This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1121

State of Minnesota,
Respondent,

vs.

Brian Arthur Barthman,
Appellant.

Filed April 11, 2022
Reversed and remanded
Cochran, Judge

St. Louis County District Court
File No. 69DU-CR-15-4576

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

Kimberly J. Maki, St. Louis County Attorney, Nathaniel T. Stumme, Assistant County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Reyes, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

COCHRAN, Judge

Appellant was convicted of several counts of first- and second-degree criminal sexual conduct. The district court sentenced appellant on two of the first-degree criminal-sexual-conduct counts, imposing consecutive 360-month prison sentences for an

aggregate sentence of 720 months. On appeal, both this court and the Minnesota Supreme Court affirmed appellant's 360-month sentence on the first count but reversed his 360-month sentence on the second count and remanded for resentencing on that count only. On remand, the district court reduced appellant's sentence on the second count to a consecutive term of 344 months, resulting in an aggregate sentence of 704 months.

Appellant now challenges the district court's sentencing decision on remand, arguing that the imposition of an aggregate sentence of 704 months is unreasonable, inappropriate, excessive, and unjustifiably disparate. Based on our review of sentences imposed in other similar criminal-sexual-conduct cases, we agree. We therefore reverse appellant's sentence on count two and remand to the district court to impose a modified sentence of up to 240 months on that count, to be served consecutively with appellant's 360-month sentence on count one, for an aggregate sentence no longer than 600 months.

FACTS

In 2017, following a jury trial, Barthman was convicted of six counts of criminal sexual conduct. The convictions were based on Barthman's sexual abuse of his daughter, C.B., while C.B. was between the ages of ten and 12 years old. C.B., along with her mother and siblings, has a rare genetic mutation that affects her cognitive development. At the time of trial, C.B. had difficulty functioning independently and communicating, and she was performing well below grade level in school.

The first three counts on which Barthman was convicted involved first-degree criminal sexual conduct. Count one was based on an incident in which Barthman engaged in cunnilingus and vaginal penetration of C.B. while he and C.B. were on a couch in their

home. Count two was based on an incident in which Barthman inserted a vibrator into C.B.'s vagina. Count three was based on multiple acts of abuse, including sexual penetration, committed over an extended period of time. And the remaining three counts on which Barthman was convicted (four through six) involved second-degree criminal sexual conduct, based on three separate incidents of sexual contact. Evidence presented at trial established that C.B.'s mother was sometimes present while Barthman sexually abused C.B. and participated in some of the sexual abuse.

The state sought upward sentencing departures on the basis of two aggravating factors: (1) C.B.'s particular vulnerability and (2) the particular cruelty of Barthman's abuse. On a special-verdict form, the jury answered "yes" to the following aggravating-factor questions: (1) did C.B. have a chromosomal defect; (2) did C.B. have a cognitive developmental delay; (3) did Barthman know about these vulnerabilities; (4) was C.B. subjected to multiple forms of sexual penetration; and (5) was C.B. subjected to multiple forms of sexual contact.

The district court sentenced Barthman only on counts one and two—the first two counts of first-degree criminal sexual conduct. The presumptive sentence range for first-degree criminal sexual conduct, considering Barthman's criminal-history score of zero, was 144 to 172 months and the statutory maximum sentence was 360 months. Minn. Sent. Guidelines 4.B (2012); Minn. Stat. § 609.342, subd. 2(a) (2012). Based on the jury's findings, the state requested that the district court impose upward durational departures on both counts one and two. Specifically, the state asked the district court to sentence Barthman to 360 months on count one and to a consecutive sentence of 240 months on

count two, for an aggregate sentence of 600 months. The district court agreed with the state that both counts involved particular vulnerability and particular cruelty, and it therefore imposed upward durational departures on each count. But the district court imposed a more severe sentence than that requested by the state—it sentenced Barthman to the statutory maximum sentences of 360 months on each count, to be served consecutively. Each sentence constituted a greater-than-double durational departure from the presumptive sentence. Barthman's aggregate sentence totaled 720 months, or 60 years.

