STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1341

State of Minnesota,
Respondent,

vs.

Bjorn Bolton Iverson,
Appellant.

Filed September 6, 2022
Affirmed
Hooten, Judge[*]

Hennepin County District Court
File No. 27-CR-20-6637

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

Michael O. Freeman, Hennepin County Attorney, Adam E. Petras, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Amy Lawler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Larson, Judge; and Hooten, Judge.

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

NONPRECEDENTIAL OPINION

HOOTEN, Judge

Appellant challenges his conviction and sentencing on multiple counts of possession of child pornography, arguing that the district court erred by imposing separate sentences for offenses committed on the same day and by imposing upward durational sentencing departures for two of the offenses. We affirm.

FACTS

This matter involves appellant Bjorn Bolton Iverson's plea of guilty to and conviction on nine counts of possession of pornographic works involving a minor in violation of Minn. Stat. § 617.247, subd. 4(a) (2014). In October or November of 2014, Iverson began communicating with the victim via an online dating application. The victim initially told Iverson that she was 18 years old; she was in fact 17 years old. The communication between Iverson and the victim involved "texting regarding sexual activities." On multiple occasions, Iverson requested and was sent naked images of the victim. Iverson also, on at least three separate occasions, met with the victim in person and recorded himself and the victim having sex.

The victim turned 18 years old in February 2015. Four and a half years later, on September 26, 2019, police executed a search warrant on Iverson's home and seized his electronics, including his cell phone and a hard drive. On Iverson's cell phone they found nude images of the victim which had apparently been sent by the victim to Iverson as well as accompanying text conversations; on a hard drive they found pornographic videos of

Iverson and the victim. Data associated with the files indicated that they had been created when the victim was 17 years old.

In March 2020, Iverson was charged with nine counts of possession of child pornography. An amended complaint was filed in April 2021, which included five additional counts of the same offense. Around the same time, Iverson was charged with multiple counts of criminal sexual conduct and possession of child pornography in three other criminal proceedings involving other underage victims.

Iverson pleaded guilty to nine counts of possession of child pornography pursuant to a global plea agreement with the state. Counts 1-6 related to nude images sent by the victim to Iverson between November 1 and November 27, 2014, while counts 7-9 related to three separate videos of the victim and Iverson engaging in sexual intercourse. The state agreed to dismiss the other charges in this matter and dismiss all the charges in the other matters. The parties additionally agreed that counts 1-6 would be "*Hernandized*,"[1] resulting in a presumptive 60-month sentence on the final count, and that the state could ask for consecutive sentences on counts 7-9. Iverson further waived his right to have a jury determine the existence of aggravating factors supporting an upward durational departure

[1] "*Hernandize*" is "the unofficial term for the process described in section 2.B.1.e [of the sentencing guidelines] of counting criminal history when multiple offenses are sentenced on the same day before the same court." Minn. Sent. Guidelines, 1.B.(9) (2014); *see also State v. Hernandez*, 311 N.W.2d 478, 480-81 (Minn. 1981). Section 2.B.1.e of the guidelines provides, "Multiple offenses sentenced at the same time before the same court must be sentenced in the order in which they occurred. As each offense is sentenced, include it in the criminal history on the next offense to be sentenced."

and agreed to allow the district court to make that determination based on stipulated facts and exhibits.

On July 14, 2021, the district court issued an 11-page order in which it set forth the applicable facts and concluded that "[t]he law supports an aggravated sentence [on counts 7 through 9] on the ground that [Iverson] created the child pornography." The district court ordered concurrent sentences for counts 1-6 and consecutive sentences for counts 7-9, including upward durational departures on counts 8 and 9, resulting in a total sentence of 126 months' confinement.

Iverson appeals.

DECISION

"We afford the [district] court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion." *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014) (quotation omitted). On appeal, Iverson contends that the district court abused its discretion (1) by imposing a sentence on each convicted count because they were not all separate behavioral incidents, and (2) by imposing upward durational departures on counts 8 and 9. Each argument is examined in turn.

I. The district court did not err by imposing sentences for each charged count.

We first consider whether the district court erred by determining that each charged count constituted a separate behavioral incident. With limited exceptions, "if 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 (2014). Thus, the law "prohibits multiple sentences, even concurrent sentences, for two or more offenses that

were committed as part of a single behavioral incident." *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016).

The state had the burden of proving, by a preponderance of the evidence, that Iverson's offenses were not part of a single behavioral incident; until the state "provides evidence that [the defendant]'s acts were separate and distinct criminal offenses," the district court must "assume[] that they were part of a single behavioral act." *State v. Johnson*, 653 N.W.2d 646, 652 (Minn. App. 2002). "Under section 609.035, the factors to be considered in determining whether multiple offenses constitute a single behavioral act are time, place, and whether the offenses were motivated by a desire to obtain a single criminal objective." *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997); *see also Bakken*, 883 N.W.2d at 270. Whether acts were part of a single behavioral incident is a mixed question of law and fact; and we review the district court's findings of fact for clear error and its application of the law to those facts de novo. *Id.* at 270.

