STATE OF MINNESOTA

IN SUPREME COURT

A17-1191

Court of Appeals

Hudson, J.
Concurring in part, dissenting in part, McKeig, J.,
Gildea, C.J., Lillehaug, J.

State of Minnesota,

Respondent/Cross-Appellant,

vs.

Filed: February 5, 2020
Office of Appellate Courts

Brian Arthur Barthman,

Appellant/Cross-Respondent.

Keith Ellison, Attorney General, Karen B. McGillic, Assistant Attorney General, Saint Paul, Minnesota, and

Mark S. Rubin, Saint Louis County Attorney, Duluth, Minnesota, for respondent/cross-appellant.

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, Saint Paul, Minnesota, for appellant/cross-respondent.

S Y L L A B U S

1. The State demonstrated by a preponderance of the evidence that two counts of first-degree criminal sexual conduct were not part of the same behavioral incident because the two acts did not occur at substantially the same time and the defendant did not have the same criminal objective in mind for both incidents.

2. The defendant was not prejudiced by the absence of a summary statement of the factual basis supporting the aggravating factors listed in the State's notice of intent to seek an aggravated sentence.

3. The district court did not abuse its discretion when it imposed a greater-than-double durational departure in sentencing the defendant on count one, but it did abuse its discretion when it imposed a greater-than-double durational departure in sentencing the defendant on count two.

Affirmed.

O P I N I O N

HUDSON, Justice.

This appeal involves appellant/cross-respondent Brian Barthman's 360-month, consecutive sentences for two convictions for first-degree criminal sexual conduct. The district court imposed these greater-than-double durational departures on the sentences for counts one and two based on the aggravating factors of particular cruelty and the particular vulnerability of the victim. The court of appeals affirmed in part, concluding that the district court could impose two sentences, that the State's notice of intent to seek an aggravated sentence complied with Minn. R. Crim. P. 7.03, that severe aggravating circumstances existed for both counts one and two, and that the district court properly imposed a greater-than-double durational departure on count one. But, the court of appeals reversed Barthman's sentence on count two, concluding that imposing a greater-than-double durational departure on a consecutive sentence when both counts involved a single

victim unduly exaggerated the criminality of Barthman's conduct. The court of appeals remanded to the district court for resentencing on count two.

We hold that the district court did not err by sentencing Barthman on two convictions for first-degree criminal sexual conduct, that Barthman was not prejudiced when respondent/cross-appellant the State of Minnesota did not include a summary statement of the factual basis supporting the aggravating factors listed in its notice of intent to seek an aggravated sentence, and that severe aggravating circumstances justified a greater-than-double durational departure on one of Barthman's sentences for first-degree criminal sexual conduct, count one. Although we agree with the court of appeals that Barthman's sentence on count two should be reversed and that a remand for resentencing on that count is necessary, we do so on different grounds. We hold that the district court abused its discretion by imposing a greater-than-double durational departure on count two because this is not an extremely rare case involving severe aggravating circumstances. We therefore affirm the decision of the court of appeals for the reasons explained here.

FACTS

Barthman is a 49-year-old father of three girls. Following a jury trial, he was convicted of six counts of criminal sexual conduct for sexually abusing C.B., his oldest daughter, when she was 10 to 12 years old.

The evidence presented at trial established that C.B.'s mother, Irene Barthman, and all the children have a rare genetic mutation, called K1F1, which affects their cognitive development. This mutation is still being studied, so it is not clear what effect the mutation has on the Barthman family. But it is believed to cause C.B.'s speech delay and to affect

her judgment and ability to keep herself safe. C.B. has an IQ of 66, which is below the average range of 80 to 120. C.B. qualified for special education services and had an Individualized Education Plan at the time that Barthman's abuse came to light.

On December 15, 2015, C.B. reported to the counselor at her school that she was not fed regularly and that she was often forced to wear dirty, smelly, ill-fitting clothes. The counselor reported these statements to child protection, and S.A., a caseworker, interviewed C.B. In the recorded interview, C.B. reported that her father "uses his violence on" C.B., her sisters, and her mother. She also reported that her mother does not wash clothes or clean food off the floor, and that C.B. often does not have food to eat. C.B. said that she was "ready just to move on" but was "really, really terrified to do it." C.B. asked S.A. not to tell her parents that she made the report and stated that her father had said that things would change the last time that a report was made, but nothing changed.

Three days later, C.B. reported that her father "needs help" because he touched her private parts. That same day, S.A. called First Witness to have a forensic interview conducted. In this recorded interview, C.B. described her mother's inability to care for the children. C.B. also detailed how her father physically abused all three of his children. Next, C.B. told the interviewer, "[s]ometimes, dad touches me." She marked on a drawing, and demonstrated on dolls, some of the places her father had hit or touched her, including on her breasts and genitals, and described some incidents when he touched her genitals. C.B. said she asked her father to stop and that "sometimes he does; sometimes, you know, he doesn't."

C.B. then described what was charged as count one, the couch incident. She told the interviewer that her father asked her if she wanted "to have some x," then pushed her onto the couch and took off her pants after she said "no." She used dolls to show the interviewer that her father had "lick[ed]" her vagina and that his penis had "touched . . . inside" her vagina. The interviewer asked how this incident ended, and C.B. told her that she stood up, told her father to stop, and went to her room. C.B. said that her mother and sisters were sleeping when this happened.

At trial, C.B. testified about the couch incident. She said she was sitting on her father's lap, when he started to touch her "with his bad part," which she clarified was his penis. C.B. then corrected herself and said that they "were actually laying down." She said she "was laying down first, and then he laid on top of [her], and then he put his penis in [her] private part." C.B. said that her mother was sleeping, and her sisters were upstairs playing while this happened. When she was asked how it ended, C.B. said she and her father both made "weird sounds."

On January 25, 2016, C.B. disclosed to her therapist that her mother had participated with her father in the sexual abuse. That same day, S.A. arranged for a second First Witness interview. In this recorded interview, C.B. described a time when her father put his "private spot" on her face. She said this happened in her father's bedroom. C.B. also said her father put his hands down her pants and was "massaging" her when her mother was in a rocking chair in the same room. Her mother initially told them to stop, but Barthman ignored her. Her mother got up, locked the door, then returned to the rocking chair and began masturbating. C.B. described another time when her mother laid on the bed between C.B.

and Barthman and touched Barthman's penis while putting her hands down C.B.'s underpants.