Barthman appealed his convictions and sentences on various grounds. We rejected Barthman's challenges to his convictions. *State v. Barthman*, 917 N.W.2d 119, 124-28 (Minn. App. 2018) (*Barthman I*), *aff'd on other grounds*, 938 N.W.2d 257 (Minn. 2020). Regarding his sentences, we concluded that the district court did not err by imposing separate sentences on counts one and two because they arose out of separate behavioral incidents; the state provided adequate notice of its grounds for seeking aggravated sentences; and the district court did not abuse its discretion by imposing permissive consecutive sentences. *Id.* at 128-130. We further determined that the aggravating factors of particular cruelty and particular vulnerability supported upward durational departures for both counts. *Id.* at 130-31. And we concluded that "the district court properly sentenced to the statutory maximum [of 360 months] on count one." *Id.* at 132. But, regarding count two, we agreed with Barthman that the consecutive 360-month sentence was excessive. *Id.* We reasoned that "imposing a departure of more than double the guidelines sentence on a consecutive sentence for a single victim is inappropriate based on

our collective experience and our caselaw." *Id.* We therefore reversed the sentence on count two and remanded to the district court for resentencing on that count. *Id.*

Both Barthman and the state petitioned for supreme court review. *State v. Barthman*, 938 N.W.2d 257, 265 (Minn. 2020) (*Barthman II*). Barthman again challenged his sentences. *Id.* Regarding count one, the supreme court concluded that the aggravating factors of particular vulnerability and particular cruelty supported the district court's imposition of a 360-month greater-than-double durational departure. *Id.* at 271-73. Regarding count two, the supreme court agreed with this court that the greater-than-double durational departure was excessive, but it reached that conclusion on different grounds. The supreme court determined that C.B.'s particular vulnerability supported an upward durational departure on count two, but it held that the district court abused its discretion when it found that the particular-cruelty factor also supported an upward departure on that count. *Id.* at 271-72. The supreme court explained that the record did not support a finding of particular cruelty on count two because, unlike count one, count two did not involve multiple forms of sexual penetration or sexual conduct. *Id.* at 271. The supreme court then concluded that the aggravating factor of particular vulnerability, alone, did not justify a greater-than-double durational departure. *Id.* at 273-75. The supreme court accordingly remanded to the district court to resentence Barthman on count two. *Id.* at 275.

Barthman also argued to the supreme court that his permissive, consecutive sentences on counts one and two unfairly exaggerated the criminality of his conduct. *Id.* at 275 n.6. The supreme court declined to reach that issue because it did "not know what new sentence the district court [would] impose" on count two on remand. *Id.* As a result,

the supreme court effectively reserved the issue of whether Barthman's aggregate sentence was excessive for potential future consideration after his resentencing.

The district court held a resentencing hearing in August 2021. Barthman requested a *concurrent* sentence of 360 months on count two, and the state requested a *consecutive* sentence of 344 months on count two. The district court sentenced Barthman to 344 months' imprisonment on count two, to be served consecutively with the 360-month sentence on count one. Barthman's sentence on remand totals an aggregate 704 months, or 58 years and eight months.

Barthman appeals.

DECISION

Barthman argues that the district court abused its discretion on remand by imposing an aggregate sentence of 704 months because the aggregate sentence is unreasonable, inappropriate, excessive, and unjustifiably disparate. He contends that we must reverse his sentence on count two and direct the district court to impose a shorter sentence on that count.

We may review a defendant's sentence to determine whether it is "inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court." Minn. Stat. § 244.11, subd. 2(b) (2020). We review a district court's sentencing decision for an abuse of discretion. *State v. Meyers*, 869 N.W.2d 893, 900 (Minn. 2015) (reviewing length of sentencing departure); *State v. Vang*, 847 N.W.2d 248, 264 (Minn. 2014) (reviewing decision to impose consecutive sentences). "Generally, [appellate courts] will not interfere

with a district court's discretion in sentencing unless the sentence is disproportionate to the offense or unfairly exaggerates the criminality of the defendant's conduct." *Vang*, 847 N.W.2d at 264. Our review of sentencing decisions is "guided by past sentences imposed on other offenders." *State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007) (quotation omitted). "[O]ur final analysis 'must be based on our collective, collegial experience in reviewing a large number of criminal appeals from all the judicial districts.'" *Barthman I*, 917 N.W.2d at 132 (quoting *Rairdon v. State*, 557 N.W.2d 318, 327 (Minn. 1996)). Appellate courts have the discretion to modify a sentence in the interests of fairness and uniformity. *State v. Vazquez*, 330 N.W.2d 110, 112 (Minn. 1983); *see State v. Poole*, 489 N.W.2d 537, 544 (Minn. App. 1992), *aff'd*, 499 N.W.2d 31 (Minn. 1993).

