree criminal sexual conduct for the sexual penetration of victim 1, Minn. Stat. § 609.342, subd. 1(a) (2018) (count one); second-degree criminal sexual conduct for sexual contact with victim 1, Minn. Stat. § 609.343, subd. 1(a) (2018) (count two); first-degree criminal sexual conduct for the sexual penetration of victim 2 (count three); and second-degree criminal sexual conduct for sexual contact with victim 2 (count four).

Victims 1 and 2 are twins, born in March 2014. For a while, they lived with their mother at their maternal grandmother's apartment. When they were about two and a half years old, they moved with their mother into a nearby apartment with Gutierrez. In September 2017, when the victims were three years old, victim 1 told her grandmother that "somebody was loving up on her too much" and "made a few more statements" which

concerned the grandmother "enough" to bring her granddaughters to Midwest Children's Resource Center[1] (MCRC) "to get checked."

On September 5, 2017, a nurse conducted a recorded interview with both victims. Victim 1 stated that Gutierrez "burned [her]" with "the lighter." But victim 1 denied ever being "hurt" on her "front butt part or [her] back butt part." When victim 2 was asked if "somebody touch[ed] you on your front butt or back butt," she responded that Gutierrez touched her "in Grandma's house" with "the knife." But when the nurse tried to get more details, victim 2 stated that "nothing" happened to her, and the nurse eventually ended the interview. No criminal charges resulted from these interviews. Victims 1 and 2 continued to live with their mother and Gutierrez, and the grandmother provided childcare.

In October 2018 when they were four years old, the grandmother left the victims in her son's care while she went to work. When the grandmother returned home, victim 1 told her, "[Gutierrez] touched me on my bottom and he hurt me." The grandmother learned that the victims had been left solely in Gutierrez's care; neither her son nor the victims' mother were present.

The grandmother did not question either child, but noticed that victim 1's "panties were not right . . . . They were stiff, and . . . corroded." A physician examined both victims at a hospital a few days later. Victim 1 complained of "some diarrhea symptoms" and that "her vaginal area hurt." Both victims underwent testing: victim 1's vaginal and rectal

[1] MCRC is a child-advocacy center and provides services to children based on concerns about physical or sexual abuse.

swabs tested positive for gonorrhea, a sexually-transmitted infection, and victim 2's vaginal and throat swabs also tested positive for gonorrhea.

An MCRC nurse interviewed the victims. Victim 1 stated that when Gutierrez "was watching us . . . . his clothes was off . . . . he was dancing with his clothes off." But victim 1 did not describe any sexual contact. Victim 2 stated that "daddy pulled my sister's pants upstairs." She explained that "he pulled her pants down and . . . . daddy covered her up and she was on the floor."

Police arrested Gutierrez and the district court issued a search warrant to permit an examination of his genitals and hands. Gutierrez tested positive for gonorrhea on November 2, 2018. Three days later, the state charged Gutierrez with counts one and two, and in June 2019, the state amended its complaint to include counts three and four.

In July 2019, the state provided notice of its intent to offer *Spreigl* and relationship evidence from, among others, A.M., Gutierrez's 17-year-old daughter.[2] After a hearing, the district court granted the state's motion in a written order and memorandum.[3] The district court reasoned that A.M.'s testimony was admissible as relationship evidence, determining that "the risk of unfair prejudice does not substantially outweigh the probative

[2] *See State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965) (providing for the admission of prior bad acts by a defendant); Minn. Stat. § 634.20 (2018) (providing for the admission of relationship evidence).

[3] While state originally moved to admit testimony from three victims, it withdrew its motion to admit evidence from one victim at the hearing. Along with granting the motion to admit A.M.'s testimony, the district court also allowed testimony from a third victim as *Spreigl* evidence, but the third victim did not testify at trial.

value of the evidence in question," and stating that it would "address any proposed limiting instructions in advance of the trial."

During the jury trial, the state offered testimony by A.M., the grandmother, victim 1's therapist, an interviewing nurse, and the medical director of MCRC. The district court also received into evidence the victims' 2017 and 2018 interviews through video recordings and transcripts, along with the gonorrhea tests of the two victims and Gutierrez. The victims testified but did not describe the assaults to the jury. Gutierrez did not testify, and introduced evidence that he declined treatment for gonorrhea when he was taken into custody, and that he later tested negative for gonorrhea in February 2019—four months after the assault. Gutierrez also called the victims' mother, who testified that she was in a sexual relationship with Gutierrez, and agreed that she had tested negative for gonorrhea "just prior to [Gutierrez's] arrest."