Regarding counts 1 and 2, the district court found that Iverson's plea colloquy established the following finding of fact: "On November 1, 2014, the victim texted defendant a picture of her bare breasts. (Count 1.) *At a different time that day*, the victim texted defendant a picture of her exposed vagina. (Count 2.)" (Emphasis added). The district court further found that "[t]he photographs . . . were distinct and were each sent individually." To establish the factual basis for his plea, Iverson was questioned by his attorney regarding these two counts:

> Q: Is it true that, on November the 1st of 2014, after conversation between the two of you about sex or sexually-

> related matters, you—or she sent to you a pictorial image via text message?
> A: Yes.
> . . . .
>
> Q: And it wasn't any fake breast; it was her breast; is that correct?
> A: Yes.
>
> Q: Is it true that, on that same date—November 1 of 2014—she sent you a separate image of her—meaning [the victim]'s—exposed vagina?
> A: Yes.
>
> Q: And it was, in fact, her real vagina; it wasn't something that was obtained off the internet; correct?
> A: Correct.

Later, in response to follow-up questioning by the state, Iverson further agreed that "every image was sent separately."

At the outset, we note that Iverson's colloquy is relatively lacking in detail regarding the time, place, and circumstances of these two offenses; all that is established is that both offenses took place on November 1, 2014, and that the images were "separate." The state bore the burden of establishing the facts regarding the circumstances of these events. *Id.* On this record, the state failed to establish whether the two offenses in question were separated temporally or spatially, and if so by how much.

However, "[d]etermining whether multiple offenses are part of a single behavioral incident is not a 'mechanical' exercise." *Id.* In this matter, while the record does not speak to the time and place of each individual charge, the facts demonstrate that the conduct itself was substantially different. Whereas count 1 involved a picture of the victim's breasts, count 2 involved a picture of the victim's vagina; while the content is similar, count 2 was

a clear escalation of the possession behavior that occurred separately from the behavior for count 1. Additionally, as far as whether Iverson was "motivated by . . . a single criminal objective," *Soto*, 562 N.W.2d at 304, the supreme court in *Bakken* noted that an offender may either have "a *single* criminal objective" or "merely the *same* criminal objective," 883 N.W.2d at 271 n.5. While Iverson was clearly motivated by "the same criminal objective," the record reflects that the two images, which were sent "separately," were substantially different. Moreover, both parties and the district court treated the counts as separate during Iverson's colloquy, and Iverson specifically agreed that the district court could "*Hernandize"* the two charges, effectively conceding that they were separate behavioral incidents that could both be sentenced. On these facts, we conclude the district court did not clearly err by finding that the two charges were separate behavioral incidents and did not abuse its discretion by imposing sentences on both counts 1 and 2.

Iverson's arguments are similarly unpersuasive with regards to counts 3 and 8. Regarding count 3, the district court found that Iverson's plea colloquy established the following facts: "On November 14, 2014, the victim texted defendant a picture of her bare breasts." Regarding count 8, the district court found that: "Later in the day on November 14, 2014, the victim met defendant at defendant's house for sex. Defendant again set up cameras and tripods to record their sexual activities, including a 7:44 minute video." During his colloquy, Iverson was questioned by his attorney regarding count 3:

> Q: And is it true that, on November 14 [sic], [the victim] sent you another picture, via text message, of—an image of her exposed breasts?
> A: Yes.

The same questioning occurred for count 8:

> Q: And it's true that you arranged a second meeting with her, this time at your house—and this was in Hennepin County, in the State of Minnesota—to have sexual intercourse with her?
> A: Yes.
>
> Q: And, again, I believe this occurred on November 14 of 2014. [Opposing counsel] can correct me if I'm wrong. But, in any event, [the victim] came to your residence; is that correct?
> A: Yes.
>
> Q: At the time she came there, you knew she was 17?
> A: Yes.
>
> Q: And you did engage in consensual sexual intercourse with her?
> A: Yes.
>
> Q: And you did video record that sex?
> A: Yes.
>
> Q: And she was aware of the video; correct?
> A: Yes.