On February 4, 2016, C.B. disclosed that a toy that vibrated had been used during the sexual abuse. She testified at trial that her father put this toy inside her vagina but did not describe any of the circumstances surrounding his use of the sex toy.

Irene testified at the trial about her children's genetic disorders and Barthman's abuse. Irene has borderline personality disorder, major depression, and generalized anxiety disorder. She said that Barthman "knew that all the kids had disabilities" and that he attended appointments with the geneticist that they were seeing. Irene admitted to pleading guilty to first-degree criminal sexual conduct for her role in C.B.'s sexual abuse. She said that, on one occasion, Irene, C.B., and Barthman were together in the parents' bedroom, and Barthman took Irene's hand and guided it between C.B.'s legs. According to Irene, Barthman was verbally and physically abusive to her, and she followed Barthman's instructions and allowed him to control her hand because she was afraid of him. Irene also testified about a second incident, when the three of them were sitting on the couch, with C.B. between her parents. Barthman started touching C.B.'s vaginal area. When Irene noticed, Barthman grabbed Irene's hand and inserted it between C.B.'s labia. Barthman masturbated both times, while guiding Irene's hand.

At the close of testimony, the district court granted the State's motion to amend the complaint. The amended complaint contained six charges, some of which contained descriptions next to the count. It alleged three counts of first-degree criminal sexual conduct. Count one alleged a violation of Minn. Stat. § 609.342, subd. 1(a) (2018), for the

"couch" incident; count two alleged a violation of Minn. Stat. § 609.342, subd. 1(a), for the "vibrator" incident; and count three alleged a violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2018), for multiple acts of sexual penetration committed over an extended period of time. The amended complaint also alleged three counts of second-degree criminal sexual conduct. Count four alleged a violation of Minn. Stat. § 609.343, subd. 1(a) (2018), for the "all three in bed" incident; counts five and six alleged violations of Minn. Stat. § 609.343, subd. 1(a), for the "Mom in rocker" incident and a separate, sixth incident.

The jury found Barthman guilty of all six charges. In a special verdict form, it also answered "yes" to the following questions: (1) "[d]id [C.B.] have a chromosomal defect;" (2) "[d]id [C.B.] have a cognitive developmental delay;" (3) "[d]id the Defendant know about these vulnerabilities;" (4) "[w]as [C.B.] subjected to multiple forms of sexual penetration"; and (5) "[w]as [C.B.] subjected to multiple forms of sexual contact."

The district court imposed sentences on two first-degree criminal sexual conduct convictions: count one, the couch incident, and count two, the vibrator incident. Barthman's criminal-history score was zero, the presumptive sentencing range for first-degree criminal sexual conduct was 144–172 months, and the statutory maximum sentence was 360 months. *See* Minn. Sent. Guidelines 4.B; Minn. Stat. § 609.342, subd. 2(a) (2018). The district court imposed greater-than-double durational departures on each sentence, resulting in two sentences of 360 months. The district court also found that permissive, consecutive sentencing was appropriate.

In its sentencing memo, the district court concluded that based on the jury's factual findings, C.B. was particularly vulnerable and had been treated with particular cruelty.

Citing C.B.'s developmental delays, which "compounded her already limited ability . . . to escape or seek help," the district court stated "that this case is essentially a textbook example of an individual preying on a victim due to her vulnerability resulting from developmental delays." Regarding particular cruelty, the district court explained that Barthman's "repeated and extended abuse of [C.B.] demonstrates a particular cruelty." It pointed to the multiple forms of penetration over a period of time, and stated that "taken in light of [C.B.'s] clear mental vulnerability," Barthman acted with particular cruelty. The district court noted that the existence of C.B.'s particular vulnerability, alone, was sufficient to justify an upward durational departure.

The court of appeals affirmed Barthman's sentence in part and reversed it in part. *State v. Barthman*, 917 N.W.2d 119, 123 (Minn. App. 2018). It concluded that the district court did not err by imposing a sentence on counts one and two, that the State's notice of intent to seek an aggravated sentence complied with Minn. R. Crim. P. 7.03, that the aggravating factors of C.B.'s particular vulnerability and Barthman's particular cruelty supported an upward durational departure for both counts, and that severe aggravating factors existed for both counts. *Id.* at 128–32. But the court of appeals determined that Barthman's "720-month cumulative sentence here is excessive, beyond the scope of the evidence presented, and unduly exaggerates [Barthman's] criminal conduct in light of similar cases." *Id.* at 132. In particular, the court of appeals held that the district court "properly sentenced Barthman to the statutory maximum on count one," and that the district court had discretion to durationally depart on count two, but that "imposing a departure of more than double the guidelines sentence on a consecutive sentence for a

single victim is inappropriate based on [its] collective experience and our caselaw." *Id.* The court of appeals reversed Barthman's sentence on count two and remanded for resentencing. *Id.*

We granted Barthman's petition for review with respect to the sentencing issues he raised, and we granted the State's petition for review on the legality of Barthman's sentence on count two.

ANALYSIS

We are presented with three questions. First, whether the district court erred by imposing a sentence on both counts one and two. Second, whether the State's notice of its intent to seek upward durational departures at sentencing complied with Minn. R. Crim. P. 7.03. Third, whether the district court abused its discretion when it found that severe aggravating factors were present that justified a greater-than-double upward durational departure on both counts.

I.

We begin with whether Barthman may be sentenced for both counts one and two. Barthman argues that the State did not show by a preponderance of evidence that the two incidents that made up counts one and two were not part of the same behavioral incident. As a result, he contends that the district court violated Minnesota Statutes § 609.035 (2018) by sentencing him on both counts.[1]

[1] The State argues for the first time that Barthman waived this argument. It is well-settled that a defendant does not forfeit a claim of double punishment under section 609.035 by failing to raise it in the district court. *See, e.g.*, *Ture v. State*,

A.