The jury found Gutierrez guilty of all four counts. During the sentencing phase, the jury responded to special-verdict interrogatories. After the trial concluded, the district court ordered a presentence investigation (PSI) and psychosexual evaluation, but Gutierrez refused to participate in either. The PSI recommended an upward-durational departure of 360 months in prison for both counts one and three, to be served consecutively.

At the sentencing hearing, the district court acknowledged that the grandmother's victim-impact statement asked for "the maximum sentence." A.M. also offered a victim-impact statement, stating that she "would like to see [Gutierrez] sentenced in a way that reduces his chance of leaving jail while he is still alive." The state urged the district court to impose the PSI's recommended sentence of 720 months in prison. Gutierrez's

attorney argued for a 360-month sentence, and asked "that the Court show some mercy to this man."

Before imposing a sentence, the district court addressed Gutierrez and stated that "there is something irretrievably broken inside of you that made you perpetuate this evil on someone else. . . . This was shockingly cruel what you did to" victim 1, victim 2, and A.M. After noting the jury's special-verdict findings, the district court concluded that "I believe that a top-of-the-box sentence for each count is appropriate. That still remains a departure."

The district court imposed a 280-month sentence for count one, first-degree criminal sexual conduct against victim 1, and a consecutive 360-month sentence for count three, first-degree criminal sexual conduct against victim 2, "for a total of 640 months incarcerated." Neither counts two nor four, the second-degree criminal-sexual-conduct charges, were adjudicated on the record, but Gutierrez's warrant of commitment shows a conviction for both counts.

Gutierrez appeals.

DECISION

I. The district court did not abuse its discretion by admitting relationship evidence from Gutierrez's daughter, A.M.

During trial, A.M. testified about three instances of abuse: (1) when A.M. was six years old and while she was sleeping, Gutierrez "pulled [A.M.'s] pants down and tried to" penetrate her with his penis, (2) when A.M. was thirteen years old, Gutierrez "got on top

of [A.M.]" and "dry humped [her]" and "tried to kiss [her]," and (3) in late 2018, Gutierrez pulled up A.M.'s dress, "[took] his penis out and tried to rape [her]."

The district court admitted A.M.'s testimony under Minn. Stat. § 634.20, the relationship-evidence statute, which allows for the admission of "[e]vidence of domestic conduct by the accused . . . against other family or household members." "Domestic conduct" includes criminal sexual conduct by a parent against a child. Minn. Stat. § 634.20; Minn. Stat. § 518B.01, subd. 2(a)(3) (2018). The supreme court has "expressly adopt[ed] Minn. Stat. § 634.20 as a rule of evidence for the admission of evidence of similar conduct by the accused against the alleged victim of domestic abuse." *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004).[4]

Relationship evidence, however, is *not* admissible if its "probative value is substantially outweighed by the danger of unfair prejudice." Minn. Stat. § 634.20. We review the district court's decision to admit relationship evidence for abuse of discretion. *State v. Lindsey*, 755 N.W.2d 752, 755 (Minn. App. 2008), *review denied* (Minn. Oct. 29, 2008). Gutierrez has the burden of establishing both that the district court abused its discretion and that the admission of the evidence prejudiced him. *Id.*

Gutierrez makes two arguments in support of his position. We discuss each in turn.

[4] The supreme court later clarified "that evidence of domestic conduct by the accused against family or household members *other than the victim* may be admitted pursuant to Minn. Stat. § 634.20." *State v. Fraga*, 864 N.W.2d 615, 627 (Minn. 2015) (emphasis added).

A. The district court did not abuse its discretion when it determined that the probative value of A.M.'s testimony was not substantially outweighed by the danger of unfair prejudice.

Gutierrez argues that A.M.'s testimony "had very little probative value" and "had great potential for unfair prejudice." The state argues that "AM's testimony was highly probative evidence because it explained how [the victims' mother] and [Gutierrez's] household functioned and the way [Gutierrez] preyed on young female family members," and that "A.M.'s testimony was not unfairly prejudicial." We reject Gutierrez's argument for two reasons.