Here, the supreme court affirmed Barthman's 360-month sentence on count one, and it determined that an upward durational departure on count two was appropriate based on the aggravating factor of particular vulnerability. *Barthman II*, 938 N.W.2d at 272-73. Barthman does not challenge these conclusions, nor could he. He further does not dispute that consecutive sentences on counts one and two, combined with upward durational departures, are permissive under the sentencing guidelines. *See* Minn. Sent. Guidelines cmt. 2.F.203-.204 (2012) (stating that consecutive sentences are permissible when multiple felony offenses are committed against a single victim and that consecutive sentences may be combined with upward durational departures). Instead, Barthman argues that his aggregate sentence on remand of 704 months is excessive when compared to sentences received by other offenders—an argument not addressed by the supreme court. He also

asserts that his aggregate sentence is tantamount to a life sentence because it "carries lifetime conditional release." He requests that we reverse his sentence on count two and impose a shorter sentence on that count in the range of 172 to 240 months.

Based on our collective experience and extensive review of the case law, we agree with Barthman that his aggregate sentence of 704 months for the two counts of first-degree criminal sexual conduct is excessive and exaggerates the criminality of his conduct. Barthman's aggregate sentence far exceeds those imposed in any of our prior cases involving multiple counts of first-degree criminal sexual conduct against children. For instance, in *State v. Suhon*, we upheld an aggregate sentence of 278 months, which consisted of consecutive sentences on two counts of first-degree criminal sexual conduct and one count of third-degree criminal sexual conduct, where the defendant committed an "estimated 832 acts of sexual abuse on his daughter" over a ten-year period. 742 N.W.2d 16, 19-20, 24-25 (Minn. App. 2007), *rev. denied* (Minn. Feb. 19, 2008). In *State v. Perleberg*, we upheld an aggregate sentence of 432 months, which involved three consecutive terms of 144 months based on six counts of first-degree criminal sexual conduct, where the defendant sexually abused his daughter "in many forms, over several years, on at least 250 occasions." 736 N.W.2d 703, 704-07 (Minn. App. 2007), *rev. denied* (Minn. Oct. 16, 2007). Another example is *State v. Schauer*, in which the defendant sexually abused his stepdaughter two to three times per week while she was between the ages of 15 and 18. No. A13-0500, 2014 WL 6608790, at *1 (Minn. App. Nov. 24, 2014).[1]

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[1] We note that the nonprecedential cases cited in this opinion are not binding authority. We cite them only for their persuasive value. *See City of Saint Paul v. Eldredge*, 788 N.W.2d

Schauer was convicted of two counts each of first-degree criminal sexual conduct, second-degree criminal sexual conduct, and third-degree criminal sexual conduct, and he was sentenced to consecutive sentences of 312 months (an upward durational departure) and 48 months, totaling an aggregate sentence of 360 months. *Id.* at *2.

We have also reversed a sentence of similar length to Barthman's. In *State v. Kellogg*, the defendant sexually abused a child in his neighborhood on numerous occasions. No. A03-16, 2004 WL 422703, at *4 (Minn. App. Mar. 9, 2004), *rev. denied* (Minn. May 18, 2004). The district court imposed an aggregate sentence of 717 months for 17 separate behavioral incidents, including consecutive sentences on three counts of first-degree criminal sexual conduct, three counts of second-degree criminal sexual conduct, ten counts of use of a minor in a sexual performance, and one count of possession of child pornography. *Id.* at *4 & n.1. On appeal, we concluded that Kellogg's aggregate sentence was excessive and imposed a modified aggregate sentence of 537 months. *Id.* at *5.

Cases involving both findings of aggravating factors and upward durational departures are particularly instructive in this case. For example, the defendant in *State v. Alejo-Rubio* sexually abused his stepdaughter on more than 25 occasions while she was between the ages of five or six and nine years old. No. A16-0689, 2017 WL 1208754, at *1 (Minn. App. Apr. 3, 2017), *rev. denied* (Minn. June 20, 2017). The abuse involved

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522, 526-27 (Minn. App. 2010) (noting that nonprecedential opinions of the court of appeals are not binding authority but may have persuasive value), *aff'd*, 800 N.W.2d 643 (Minn. 2011).

various types of penetration and resulted in the victim testing positive for a sexually transmitted disease. *Id.* at *1, *3. The jury found Alejo-Rubio guilty of eight counts of first-degree criminal sexual conduct. *Id.* at *1. Based on a jury finding, the district court determined that count one involved multiple forms of penetration. *Id.* at *2. On appeal, we upheld Alejo-Rubio's 420-month aggregate sentence, which consisted of an upward durational departure of 276 months on count one and a consecutive 144-month sentence on count two. *Id.* at *1, *3.