With exceptions not relevant here, "[i]f a person's conduct constitutes more than one offense . . . , the person may be punished for only one of the offenses." Minn. Stat. § 609.035. As a result, multiple sentences for multiple offenses committed as part of the same behavioral incident are prohibited. *See State v. Ferguson*, 808 N.W.2d 586, 589 (Minn. 2012). "Whether a defendant's offenses occurred as part of a single course of conduct is a mixed question of law and fact." *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014). We review the district court's finding of fact under a clearly erroneous standard, and its application of the law to those facts de novo. *Id.*

To determine whether two or more offenses were committed during a single behavioral incident, we examine two factors: (1) whether "the offenses occurred at substantially the same time and place," *Jones*, 848 N.W.2d at 533, and (2) whether the conduct "was motivated by an effort to obtain a single criminal objective," *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011) (citation omitted) (internal quotation marks omitted). When a district court imposes multiple sentences, "[t]he State bears the burden of proving, by a preponderance of the evidence, that a defendant's offenses were not part of a single behavioral incident." *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016).

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353 N.W.2d 518, 523 (Minn. 1984) (citing multiple cases for the proposition that "the prohibition against double punishment in section 609.035 cannot be [forfeited]"). The State argues that Barthman did more than simply forfeit an available argument. Rather, he "intentionally relinquished a known right by taking the opposite position in the district court." We need not reach this question of waiver because the record supports the district court's decision.

B.

Regarding the first factor, the parties do not dispute that each of the offenses happened in the same place—the Barthman family home. Our inquiry, therefore, focuses on whether the incidents occurred at substantially the same time. Barthman argues that the State did not prove that the incidents occurred at separate times. The State contends that C.B.'s descriptions of the couch and vibrator incidents at trial and in the forensic interviews demonstrate that these two assaults were two separate incidents.

Two penetration incidents are at issue here. The first, involving Barthman's penis, is described as the "couch" incident. The second, involving a vibrator, is described as the "vibrator" incident. C.B., like many children in her situation, was unable to pinpoint the exact dates and times of each instance of sexual abuse. *See State v. Rud*, 359 N.W.2d 573, 578 n.1 (Minn. 1984) (noting the difficulty child victims have in naming precise dates of offenses).

C.B. first described what became known as the couch incident during her first forensic interview. She told the interviewer that her father asked her if she wanted "to have some x," then, after she said no, he pushed her onto the couch and took off her pants. She told the interviewer that her father had "lick[ed]" her vagina, and that his penis had "touched . . . inside" her vagina. The interviewer asked how it ended, and C.B. told her that she stood up, told her father to stop, and went to her room. She did not mention a sex toy or vibrator during that interview.

During trial, C.B. described the couch and vibrator incidents separately. Regarding the couch incident, C.B. described a time when she was sitting on her father's lap, and he

started to touch her "with his bad part," which she clarified was his penis. She said she "was laying down first, and then he laid on top of [her], and then he put his penis in [her] private part." When she was asked how it ended, C.B. said she and her father both made "weird sounds." Once again, C.B. did not mention a sex toy while describing the couch incident.

After C.B. described multiple other instances of her father touching her private parts with his hand and penis, the prosecutor asked if her father "put anything else inside of [her] private spot other than his penis." C.B. said "yes," and the prosecutor asked "what was the next thing that he used . . . other than his penis?" C.B. said that he used a "bad toy," also described as a "sex toy" and a "wrong toy," on her "private spot."

This evidence shows that C.B. was describing separate incidents. First, in both the forensic interview and at trial, C.B. explained Barthman's conduct on the couch without mentioning a sex toy. The questioners both asked C.B. how the couch incident ended, and she described how the sexual contact finished. Her description of the couch incident, without any mention of a sex toy being used, shows that its use occurred in a separate incident. Second, at trial, after describing the couch incident, C.B. described multiple other acts by her father, including the incident with a sex toy. This testimony provides further support for a finding that the couch incident and the sex toy incident did not occur at the same time.

Because C.B.'s undisputed testimony shows that the vibrator and couch incidents occurred at separate times, we hold that the evidence supports the district court's finding that these incidents did not occur at "substantially" the same time.

C.

We also consider whether Barthman's offenses were committed to obtain a single criminal objective. Barthman argues that his acts were committed to achieve a single criminal objective: sexual gratification. We have repeatedly stated, however, that "[b]road statements of criminal purpose do not unify separate acts into a single course of conduct." *Jones*, 848 N.W.2d at 533. Instead, we ask "whether all of the acts performed were necessary to or incidental to the commission of a single crime and motivated by an intent to commit that crime." *State v. Krampotich*, 163 N.W.2d 772, 776 (Minn. 1968).

In *Bakken*, the defendant challenged his convictions for multiple counts of possession of child pornography as violating section 609.035 because each act of possession was intended to achieve the single criminal objective of satisfying sexual urges. 883 N.W.2d at 271. We rejected that argument because "Bakken's offenses were not in furtherance of, or even incidental to, the successful completion of any of his other offenses." *Id.* The same is true here. Barthman's sexual acts that formed the basis of the couch incident were not in furtherance of, or incidental to, his successful completion of the other sexual assault involving the sex toy. And just as we explained in *Bakken*, even assuming that Barthman committed each sexual act "to satisfy his sexual urges, the mere fact that he committed multiple crimes over time for the *same* criminal objective does not mean he committed those crimes to attain a *single* criminal objective." *Id.* Barthman did not have a single criminal objective when he committed counts one and two.

Based on our analysis, we hold that the district court did not err in concluding that counts one and two were not part of a single behavioral incident.

II.

Next, we address whether the State provided Barthman sufficient notice of the grounds on which it sought a departure from the sentencing guidelines. Barthman argues that the State's notice of its grounds for departure under Minn. R. Crim. P. 7.03 was deficient because it failed to include a summary of the factual basis for the departure. We agree, but conclude that the error does not require reversal.

A.

A district court departing from the guidelines must articulate "substantial and compelling" circumstances justifying the departure. Minn. Sent. Guidelines 2.D.1. There is a "nonexclusive list of" aggravating "factors that may be used as reasons for departure." Minn. Sent. Guidelines 2.D.3; *see also* Minn. Stat. § 244.10, subd. 5a (2018). Other than a prior conviction, the jury must determine any additional facts, beyond those reflected in the jury verdict or admitted by the defendant, that a district court relies on when it determines that an aggravating factor is present and imposes an upward sentencing departure. *State v. Shattuck*, 704 N.W.2d 131, 141 (Minn. 2005).