First, the district court did not abuse its discretion when it determined that A.M.'s testimony was probative. "[E]vidence showing how a defendant treats his family or household members . . . sheds light on how the defendant interacts with those close to him, which in turn suggests how the defendant may interact with the victim." *State v. Valentine*, 787 N.W.2d 630, 637 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010). "[T]he probative value of relationship evidence involving a family or household member is high . . . ." *State v. Ware*, 856 N.W.2d 719, 729 (Minn. App. 2014).

In his brief to this court, Gutierrez emphasizes what the testimony did *not* prove: "it did not illuminate the history of the relationship between Gutierrez and [victims 1 and 2] and it did not put the crime charged in the context of the relationship between them"; some of A.M.'s testimony was "not probative on any element of the charged offenses"; and "it did not provide the jury with the means to judge the credibility of [the victims] and Gutierrez." But Gutierrez's argument misses the point. A.M.'s testimony shed light on

Gutierrez's relationship with the victims, two young girls in his household, by showing his conduct with his biological daughter when she was about the same age as the victims.

Second, we conclude that the district court did not abuse its discretion when it determined that the probative value of A.M.'s testimony was not substantially outweighed by the danger of unfair prejudice. "[U]nfair prejudice is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted).

Gutierrez argues that "the district court did nothing meaningful at the time the evidence was admitted to prohibit the jury from misusing the 'relationship evidence' as character or propensity evidence." Based on the record, we disagree. Just before A.M. testified about how Gutierrez abused her, the district court instructed the jury that her testimony "is being offered for the limited purpose of assisting you in whether the defendant committed the acts with which he is charged in this case." The district court instructed that Gutierrez "is not being tried and you are not to convict him based on any previous evidence."[5]

[5] This is generally considered the *Spreigl* instruction. 10 *Minnesota Practice*, CRIMJIG 2.01 (2018). Gutierrez did not object before or after the instruction. This instruction is similar to the relationship-evidence instruction, which reads:

> This evidence is being offered for the limited purpose of demonstrating the nature and extent of the relationship between the defendant and [the victim] in order to assist you in determining whether the defendant committed those acts with which the defendant is charged in the complaint.

At the close of testimony, the district court stated that it was "not sure I gave the correct instruction when they got [A.M.'s] testimony." But the district court also noted "there's not that much of a difference." The parties agreed that the district court should use similar language in its final instructions. The district court instructed the jury before it deliberated that A.M.'s testimony

> is not to be used as proof of the character of the defendant or that the defendant acted in conformity with that character.
>
> The defendant is not being tried for and may not be convicted of any offense other than the charged offenses. You are not to convict the defendant on the basis of any alleged occurrences between the defendant and [A.M.]

On appeal, Gutierrez appears to assume that the jury disregarded these instructions, but "we presume that jurors follow the court's instructions." *Zornes v. State*, 880 N.W.2d 363, 373 (Minn. 2016). Thus, although the district court did not use the pattern instruction for relationship evidence to limit the jury's use of A.M.'s testimony, the district court instructed the jury appropriately.

B. Any error was harmless.

Even if we assume that the district court abused its discretion by admitting A.M.'s testimony, any error was harmless. "An error is harmless if there is no reasonable possibility that it substantially influenced the jury's decision." *State v. Taylor*, 869 N.W.2d 1, 14 (Minn. 2015) (quotation omitted); *see also State v. Post*, 512 N.W.2d 99, 102 n.2

> The defendant is not being tried for and may not be convicted of any behavior other than the charged offense(s).

10 *Minnesota Practice*, CRIMJIG 2.07 (2018). Gutierrez does not argue that the district court's instruction was plainly erroneous, and we discern no error.

(Minn. 1994). To make this determination, we examine the record as a whole, and "consider the manner in which the evidence was presented, whether the evidence was highly persuasive, whether it was used in closing argument, and whether it was effectively countered by the defense." *State v. Courtney*, 696 N.W.2d 73, 80 (Minn. 2005); *see also State v. Bolte*, 530 N.W.2d 191, 198-99 (Minn. 1995). For three reasons, we conclude that any error was harmless.

First, while A.M.'s testimony was highly persuasive, it was not presented unfairly because the district court gave limiting instructions before A.M. testified and before jury deliberations. Second, the prosecuting attorney used A.M.'s testimony appropriately during closing arguments. While the prosecuting attorney summarized A.M.'s testimony, the attorney also reminded the jury of the district court's cautionary instruction: "[A.M. is] not a charged victim in this case, but you're allowed to use her testimony to consider what it was like in that household and to consider the acts against her as you determine the defendant's guilt in this case." The prosecuting attorney discussed A.M.'s testimony briefly; two pages of the 18-page closing argument refer to A.M's testimony. And the prosecuting attorney did not discuss A.M.'s testimony at all during rebuttal.