In addition, in *State v. Senske*, the defendant sexually abused his son and stepdaughter. 692 N.W.2d 743, 745 (Minn. App. 2005), *rev. denied* (Minn. May 17, 2005). The abuse involved penetration and other forms of sexual contact on multiple occasions. *Id.* Senske pleaded guilty to two counts of first-degree criminal sexual conduct. *Id.* The district court found several aggravating factors, including victim vulnerability, planning and manipulation, threats, abuse of a position of trust, and multiple incidents of abuse. *Id.* It imposed two consecutive sentences of 216 months, both upward durational departures, totaling 432 months. *Id.* On appeal, we reversed the upward durational departures because the district court made factual findings on the aggravating factors without affording the defendant his rights under *Blakely v. Washington*, 542 U.S. 296 (2004), but we affirmed the district court's imposition of consecutive sentences. *Id.* at 746, 749.

These examples illustrate the disparity between Barthman's aggregate sentence and the sentences imposed in other first-degree criminal-sexual-conduct cases against children. They show a range of aggregate sentences in such cases between 278 months and 537 months. In each of these cases, the defendant was convicted of egregious sexual abuse

of one or more children on numerous occasions, often over many years. Yet, in each case, the defendant ultimately received an aggregate sentence much shorter than Barthman's 704-month aggregate sentence.

The state urges us to uphold Barthman's aggregate sentence, arguing that our prior cases are not comparable to this one because many of those cases did not involve aggravated circumstances and upward durational departures. But our review of the case law demonstrates that Barthman's aggregate sentence is disproportionate even when compared to cases in which the district court imposed upward durational departures based on aggravating factors. *See, e.g.*, *Senske*, 692 N.W.2d at 745-46 (discussing that district court imposed upward durational departures on two counts based on several aggravating factors, for an aggregate sentence of 432 months, but reversing based on *Blakely* violation); *Alejo-Rubio*, 2017 WL 1208754, at *1-2 (involving 420-month aggregate sentence and one aggravating factor); *see also State v. Mitchell*, No. A21-0092, 2021 WL 4944514, at *1 (Minn. App. Oct. 25, 2021) (discussing that defendant was convicted of two counts of first-degree criminal sexual conduct against a child and sentenced to an upward durational departure of 288 months on count one, based on one aggravating factor, and a *concurrent* 216 months on count two), *rev. denied* (Minn. Jan. 18, 2022). Moreover, the state has not identified any case in which an aggregate sentence based on multiple counts of first-degree criminal sexual conduct came close to 704 months. Of the cases cited by both parties, the longest aggregate sentence is 537 months. *See Kellogg*, 2004 WL 422703, at *5.

We recognize that Barthman's actions against his daughter were horrific and warrant a harsh sentence as recommended by the supreme court. Nonetheless, the

aggregate 704-month sentence imposed by the district court was excessive when compared with other similar cases and exaggerates the criminality of Barthman's conduct. Accordingly, we reverse Barthman's 344-month sentence on count two and remand to the district court to impose a modified sentence of up to 240 months on that count, to be served consecutively with Barthman's 360-month sentence on count one, for an aggregate sentence no longer than 600 months.[2]

Reversed and remanded.

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[2] We recognize that a 240-month sentence on count two constitutes a shorter sentence on that count than we instructed the district court to impose in *Barthman I*. There, we directed the district court to resentence Barthman on count two "within the range of 288 to 344 months." *Barthman I*, 917 N.W.2d at 132. But our determination in that case was based in part on our conclusion that two aggravating factors supported count two. *Id.* at 130-31. Because the supreme court subsequently concluded that only one aggravating factor supported count two, *Barthman II*, 938 N.W.2d at 271-72, we conclude that our prior decision does not provide sufficient guidance on the appropriate sentence for count two.