The State must "provide[] reasonable notice to the defendant . . . prior to sentencing of the factors on which the state intends to rely" when seeking a departure from the sentencing guidelines. Minn. Stat. § 244.10, subd. 4 (2018). The rules of criminal procedure require the following:

> [t]he prosecutor must give written notice at least 7 days before the Omnibus Hearing of intent to seek an aggravated sentence. Notice may be given later if permitted by the court on good cause and on conditions that will not unfairly prejudice the defendant. The notice must include the grounds or

> statutes relied upon *and a summary statement of the factual basis* supporting the aggravated sentence.

Minn. R. Crim. P. 7.03 (emphasis added).

The State's written notice that it was seeking an aggravated sentence was a form with checked boxes stating that it would seek an upward departure based on the victim's particular vulnerability and treating the victim with particular cruelty. The victim's particular vulnerability and treating the victim with particular cruelty are aggravating factors, or legal reasons, that may support an upward durational departure. Minn. Stat. § 244.10, subd. 5a(1)–(2); Minn. Sent. Guidelines 2.D.3.b(1)–(2). The State's notice informed Barthman of the legal grounds on which the State sought an upward departure. *See* Minn. R. Crim. P. 7.03 (requiring the notice to "include the grounds or statutes relied upon" to support "the aggravated sentence"). But the notice did not summarize the factual basis supporting those legal grounds. *Cf. State v. Rourke*, 773 N.W.2d 913, 919 (Minn. 2009) (explaining that there are "two distinct requirements" for an upward "sentencing departure: (1) a factual finding that there exist one or more circumstances not reflected in the guilty verdict or guilty plea, and (2) an explanation by the district court as to why those circumstances create a substantial and compelling reason to impose" the departure). Nor did the notice summarize the facts the district court could rely on to conclude that C.B. was particularly vulnerable or that Barthman treated C.B. with particular cruelty. Accordingly, the State's notice did not comply with Rule 7.03.

B.

Barthman conceded at oral argument that, absent plain error, the State's failure to comply with Rule 7.03 does not merit reversal. Our review is for plain error because Barthman did not object to this error before the district court. *State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017). To be entitled to relief under a plain-error analysis, a defendant must show that the error affected their substantial rights. *Id.* Barthman has not done so.

"To satisfy the third prong of the plain-error test, [Barthman] bears the 'heavy burden' of showing there is a 'reasonable likelihood that [the error] had a significant effect on the jury verdict.' " *State v. Washington-Davis*, 881 N.W.2d 531, 542 (Minn. 2016) (quoting *State v. Kelley*, 855 N.W.2d 269, 283 (Minn. 2014)); *see State v. Beaulieu*, 859 N.W.2d 275, 281–82 (Minn. 2015); *State v. Brown*, 792 N.W.2d 815, 824 (Minn. 2011). Here, the State gave Barthman notice that it was seeking an upward durational departure based on the aggravating factors of a particularly vulnerable victim and treating the victim with particular cruelty. Although the notice did not provide a factual summary to support these grounds, Barthman has not argued that he did not know the facts the State would attempt to prove in order to argue that these aggravating factors were present. In fact, when the parties discussed the special verdict form, which listed the additional factual findings related to an upward sentencing departure, Barthman did not claim that he was unaware of these facts or seek a continuance so that he could adequately dispute them. And Barthman has not articulated anything he would have done differently at trial to contest these facts if the State's notice had included a factual summary to support the aggravating

factors listed. Simply put, Barthman has not shown he was prejudiced by the lack of a factual summary in the notice of aggravating factors that he was given. *See State v. Tscheu*, 758 N.W.2d 849, 861–62 (Minn. 2008) (concluding the appellant was not entitled to reversal because he did not show prejudice from lack of notice that the State intended to impeach his testimony with prior convictions).

Because Barthman failed to demonstrate the error affected his substantial rights, we hold that the State's failure to include a summary of the factual basis for the aggravating factors listed in its notice of intent to seek a sentencing departure was not reversible error.

III.

Next, we address the greater-than-double durational departures that the district court imposed on counts one and two. We "review decisions to depart from the sentencing guidelines only for 'an abuse of discretion.' " *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017) (quoting *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999)). A district court abuses its discretion if its reasons for departure are inadequate or improper. *See State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009).

A.

First, we must address Barthman's request that we clarify how *State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981), should apply to the current sentencing guidelines. *Evans* established the rule 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." *Id.* We have interpreted the *Evans* rule to authorize a sentence that is twice the upper end of the presumptive sentencing range. *See State v. Johnson*, 450 N.W.2d 134, 135 (Minn.

1990) (modifying an upward durational departure to double the high end of the presumptive sentencing range).

Barthman requests that we "limit any departure to twice the 'presumptive sentence' " instead of "twice the upper end of the presumptive sentence range." But in *State v. Jackson*, 749 N.W.2d 353, 359 (Minn. 2008), we declined to revisit the *Evans* rule in the wake of changes to the sentencing guidelines. We recognized that past revisions to the sentencing guidelines now allow for much longer sentences without a departure, but said the Guidelines Commission should address this issue in the first instance. *Id.* at 360.

Barthman acknowledges that our precedent does not explicitly support his argument, yet he fails to explain why we should disregard that precedent. Instead, he makes arguments similar to the ones that failed to persuade us in *Jackson*. Because "[w]e are 'extremely reluctant' to overrule our precedent absent a compelling reason to do so," and Barthman fails to present such a reason to depart from *Jackson*, we decline to overturn or modify the *Evans* rule. *State v. Harris*, 895 N.W.2d 592, 598 (Minn. 2017) (quoting *State v. Lee*, 706 N.W.2d 491, 494 (Minn. 2005)).

B.

Barthman challenges the district court's stated reasons for imposing the upward durational departures. We start with the Minnesota Sentencing Guidelines. The purpose of the Minnesota Sentencing Guidelines "is to establish rational and consistent sentencing standards which reduce sentencing disparity and ensure that sanctions following conviction of a felony are proportional to the severity of the offense of conviction and the extent of the offender's criminal history." *Jackson*, 749 N.W.2d at 357 (citation omitted) (internal

quotation marks omitted). "To maintain uniformity and proportionality, departures from the presumptive guidelines sentence are discouraged." *Id.* Such departures "are intended to apply to a small number of cases." *Id*.