Third, other evidence corroborated the state's case. Gutierrez and the two minor victims tested positive for gonorrhea. It was undisputed that the victims were in Gutierrez's care at the time of the assaults. The grandmother testified about what the victims told her after the assault, and the state also introduced the victims' MCRC statements in their entirety.

Gutierrez concedes that "the state had evidence apart from the 'relationship evidence' from which the jury could have found Gutierrez guilty," but he argues that A.M.'s testimony silenced "any question the jurors may have had about whether Gutierrez sexually abused [victims 1 and 2]." We are not convinced because the defense effectively countered A.M.'s testimony by offering: (1) testimony by the victims' mother, who stated she did not contract gonorrhea, and (2) evidence that Gutierrez tested negative for gonorrhea after the assault even though he did not receive medical treatment. Gutierrez's attorney also countered A.M.'s testimony by arguing that she was "troubled beyond belief" and impugning her credibility with the aid of the mother's testimony. We conclude that A.M.'s testimony was necessary to counter Gutierrez's arguments and prove Gutierrez's guilt beyond a reasonable doubt.

For these reasons, we affirm the district court's decision to admit A.M.'s testimony as relationship evidence.

II. The district court erred during the sentencing phase of Gutierrez's trial.

Following a guilty verdict, a trial moves to the sentencing phase. *See* Minn. R. Crim. P. 27.03. "For most felony offenses, the maximum sentence authorized by a . . . guilty verdict is the top of the presumptive sentencing range provided in the Minnesota Sentencing Guidelines' grid," *State v. Rourke*, 773 N.W.2d 913, 919 (Minn. 2009), which is determined based on an offender's criminal-history score and the convicted offense's severity. Minn. Sent. Guidelines 2 (2018).

But the district court may depart from this presumptive range if "there exist identifiable, substantial, and compelling circumstances to support a departure." *Id.* 2.D.1.

Before imposing a sentence that departs from the guidelines, a district court must (1) rely on a factual finding of one or more additional circumstances that are not reflected in the guilty verdict, and (2) explain why those circumstances are a substantial and compelling reason to depart from the guidelines. *Rourke*, 773 N.W.2d at 919.

Additional circumstances other than a defendant's criminal history must be admitted by the defendant or found beyond a reasonable doubt by a fact-finder, consistent with the defendant's Sixth Amendment right to jury trial. *Id.* (citing *Blakely v. Washington*, 542 U.S. 296, 301, 303-04, 124 S. Ct. 2531, 2537 (2004)). During the sentencing phase, the jury's role is to find or reject "a factual circumstance which the State alleges would provide the district court a substantial and compelling reason . . . to depart from the presumptive guideline sentence," often in the form of special-verdict interrogatories. *Id.* at 923. The presence of a single aggravating factor is sufficient to uphold an upward departure. *See State v. O'Brien*, 369 N.W.2d 525, 527 (Minn. 1985). An appellant may challenge the validity of a sentence for the first time on appeal. *See State v. Maurstad*, 733 N.W.2d 141, 146-47 (Minn. 2007) (reviewing appellant's sentencing challenge, even though that argument was not raised at sentencing); Minn. R. Crim. P. 27.03, subd. 9.

Gutierrez makes three challenges to his sentence. He argues that (1) the district court's special-verdict interrogatories during the sentencing phase of trial were improper and warrant reversal, (2) the district court erred by imposing a greater-than-double upward-durational departure from the sentencing guidelines without sufficient findings, and (3) the

district court erroneously entered convictions for counts two and four. We address each of Gutierrez's arguments in turn.

A. The special-verdict interrogatories were plainly erroneous, but the error did not affect Gutierrez's substantial rights.

In response to special-verdict interrogatories, the jury found that Gutierrez "act[ed] with particular cruelty by sexually assaulting [victim 1] in the presence of [victim 2]," which only applies to counts one and two. The jury also found that both victims were "particularly vulnerable due to [their] age," and this finding applies to count three.[6]

Gutierrez argues that his sentence for count three, first-degree criminal sexual conduct against victim 2, must be reversed because (1) "the jury's 'particular cruelty' special-verdict finding does not apply to count III," and (2) "the jury's special-verdict findings are inadequate to support the aggravated sentence."