Implicit in these statements is the fact that Iverson was not in the presence of the victim at the time the victim sent him the image on November 14, but he was in her presence at the time he filmed them having sexual intercourse. The record therefore establishes that the image for count 3 was sent at one time on the 14th, and the video for count 8 was recorded at another time on the 14th. Thus, the factors of time and place support a finding that counts 3 and 8 were separate behavioral incidents. *See Soto*, 562 N.W.2d at 304. Additionally, as with counts 1 and 2, while counts 3 and 8 were motivated by "the *same* criminal objective," they were not motivated by "a *single* criminal objective." *Bakken*, 883 N.W.2d at 271 n.5. Thus, we conclude that the district court did not clearly

err by finding that the two charges were separate behavioral incidents and did not abuse its discretion by imposing sentences on both counts 3 and 8.

II. The district court did not abuse its discretion by imposing upward durational departures on counts eight and nine.

Iverson also argues that the district court abused its discretion by imposing upward durational departures on counts 8 and 9, which related to two of the three videos created by Iverson. "[A] sentencing court can exercise its discretion to depart from the guidelines *only if* aggravating or mitigating circumstances are present and those circumstances provide a substantial and compelling reason not to impose a guidelines sentence." *Soto*, 855 N.W.2d at 308 (quotations and citations omitted). "Substantial and compelling circumstances are factual circumstances that significantly distinguish the case, making it atypical." *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010) (quotation omitted), *rev. denied*, (Minn. July 20, 2010).

Generally, "[w]e review a district court's decision to depart from the presumptive guidelines sentence for an abuse of discretion. A district court abuses its discretion when its reasons for departure are legally impermissible and insufficient evidence in the record justifies the departure." *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (citation omitted). In the context of "reviewing whether a particular reason for an upward departure is permissible," appellate courts must first "determine *as a matter of law* that the district court has identified proper grounds for justifying a challenged departure." *Dillon*, 781 N.W.2d at 595 (emphasis added).

The district court concluded that: "The state has proven beyond a reasonable doubt that [Iverson] created the child pornography that is the subject of Counts 7 through 9" and that "[t]he law supports an aggravated sentence on the ground that defendant created the child pornography." The district court summarized its reasoning:

> Defendant's creation of the videos—his treating the victim as his sexual slave, unworthy of respect, calling her names, dehumanizing her—caused obvious physical pain and untold psychological harm to the child. These facts make his carrying around of the finished product even more abhorrent . . . Someone actually caused the harm—the pain and shame—visible in the videos defendant possessed, and that person was defendant himself.

The district court determined that Iverson's creation of the videos was a "substantial and compelling circumstance" justifying an upward durational departure on counts 8 and 9.

The content of the videos in question is not generally disputed, and Iverson does not dispute the district court's general factual findings as to what the videos show. Rather, Iverson argues he "did not commit counts 8 and 9 in a particularly serious way." Specifically, he argues that while "[i]n many cases involving child pornography, the sexual act depicted in the picture or video is itself a crime, . . . that is not the case here," as the victim was 17 years old and able to consent to the acts themselves. He also argues that "in many, if not most, cases, these images are shared widely, and disseminated to other adults electronically," whereas here "the images were not shared or disseminated."

Caselaw has recognized that "[s]ubjecting the victim to outrageously gross and vile physical abuse" is "a sufficiently severe aggravating circumstance" to warrant an upward durational departure, as is the fact that an offense was committed in an "extraordinarily

brutal" manner. *See, e.g., Dillon*, 781 N.W.2d at 597-98; *see also State v. Herberg*, 324 N.W.2d 346, 350 (Minn. 1982); *State v. Van Gorden*, 326 N.W.2d 633, 633-64 (Minn. 1982). In this case, the district court opined that while most child-pornography-possession charges merely involve possession of images, Iverson, in creating the videos in question, perpetrated actions that were at least categorically equivalent to the actions in the above cases. Reasonable minds could perhaps disagree as to whether the acts described in the district court's above-quoted reasoning rose to the level of "gross and vile physical abuse" or "extraordinarily brutal" conduct. However, insofar as this court's de novo review is concerned, where this court must determine whether "the district court has identified proper grounds" as a matter of law, the district court's focus on the perceived violence and brutality of Iverson's actions identifies a proper legal ground for departure. *See Dillon*, 781 N.W.2d at 595.

Having established that the district court had a proper legal ground for departure, "we review its decision *whether* to depart for an abuse of discretion." *See id.* This review is highly deferential. *See id.* at 595-96 ("[W]e have found no case in which this court or the supreme court has overturned a district court's decision *to* depart . . . when adequate departure grounds exist."). Given that the departure in this matter was a double-upward durational departure, and a sentence that falls between the presumptive sentence and twice the presumptive sentence, "invite[s] the greatest deference," *see id.* at 596, we discern no abuse of discretion in the district court's sentencing determinations.

In sum, the district court did not abuse its discretion in imposing an upward durational departure on counts 8 and 9.

Affirmed.