STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0679

State of Minnesota,
Respondent,

vs.

Tony James Hewitt,
Appellant.

Filed April 18, 2022
Affirmed in part, reversed in part, and remanded
Smith, John, Judge[*]

Nicollet County District Court
File No. 52-CR-18-411

Keith Ellison, Attorney General, Lydia Villalva Lijó, Assistant Attorney General, St. Paul, Minnesota; and

Michelle Zehnder Fischer, Nicollet County Attorney, St. Peter, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Wheelock, Judge; and Smith, John, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

SMITH, JOHN,

We affirm the district court's denial of appellant Tony James Hewitt's motion for a downward dispositional departure because the district court considered the reasons advanced for departure and in its discretion rejected them. We reverse in part and remand for resentencing because the eight convictions of burglary and two criminal-sexual-conduct convictions were part of the same behavioral incident, and he should only have been sentenced on one conviction for burglary and one conviction for criminal sexual conduct.

FACTS

Appellant was awaiting sentencing after pleading guilty to third-degree driving while intoxicated.[1] Hewitt was furloughed from jail in August 2018 to receive inpatient treatment from the Veterans Affairs clinic in Mankato. Hewitt was discharged from treatment and a warrant was issued because he failed to return to the Nicollet County jail.

Two days later, according to victim T.P.'s testimony, T.P. fell asleep on her living room couch without locking the doors to her St. Peter townhouse. She woke up to the sound of her dog barking, and someone walking upstairs and speaking. T.P. went upstairs and found Hewitt in her daughter's bedroom sitting on her daughter's bed. T.P testified that she and Hewitt had consensual sexual relations decades earlier in high school, but that

[1] The facts come from testimony established at trial.

recently he would come over to her house "a couple times a year" wanting to have sex. She would agree to have sex with Hewitt to get him to leave. This night, however, T.P. told Hewitt he had to leave. They walked downstairs to talk—T.P. repeatedly told Hewitt to leave. When T.P. threatened to call the police, Hewitt said he would "knock [her] out" if she did.

At around 3:00 a.m., T.P began calling and sending text messages to her friends D.M. and T.H. asking for help. Hewitt, who refused to leave, approached T.P. in her living room and tried to remove her pants. He eventually removed her pants and digitally penetrated her vagina and anus in a "pounding" manner, causing T.P. "a lot of pain." T.P. continued to tell Hewitt to leave and resisted until D.M. arrived. D.M. said that police were on their way, and Hewitt ran out of the front door.

In an amended complaint the state charged Hewitt with fourteen offenses: four counts of criminal sexual conduct, eight counts of burglary, and one count each of false imprisonment and interfering with an emergency call.[2]

At trial, Hewitt testified that he went to T.P.'s house to discuss treatment, not to have sex. Instead, Hewitt said that T.P. agreed to "role play," which included sending text and voicemails to her friends before they engaged in, according to him, consensual sex. He testified that he left after D.M. arrived and acted aggressively toward him.

[2] Minn. Stat. §§ 609.342, subd. 1(e)(i), .343, subd. 1(e)(i), .344 subd. 1(c), .345, subd. 1(c), .582, subd. 1(a), (c), .582, subd. 2(a)(1), .582, subd. 3, .713, subd. 1, .255, subd. 2, .78, subd. 2(1) (2018).

The jury found Hewitt guilty of each count of criminal sexual conduct and burglary and found him not guilty of false imprisonment and interference with an emergency call.

Hewitt requested that sentencing be continued to document his military service and to allow for a psychosexual evaluation. Over the state's objection, the district court continued the matter, and he was remanded into custody pending sentencing. After submitting a presentence investigation report (PSI), a sentencing memorandum, and a psychosexual evaluation report and exhibits, Hewitt moved for a downward dispositional departure. At the sentencing hearing, Hewitt's counsel detailed Hewitt's military service, physical and mental injuries, and discussed the psychosexual evaluation (which recommended a probationary sentence).

The district court denied the dispositional departure, stating:

> I have considered the briefs that have been filed on your behalf, and your service to the country. And I recognize that you had some traumatic things occur to you, but the offense that you were convicted of is a very serious offense.

The district court formally adjudicated and sentenced Hewitt on all ten counts. The sentence for the first-degree criminal sexual conduct was a term of 144 months' imprisonment. The remaining sentences were all concurrent because, as the district court found, they were part of a "single behavioral incident."

DECISION

I. The district court considered Hewitt's arguments before denying his motion for a downward dispositional departure.

First, Hewitt challenges the district court's denial of his motion for a downward dispositional departure. We review the district court's decision whether to depart from a

presumptive sentence for an abuse of discretion. *State v. Schmit*, 601 N.W.2d 896, 898 (Minn. 1999). The Minnesota Sentencing Guidelines limit that discretion by prescribing presumptive sentences. *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (citing Minn. Sent. Guidelines 2.D.1 (2014)[3]). A district court must adhere to those presumptive sentences unless "substantial, and compelling" reasons warrant a departure. *Id.* (quoting Minn. Sent. Guidelines 2.D.1 and cmt. 2.D.103).

At issue here is a downward dispositional departure. In determining whether to grant a downward dispositional departure, the district court focuses on the defendant's individual characteristics and what sentence would be best for the defendant and society. *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). It is also well-established that district courts may consider both offense-related and offender-related factors when deciding whether to grant a request for dispositional departure. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018). The guidelines provide a nonexclusive list of mitigating factors that may warrant a dispositional departure, including when the defendant is "particularly amenable to probation." *Soto*, 855 N.W.2d at 308. The factors the district court may consider in determining whether the defendant is particularly amenable to probation include, but are not limited to, "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family" (the *Trog* factors). *See id.* at 310 (quoting *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)).