Because Gutierrez did not object to the special-verdict interrogatory, we review for plain error.[7] *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under plain-error review,

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[6] The jury's special verdict also determined that Gutierrez did *not* "act with particular cruelty by transmitting a sexually transmitted disease" to either victim.

[7] Gutierrez argues that we should consider this issue de novo, relying on *State v. Grampre*, 766 N.W.2d 347, 350 (Minn. App. 2009) ("[W]hether a particular reason for an upward departure is permissible is a question of law, which is subject to a *de novo* standard of review.") We disagree. Gutierrez's brief to this court concedes that particular cruelty is a permissible reason for the district court's departure, but argues that the interrogatories submitted to the jury were improper. Gutierrez did not object to the interrogatories. "Failure to request specific jury instructions or to object to instructions given generally results in forfeiture of the issue on appeal. But we have discretion to consider a district court's failure to give a jury instruction if the failure constitutes plain error affecting substantial rights." *State v. Goodloe*, 718 N.W.2d 413, 422 (Minn. 2006) (citations omitted). We therefore apply plain-error review.

"there must be (1) error; (2) that is plain; and (3) the error affects [the appellant's] substantial rights. If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.* (citing *Johnson v. United States*, 520 U.S. 461, 468-69, 117 S. Ct. 1544, 1549-50 (1997)).

We consider the state's responses to Gutierrez's argument in three steps. First, the state concedes that "the only aggravating factor the jury found that relates to Count III . . . is that [victim 2] was especially vulnerable because of her age." The state argues that "[t]here is no indication that [the district court] applied the special-verdict findings incorrectly as to either count." Based on the sentencing-hearing transcript, we agree. Before imposing Gutierrez's sentence, the district court stated that "the jury found factors relevant to an upward departure. And I want to make sure I acknowledge both victims and the particular cruelty that they suffered at the hands of this defendant." The district court then imposed a sentence for count one relating to victim 1, followed by a sentence for count three relating to victim 2. There is no indication that the district court relied on the jury's finding that Gutierrez "assault[ed] [victim 1] in the presence of [victim 2]" when it imposed an upward departure for count three. We therefore reject Gutierrez's first argument and turn to the special-verdict finding that victim 2 was particularly vulnerable.

Second, the state concedes that the district court plainly erred in the form of its sentencing interrogatories. We agree. "An error is plain if it contravenes case law, a rule, or a standard of conduct." *State v. Hayes*, 831 N.W.2d 546, 555 (Minn. 2013) (quotation

omitted). Here, the district court plainly erred in its special-verdict interrogatories by asking the jury to find a reason for departure—particular vulnerability—rather than asking the jury to find facts that could guide the district court's decision on whether to depart from the guidelines. In *Rourke*, the supreme court distinguished between "additional facts that support the departure" and "a substantial and compelling reason to impose a sentence outside the range on the [sentencing guidelines] grid." 773 N.W.2d at 919-20.[8] The supreme court concluded that the jury should not be asked to find a reason for a departure, but instead should be asked to find facts which could, in the district court's discretion, support the district court's determination that substantial and compelling circumstances warrant a departure. *Id.* at 923.

Third, despite this error in the verdict form, the state argues that the facts of the case "overwhelmingly establish that [the victims] were particularly vulnerable," and that the jury would have come to the same conclusion "had it been presented with questions of fact pertaining more specifically to each twin's vulnerability." We agree. An error affects a defendant's rights if there is a "reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury." *Griller*, 583 N.W.2d at 741 (quotation omitted).

The victims' ages—four years old—was well established by the record, and, as the state contends, they were "scared to be in the same room with [Gutierrez]." Gutierrez did

[8] "[A]dditional facts" are "those facts that were not reflected in the jury verdict or admitted by [the defendant] but that would support a substantial and compelling reason to depart from the presumptive guideline sentence." *Id.* at 919 n.5.

not dispute the young age of the victims or that they were in his sole care during the assaults. And, as the state argues, they were "so young they were unable to report the abuse sufficiently for them to receive help." We are satisfied that the jury would have found sufficient facts to support the district court's determination that a departure was warranted for count three based on victim 2's particular vulnerability had the jury been properly instructed.