A district court may depart from the presumptive sentence "*only* when substantial and compelling circumstances are present in the record." *Taylor v. State*, 670 N.W.2d 584, 587 (Minn. 2003) (emphasis added). "Substantial and compelling circumstances are those demonstrating that 'the defendant's conduct in the offense of conviction was *significantly* more or less serious than that typically involved in the commission of the crime in question.' " *State v. Jones*, 745 N.W.2d 845, 848 (Minn. 2008) (quoting *State v. Misquadace*, 644 N.W.2d 65, 69 (Minn. 2002)). There is a "nonexclusive list of" aggravating "factors that may be used as reasons for departure." Minn. Sent. Guidelines 2.D.3; *see also* Minn. Stat. § 244.10, subd. 5a(a) (stating that " 'aggravating factors' include, but are not limited to" a list of "situations").

Here, the district court determined that the facts found by the jury supported the application of two aggravating factors on both counts one and two: (1) that the victim was treated with particular cruelty, and (2) that the victim was particularly vulnerable. Barthman concedes that both of these are aggravating factors upon which a district court may base an upward departure. *See* Minn. Sent. Guidelines 2.D.3.b(1) (listing as an aggravating factor that "[t]he victim was particularly vulnerable due to . . . reduced physical or mental capacity, and the offender knew or should have known of this vulnerability"); Minn. Sent. Guidelines 2.D.3.b(2) (listing as an aggravating factor that

"[t]he victim was treated with particular cruelty for which the individual offender should be held responsible"). He argues that these factors do not apply to the facts of this case.

" '[P]articular cruelty' involves the gratuitous infliction of pain and cruelty 'of a kind not usually associated with the commission of the offense in question.' " *State v. Rourke*, 773 N.W.2d 913, 922 (Minn. 2009) (quoting *State v. Norton*, 328 N.W.2d 142, 146 (Minn. 1982)). We have long recognized that it is particularly cruel to subject a criminal-sexual-conduct complainant to multiple forms of penetration. *See Kilcoyne v. State*, 344 N.W.2d 394, 397–98 (Minn. 1984) (affirming a durational departure based on "particularly perverted, especially outrageous" sexual abuse, in part, because each act of abuse involved multiple forms of penetration); *State v. Martinez*, 319 N.W.2d 699, 700−01 (Minn. 1982) (concluding that the defendant committed first-degree criminal sexual conduct with particular cruelty when he subjected the complainant to multiple forms of penetration).

When reviewing the durational departures that Barthman received, we may only "consider the conduct underlying the charge of which [he] [was] convicted," and may not consider conduct that only relates to some other offense. *Taylor*, 670 N.W.2d at 588. The district court sentenced Barthman on two counts of first-degree criminal sexual conduct, count one, which involved an incident of sexual abuse on a couch, and count two, which involved another incident of sexual abuse involving a vibrator. Our focus, then, has to be only on the conduct that underlies each of these offenses.

Concerning count one, C.B. testified that, during the couch incident, Barthman performed cunnilingus on her and inserted his penis into her vagina. Accordingly, although

only one act of penetration is required to prove this offense, multiple forms of penetration occurred during the conduct underlying this offense. *See* Minn. Stat. § 609.342, subd. 1(a). Based on the jury's findings, the district court did not abuse its discretion when it concluded that the sexual abuse that formed the basis for count one was significantly more serious than the typical offense, based on the aggravating factor of particular cruelty.

We reach a different conclusion regarding the district court's determination that Barthman treated C.B. with particular cruelty when he committed the sexual abuse that formed the basis for count two. C.B.'s testimony about the incident that formed the basis for count two discussed only the use of a sex toy, and she said that Barthman put the sex toy inside her vagina. In *Taylor*, we overturned an upward durational departure when the district court relied on additional acts of sexual abuse that were not part of the charged conduct for which the defendant was sentenced. 670 N.W.2d at 588–89. Although C.B. testified that she was subjected to multiple forms of sexual penetration and sexual contact during other incidents of abuse, those additional acts were not part of the conduct underlying count two. There was no evidence that Barthman subjected C.B. to multiple forms of sexual penetration or sexual contact during the vibrator incident.[2] As a result, we

[2] When discussing particular cruelty in its sentencing memorandum, the district court referred to Barthman's "extended sexual abuse" of C.B. and that he sexually abused her "over a period of years." Neither count one nor count two involved "extended sexual abuse" that occurred "over a period of years." Each count involved one incident that occurred on a single day. There certainly was evidence that Barthman sexually abused C.B. over a period of years, but that evidence relates to the conduct that supports Barthman's conviction on count three for violating Minn. Stat. § 609.342, subd. 1h(iii) (prohibiting sexual penetration of a complainant when, among other things, "the sexual abuse involved multiple acts committed over an extended period of time"). Because this

hold that the district court abused its discretion by using the jury's findings of multiple forms of sexual penetration and sexual contact to conclude that Barthman treated C.B. with particularly cruelty when he committed the sexual abuse alleged in count two.[3]

We next consider the district court's conclusion that C.B. was particularly vulnerable. Barthman acknowledges that this departure ground "theoretically might justify an upward departure as a matter of sentencing law." He contends, however, that "under the facts here," C.B.'s particular vulnerability did "not make the case atypical" because her cognitive delays did not prevent her from seeking help. We disagree.

"evidence only supports defendant's guilt of some other offense but does not support the conclusion that the defendant committed the instant offense for which he is being sentenced in a particularly serious way then it cannot be relied upon as a ground for departure." *State v. Ott*, 341 N.W.2d 883, 884 (Minn. 1984). It was improper for the district court to rely on the fact that the sexual abuse occurred over a period of years when it imposed sentences on counts one and two.

[3] The State argues that Barthman's conduct underlying counts one and two was significantly more cruel because he "committed those acts against a backdrop of long-term neglect, physical abuse, and threats, and because he could effortlessly and openly commit those acts with the acquiescence of C.B.'s mother." We will not consider these facts in evaluating whether Barthman treated C.B. with particular cruelty. The jury was not asked to, and made no finding about, long-term neglect, physical abuse, threats, or the acquiescence of C.B.'s mother. *See State v. Shattuck*, 704 N.W.2d 131, 141 (Minn. 2005) (explaining that based on the rule announced in *Blakely v. Washington*, 542 U.S. 296, 303−04 (2004), other than a prior conviction, the jury must determine any additional facts, beyond those reflected in the jury verdict or admitted by the defendant, that a district court relies on when it determines that an aggravating factor is present and imposes an upward sentencing departure). Since *Blakely* was decided, we have held that if a ground for a departure was improper, an appellate court may not independently review the record to determine if other evidence to justify a departure exists, unless the defendant has waived the right to a *Blakely* jury. *See State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009); *Jackson*, 749 N.W.2d at 358; *Jones*, 745 N.W.2d at 851.