[3] The 2019 version of the guidelines has not materially changed.

The presence of mitigating factors does not obligate the district court to grant a departure. *Wells v. State*, 839 N.W.2d 775, 781 (Minn. App. 2013) (quoting *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984)).

Additionally, there are sentencing considerations that apply for military veterans. The district court is required to ask if a defendant is a veteran of the armed forces. Minn. Stat. § 609.115, subd. 10 (2018). If that veteran has been diagnosed as having a mental illness by a medical professional, the district court "*may* . . . consider the treatment recommendations of any diagnosing or treating mental health professionals together with the treatment options available to the defendant in imposing sentence." *Id.* at subd. 10(b) (emphasis added). And if the defendant has a serious and persistent mental illness, which includes PTSD, the district court "when consistent with public safety, *may* instead place the offender on probation." Minn. Stat. § 609.1055 (2018) (emphasis added).

Here, the district court considered the state's sentencing memorandum and defense counsel's written reply, as well as the psychosexual evaluation and exhibits. The district court also heard testimony on the results of the evaluation, the doctor's recommendation that Hewitt be put on probation, and the victim impact statement from T.P. But the district court, while recognizing Hewitt's military-related trauma, noted that the offense against T.P. was a "very serious offense." Based on this record, we discern that the district court considered all this information and testimony—including military-related and mental-

illness-related mitigating factors—before ruling that Hewitt was not amenable to probation. Therefore, the district court did not abuse its discretion.

To convince us otherwise, Hewitt also alleges that the district court erred by not showing a "deliberate consideration" of the factors supporting a probationary sentence because the district court did not expressly refute the expert testimony regarding his mental health. The district court noted it read the briefs and other responses, and there are over 12 pages of transcript in which Hewitt's counsel explained Hewitt's underlying mental health issues and summarized the expert's conclusions. Hewitt does not otherwise point to a requirement that the district court must expressly refute every point made when denying a departure. And our caselaw highlights the opposite—there is no requirement to discuss all mitigating factors presented to the court. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985) (stating that if the district court "considers reasons for departure but elects to impose the presumptive sentence," an explanation for denying departure is not required).[4]

Accordingly, the district court did not abuse its discretion when denying the motion for a dispositional departure.

[4] Hewitt also cites to *Porter v. McCollum*, 558 U.S. 30, 43-44 (2009) to argue that there were substantial and compelling reasons to depart. *Porter* is not applicable here. Not only does *Porter* involve the determination of mitigating factors for a defendant facing the death penalty, the error was in the Florida postconviction court failing to consider Porter's military service and childhood abuse. Here, the record shows that Hewitt's military service and mental trauma were explicitly stated and repeated before the district court. The district court, in its discretion, did not consider them adequate for a departure. This is not the same as the error of not considering those issues at all.

II. The district court improperly adjudicated and sentenced Hewitt due to the offenses being part of a single behavioral incident.

Next, Hewitt argues that the district court improperly adjudicated and sentenced Hewitt to two counts of criminal sexual conduct and eight counts of burglary. Hewitt and the state agree on all points of this issue, including the remedy: reverse the judgments of conviction for all counts and remand for resentencing for one count of first-degree criminal sexual conduct and one count of first-degree burglary based on violations of Minnesota Statutes sections 609.035, .04, and .585 (2018).[5]

We review whether a conviction or sentence violates sections 609.035, .04, or .585 de novo. *State v. Holmes*, 778 N.W.2d 336, 339 (Minn. 2010). When a defendant is convicted of more than one charge for the same act, the proper procedure is to reverse the convictions and remand for the district court to adjudicate formally and impose a sentence on one count only and to leave the remaining counts unadjudicated. *State. v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984).

Turning to the violated statutes, under section 609.04, a person may be convicted of either the crime charged or an included offense, but not both. Minn. Stat. § 609.04, subd. 1. This statute also bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident. *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). Similarly, if a defendant commits multiple offenses against the same victim

[5] Hewitt did not object before the district court to the multiple adjudications and sentences. 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).

during a single behavioral incident, section 609.035 provides that the defendant may be sentenced for only one of those offenses. Minn. Stat. § 609.035; *State v. Bookwalter*, 541 N.W.2d 290, 293 (Minn. 1995). Finally, section 609.585 permits a district court to impose a sentence for burglary and "any other crime" committed during the burglary.

Criminal-sexual-conduct convictions

Looking first at the criminal sexual conduct offenses, third-degree criminal sexual conduct is an included offense of first-degree criminal sexual conduct. *State v. O'Brien*, 369 N.W.2d 525, 526-27 (Minn. 1985).

Here, the district court adjudicated and sentenced Hewitt on both first-degree criminal sexual conduct and third-degree criminal sexual conduct. The district court also found that this conduct was part of a single behavioral incident. Because third-degree criminal sexual conduct is an included offense of first-degree criminal sexual conduct, and because Hewitt's conduct was found to be part of a single behavioral incident, the conviction and sentence on the count of third-degree criminal sexual conduct violate sections 609.035 and .04.

Burglary convictions

Turning next to the burglary convictions, the district court adjudicated and sentenced Hewitt to four counts of first-degree burglary, two counts of second-degree burglary, and two counts of third-degree burglary. Because these counts are all under the same statute, section 609.582, the convictions for all eight offenses violate section 609.04. *Jackson*, 363 N.W.2d at 760.

In sum, we reverse and remand to the district court with instructions to vacate all but one conviction and sentence for first-degree criminal sexual conduct and one conviction and sentence for first-degree burglary.[6]

Affirmed in part, reversed in part, and remanded.

[6] Vacating the convictions and sentences does not reverse or overturn the jury's guilty verdicts on these offenses. *Walker*, 913 N.W.2d at 467, 469.