Because the district court did not rely on particular cruelty—the assault of victim 1 in the presence of victim 2—to impose an upward departure for count three, and because relevant factual interrogatories on the verdict form would have supported the district court's decision to impose an upward departure for count three based on particular vulnerability, we conclude that the plain error in the special-verdict interrogatories did not affect Gutierrez's substantial rights.

B. The district court abused its discretion by imposing a greater-than-double departure for count three without finding a severe aggravating factor.

Gutierrez argues that the 360-month sentence imposed on count three was a greater-than-double departure and that the district court did not determine that a severe aggravating circumstance justified the sentence. The state counters that the "sentence imposed" was not a greater-than-double departure, arguing that "[a] greater-than-double upward departure would have been 704 months or, 360 months on count I (top of the box

presumptive sentence with 4 criminal history points) and 344 months on count three (double top of the box presumptive sentence with artificial 0 criminal history score)."[9]

The supreme court has held that "generally in a case in which an upward departure in sentence length is justified, the upper limit will be double the presumptive sentence length." *State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981). "[D]ouble the presumptive sentence length" means "twice the upper end of the presumptive sentencing range." *State v. Barthman*, 938 N.W.2d 257, 269 (Minn. 2020). A district court may impose a greater-than-double durational departure only if it finds a "severe aggravating factor." *State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009). Appellate courts "review decisions to depart from the sentencing guidelines only for an abuse of discretion." *Barthman*, 938 N.W.2d at 269 (quotation omitted). "A district court abuses its discretion if its reasons for departure are inadequate or improper." *Id.*

We agree with Gutierrez that the district court imposed a greater-than-double departure for count three. The district court imposed a "permissive consecutive sentence" for count three, and before imposing the sentence for count three, the district court stated it was "keeping [Gutierrez's] felony point score and sentencing him to 360 months." The guidelines provide that "[i]f the offender is being sentenced for multiple current felony convictions for crimes [including first-degree criminal sexual conduct] the convictions may be sentenced consecutively to each other." Minn. Sent. Guidelines 2.F.2.a.(1)(ii). But if the

[9] We note that, while it does not affect the state's conclusion, a top-of-the-box presumptive sentence with four criminal-history points is 280 months, not 360 months. Minn. Sent. Guidelines 4.B. (2018). Thus, under the state's reasoning, a greater-than-double departure would be 624 months, and Gutierrez was sentenced to a total of 620 months.

district court sentences consecutively, then "the court must use a Criminal History Score of 0 . . . to determine the presumptive duration. A consecutive sentence at any other duration is a departure." *Id.* 2.F.2.b. With a criminal-history score of 0, the upper end of the guidelines range for count three was 172 months. Minn. Sent. Guidelines 4.B. Here, the district court imposed a 360-month sentence for count three, which is more than twice the upper end of the presumptive range. Gutierrez's sentence for count three is therefore a greater-than-double departure.

The district court, however, did not find a "severe" aggravating factor to support the greater-than-double departure. As discussed above, the district court found a single aggravating factor for count three and did not consider whether it was "severe." Thus, its reasoning was inadequate and improper. *See Stanke*, 764 N.W.2d at 828. We must therefore reverse and remand for resentencing consistent with this opinion.

C. The convictions for counts two and four must be vacated.

Gutierrez argues that his convictions for counts two and four, second-degree criminal sexual conduct, "must be vacated because they are included offenses" of counts one and three, first-degree criminal sexual conduct. The state agrees, as do we.

Minnesota law prohibits multiple convictions for lesser-included offenses, Minn. Stat. § 609.04, subd. 1 (2018), and "[s]econd . . . degree criminal sexual conduct [is a] lesser-included offense[] of first-degree criminal sexual conduct." *State v. Kobow*, 466 N.W.2d 747, 752 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991). Thus, the convictions for counts two and four are lesser-included offenses of counts one and three.

At the sentencing hearing, the district court did not adjudicate or impose a sentence on either count two or four, and the state's brief submits that "the entry of the convictions was not intentional and occurred in error." "Clerical mistakes in a judgment, order, or in the record arising from oversight or omission may be corrected by the court at any time, or after notice if ordered by the court." Minn. R. Crim. P. 27.03, subd. 10. Therefore, we reverse and remand for the district court to vacate the convictions for counts two and four.

Affirmed in part, reversed in part, and remanded.