C.B.'s cognitive delays were substantial at the time of the abuse. Her IQ of 66 fell well outside the normal range. This "lower intellectual functioning" combined with her "below-average adaptive abilities or behaviors" contributed to her diagnosis of developmental cognitive disability. C.B. also has difficulty communicating, as she is not always able to understand what is said to her or clearly express what she means to say. As a result, C.B. was several grade levels behind her peers. For example, she was learning her upper-case and lower-case letters in seventh grade. Having low adaptive abilities, as C.B. does, also affects her ability to function independently either outside or inside the home, manage her time, care for herself without assistance, and manage a routine. C.B. was in the lowest percentile for these independent living skills. The jury found that C.B. has a chromosomal defect and cognitive developmental delay and that Barthman knew about her condition. The district court did not abuse its discretion by concluding that C.B. was particularly vulnerable. *See Edwards*, 774 N.W.2d at 601 ("If the reasons given for an upward departure are legally permissible and factually supported in the record, the departure will be affirmed.").

In summary, we hold that the district court did not abuse its discretion when it relied on the aggravating factor of particular cruelty to support an upward durational departure on count one, but that it did abuse its discretion when it relied on this same aggravating factor when imposing an upward durational departure on count two. We further hold that the district court did not abuse its discretion when it relied on the aggravating factor of victim vulnerability to support its upward departure on both counts one and two.

C.

Barthman's two 360-month sentences were greater-than-double durational departures. Barthman argues that even if there are aggravating factors that could support a durational departure, they do not justify greater-than-double durational departures. The State responds that because the aggravating circumstances are severe, the district court was justified when it imposed greater-than-double durational departures.

Double the presumptive sentence length is generally the *upper limit* for an upward durational departure. *Evans*, 311 N.W.2d at 483. Out of the small number of cases in which a sentencing departure is appropriate, there are "rare cases in which the facts are so unusually compelling that" a greater-than-double durational departure is justified. *Id.*; *see also Rairdon v. State*, 557 N.W.2d 318, 326 (Minn. 1996) ("We have recognized that circumstances justifying a combined departure that more than doubles a presumptive sentence are *extremely rare*." (emphasis added)). Similarly, we have stated that cases when a greater-than-double departure is justified are "extraordinary case[s]." *Johnson*, 450 N.W.2d at 135. A district court may impose a greater-than-double durational departure only if there are "severe aggravating factors." *State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009); *see also Norton*, 328 N.W.2d at 146−47.

"Whether a given case is the 'rare' case where the aggravating circumstances are so severe that a greater-than-double durational departure is justified is a decision which must be based on our 'collective, collegial experience in reviewing a large number of criminal appeals from all the judicial districts.' " *Johnson*, 450 N.W.2d at 135 (quoting *Norton*, 328 N.W.2d at 146–47).

We start with the greater-than-double durational departure on count one. The facts of this case demonstrate that C.B.'s vulnerability was substantial. As we previously explained, because of her chromosomal defect and cognitive delays, C.B. was several grade levels below her peers and had difficulty communicating. She also scored in the lowest percentile for independent living skills, such as managing her time, caring for herself without assistance, and managing a routine. As the district court found, C.B.'s "significant cognitive delays greatly compounded her already limited ability, as a young girl, to escape or seek help." And Barthman treated C.B. with particular cruelty when he committed this offense. We have affirmed greater-than-double durational departures when multiple aggravating factors are present, including a particularly vulnerable victim and treating the victim with particular cruelty. *State v. Mortland*, 399 N.W.2d 92, 95–96 (Minn. 1987) (affirming a greater-than-double durational departure in first-degree criminal sexual conduct case when the victim was vulnerable, the victim was treated with particular cruelty, the offense happened in the victim's zone of privacy, and the victim suffered serious psychological damage); *State v. Van Gorden*, 326 N.W.2d 633, 635 (Minn. 1982) (affirming a greater-than-double durational departure in first-degree criminal sexual conduct case when the victim was vulnerable, the victim was treated with particular cruelty, and the offense occurred in the victim's zone of privacy); *State v. Stumm*, 312 N.W.2d 248, 249 (Minn. 1981) (affirming a greater-than-double durational departure when the victim was particularly vulnerable and was treated with particular cruelty). Based on the facts of this case and these prior cases, we hold that the district court did not abuse its discretion

when it imposed a greater-than-double durational departure on Barthman's sentence for count one.

We next consider the greater-than-double durational departure on count two. We have already concluded that the district court abused its discretion when it based this upward departure on particular cruelty. Thus, we must determine if a greater-than-double durational departure could be imposed based only on C.B.'s particular vulnerability. Although C.B.'s particular vulnerability is undoubtedly an aggravating factor on which to base an upward departure, we conclude that it is not a *severe* aggravating factor that justifies a greater-than-double durational departure.

Our case law supports the conclusion that the district court abused its discretion by imposing a greater-than-double durational departure. Upward departures of greater than double the presumptive sentence are allowed only in "extremely rare" cases. *See Rairdon*, 557 N.W.2d at 327. The criminal-sexual-conduct cases in which we have upheld greater-than-double durational departures are significantly different than this count.[4] Notably, they

[4] *See Perkins v. State*, 559 N.W.2d 678, 691–92 (Minn. 1997) (affirming a greater-than-double durational departure for first-degree criminal sexual conduct when the defendant threatened to kill the victim's children, inflicted "gratuitous acts of violence" on her, and knew that he had AIDS when he committed the offense); *Rairdon*, 557 N.W.2d at 327 (finding severe aggravating circumstances in case involving interfamilial sexual abuse with multiple forms of penetration, victim vulnerability, particular cruelty, and habitual sexual abuse that began when the victim was 8 years old); *State v. Glaraton*, 425 N.W.2d 831, 834 (Minn. 1988) (affirming a greater-than-double durational departure for first-degree criminal sexual conduct when the defendant "stuck the gun in the victim's mouth and in his rectum," subjected the victim to multiple acts of penetration, "inflicted gratuitous physical injury" on the victim, "urinated on the victim's face and made him lie face down in the urine," and "ridiculed his religious beliefs"); *Mortland*, 399 N.W.2d at 95 (affirming a greater-than-double durational departure for first-degree criminal sexual conduct when

involved particular cruelty, often involving gratuitous acts of violence, and multiple aggravating factors.

Based on the facts of this case, C.B.'s particular vulnerability, on its own, does not make this the "extremely rare" case in which a greater-than-double durational departure is justified. Further supporting this conclusion is the presentencing report, which recommended a considerably lower sentence than the district court imposed. Indeed, the district court went even higher than the State's recommended sentences of 360 months for count one and 240 months for count two.

The facts underlying count two are similar to other criminal sexual conduct cases in which we reversed greater-than-double durational departures involving vulnerable victims. In *State v. Partlow*, we reversed a greater-than-double durational departure in a first-degree criminal sexual conduct case involving an "absolute[ly] vulnerab[le]" 2-year old victim who suffered injuries to her vaginal area.[5] 321 N.W.2d 886, 887 n.1 (Minn. 1982)

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the victim was vulnerable and was subjected to multiple forms of penetration, the defendant broke the victim's tooth and threatened to kill the victim, the offense happened in the victim's zone of privacy, and the victim suffered serious psychological damage); *Van Gorden*, 326 N.W.2d at 634–35 (affirming a greater-than-double durational departure for first-degree criminal sexual conduct when the victim was vulnerable and subjected to multiple forms of penetration; the victim suffered a serious, permanent injury; and the offense occurred in the victim's zone of privacy); *State v. Herberg*, 324 N.W.2d 346, 350 (Minn. 1982) (affirming a greater-than-double durational departure for first-degree criminal sexual conduct when the victim was subjected to multiple forms of penetration and the defendant "subjected the victim to outrageously gross and vile physical abuse, including cutting her vagina, forcing her to stick a pin into one of her nipples, hitting her gratuitously, choking her, and forcing her to ingest excrement and urine").

[5] In arguing that *Partlow* does not support our conclusion that severe aggravating circumstances do not exist with respect to count two, the dissent mischaracterizes *Partlow*.

(concluding that the "doubling limitation expressed in" *Evans* applied when aggravating factors of victim vulnerability and particular cruelty were present); *see also Johnson*, 450 N.W.2d at 135 (reversing a greater-than-double durational departure for attempted first-degree criminal sexual conduct in which the victim was particularly vulnerable because she was 14 years old and caring for two infants at the time of the offense and the offense occurred in victim's zone of privacy). Although C.B.'s vulnerability based on her cognitive and developmental delays is substantial, it is not more severe than an "absolutely vulnerable" 2-year-old, who is unable to speak and tell anyone what happened.

Because C.B.'s particular vulnerability is not a severe aggravating circumstance, we conclude that the district court abused its discretion when it sentenced Barthman to a greater-than-double durational departure on count two and that his sentence on that count must be reversed. *See State v. Soto*, 855 N.W.2d 303, 312 (Minn. 2014) ("The use of an abuse-of-discretion standard in our review of sentencing decisions, while deferential, is not a limitless grant of power to the trial court." (citation omitted) (internal quotation marks omitted)). Despite this conclusion, we acknowledge that Barthman's sexual abuse of C.B. was horrific, and that he should receive a harsh sentence for his offenses. We simply hold

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We expressly found that two aggravating factors were present in that case: "the victim was particularly vulnerable due to her age and that she was treated with particular cruelty." *Partlow*, 321 N.W.2d at 887. We did note that "[w]hile the offense charged contain[ed] a victim age element," and that "under ordinary circumstances the victim's age could not be again relied upon for a departure factor because the same factor would then be twice considered in sentencing, the absolute vulnerability of the 2-year, 10-month-old victim here justifies an aggravation of sentence." *Id.* at 887 n.1. We went on to hold that both of these aggravating factors did not justify a greater-than-double durational departure. *Id.* at 887.

that count two is not one of those rare cases in which a greater-than-double durational departure may be imposed. Because of the aggravating factor of C.B.'s particular vulnerability, the district court on remand has the discretion to impose a sentence on count two of up to double the upper limit of the presumptive range, which is 344 months.[6] *See State v. Solberg*, 882 N.W.2d 618, 624 (Minn. 2016) ("[W]e have affirmed upward durational departures that were based on a single aggravating factor.").

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals, including the decision to reverse Barthman's sentence on count two and remand for resentencing on that count, though on this issue, we do so for different reasons.

Affirmed.

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[6] The district court imposed permissive, consecutive sentences on counts one and two. *See* Minn. Sent. Guidelines 2.F.2.a(1)(ii), 6. Barthman argues that his consecutive sentences unfairly exaggerate the criminality of his conduct. *See State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998) ("A trial court's decision regarding permissive, consecutive sentences will not be disturbed unless the resulting sentence unfairly exaggerates the criminality of the defendant's conduct."). Because we are remanding for resentencing on count two and do not know what new sentence the district court will impose, we will not consider whether Barthman's new sentences unfairly exaggerate the criminality of his conduct.

The State argues that the court of appeals erred when it concluded that imposing greater-than-double durational departures on both counts one and two and making those sentences run consecutively unduly exaggerated the criminality of Barthman's conduct. Because we hold that the district court abused its discretion by imposing a greater-than-double durational departure on count two and, as did the court of appeals, remand for resentencing on this count, we need not decide this issue.

C O N C U R R E N C E & D I S S E N T

MCKEIG, Justice (concurring in part, dissenting in part).

The majority concludes there were aggravating circumstances severe enough to justify a greater-than-double durational departure as to count one, the couch incident, but not as to count two, the vibrator incident. I find that C.B.'s cognitive disability is a severe aggravating circumstance, which on its own supports a greater-than-double durational departure as to counts one and two. I further conclude that this case is exceptional, justifying the rare imposition of maximum sentences. Accordingly, I respectfully dissent from part III.C of the court's opinion, which remands for resentencing on count two. I would affirm the district court's sentence in all respects.

Under the Minnesota Sentencing Guidelines, a durational departure may be supported by a single aggravating factor. Minn. Sent. Guidelines 2.D.3.b; *see also* Minn. Stat. § 244.10, subd. 5a(b) (2018) ("[T]he court may order an aggravated sentence beyond the range specified in the sentencing guidelines grid based on *any* aggravating factor arising from the same course of conduct.") (emphasis added); *State v. Solberg*, 882 N.W.2d 618, 624 (Minn. 2016). To support a greater-than-double durational departure, the aggravating circumstances must be "severe." *State v. Norton*, 328 N.W.2d 142, 146 (Minn. 1982).

A victim's particular vulnerability is an aggravating factor that can justify a durational departure. The factor applies when a "victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, and the offender knew or should have known of this vulnerability." Minn. Sent. Guidelines 2.D.3.b(1); *see* Minn. Stat. § 244.10, subd. 5a(a). We have acknowledged that "there is no clear line that marks the

boundary between 'aggravating circumstances' justifying a double departure and 'severe aggravating circumstances' justifying a greater-than-double departure." *Norton*, 328 N.W.2d at 146. Here, considering whether the aggravating circumstances were severe when Barthman sexually abused his developmentally disabled daughter by performing cunnilingus on her and inserting his penis into her vagina in count one, and penetrating her vagina with a vibrator in count two, the answer is plainly yes.

The jury, in addition to handing down six guilty verdicts, specifically found three facts related to particular vulnerability: that C.B. had a chromosomal defect, that C.B. had a cognitive developmental delay, and that Barthman knew about these vulnerabilities. In its departure report, the district court explicitly concluded that the existence of C.B.'s particular vulnerability, *alone*, was sufficient to justify its upward durational departure because "Barthman unquestionably victimized [C.B.], a little girl who depended on him for her care, and her cognitive delays made her already vulnerable position even more so."

C.B.'s cognitive disability made her an ideal victim for a sexual predator. C.B.'s rare genetic mutation meant that she had the cognitive development of a young child, still "learning her upper-case and lower-case letters in seventh grade," but the physically-more-mature, pubescent body of a pre-teenage girl. The penetration of, and performance of cunnilingus on, a child are disturbing under any circumstances. Here, however, the severe vulnerability resulting from the vast difference between C.B.'s cognitive abilities and her physical development makes the abuse especially troubling. The district court found that "this case is essentially a textbook example of an individual preying on a victim due to her vulnerability resulting from developmental delays."

The majority acknowledges the severity of C.B.'s rare genetic mutation, including that it "affects [her] cognitive development" and "it is believed to cause C.B.'s speech delay and to affect her judgment and ability to keep herself safe." The majority further notes that C.B.'s IQ is 66, "which is below the average range of 80 to 120," and that she "has difficulty communicating, as she is not always able to understand what is said to her or clearly express what she means to say." Additionally, C.B.'s assessments indicate she was less capable of living independently than 99 percent of children her age.

Barthman knew all of this. As C.B.'s father and caregiver, he attended appointments with her geneticist and was aware of her ongoing medical care. He also attended meetings at C.B.'s school and was familiar with her individualized education program, a program C.B. qualified for based on her demonstrated need for special education services and below-average adaptive abilities. Barthman knew of her speech delay, reduced judgment, and inability to keep herself safe. He knew she had trouble communicating clearly and expressing herself, and that she depended on him. This intimate knowledge of her cognitive disability enhanced Barthman's ability to sexually prey on C.B. Her inability to recall specific details surrounding count two, for instance, is directly symptomatic of her condition—not evidence that the events of this case were no less horrific than usual. In fact, the inability to sequence or recall detailed information is exactly the kind of trait that would enable an abuser like Barthman to sexually abuse a victim like C.B. with impunity.

The Legislature has never revoked a district court's ability to impose the statutory maximum sentence in a case where justice so requires, nor limited greater-than-double

durational departures that depend on a single aggravating factor to cases of severe cruelty.[1] Given the majority's decision here—in this "textbook" case of exploitation of a young victim with reduced mental capacity—it is unclear whether particular vulnerability on its own would ever be sufficient to rise to the level of a severe aggravating circumstance. The majority essentially forecloses the district courts from finding that particular vulnerability can be sufficiently severe to warrant a greater-than-double durational departure.

C.B. was no less vulnerable when Barthman abused her with a vibrator than when he abused her on the couch. C.B.'s particular vulnerability, alone, should be a sufficiently severe aggravating factor to support greater-than-double durational departures as to counts one and two in this case. Due to C.B.'s severe particular vulnerability at the time of her

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[1] *State v. Partlow*, 321 N.W.2d 886, 887 (Minn. 1982) does not prevent a greater-than-double durational departure here. In *Partlow*, we determined that the "absolute vulnerability" of a 2-year-old sexual abuse victim alone did not justify the statutory maximum sentence when the abuse had not been done with particular cruelty. *Id.* at 887 n.1. As we noted in that case, when a vulnerability has been accounted for by the Legislature in defining the elements of a crime, that vulnerability cannot be used as an independent aggravating circumstance. *Id.*; *see also State v. Brusven*, 327 N.W.2d 591, 593 (Minn. 1982). First-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1 (2018), is based on "sexual contact with a person *under 13 years of age*." (Emphasis added).

Here, as in *Partlow*, age is an improper independent aggravating circumstance. C.B.'s age is not, and never was, the reason for her particular vulnerability. It is her cognitive disability which makes her particularly vulnerable, and cognitive disability is in no way accounted for in the elements of first-degree criminal sexual conduct.

We have, however, considered age in addition to other factors. *See, e.g.*, *State v. Luna*, 320 N.W.2d 87, 90 (Minn. 1982) ("The combination of these facts with other facts, including the fact that the victim was only 13 years old, makes this case sufficiently different in degree to justify the limited upward departure."). It would therefore be appropriate to consider C.B.'s age as one of several factors supporting a departure in this case.

abuse, a remand for resentencing on count two is improper. I would affirm the district court's sentence as to counts one and two. I respectfully dissent.

GILDEA, Chief Justice (concurring in part, dissenting in part).

I join in the concurrence and dissent of Justice McKeig.

LILLEHAUG, Justice (concurring in part, dissenting in part).

I join in the concurrence and dissent of Justice McKeig.