**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A23-1563**

State of Minnesota,
Respondent,

vs.

David Stephan Herr,
Appellant.

**Filed October 28, 2024**
**Affirmed**
**Segal, Chief Judge**

Hennepin County District Court
File No. 27-CR-20-9725

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

Mary F. Moriarty, Hennepin County Attorney, Robert I. Yount, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Jon Simpson, Simpson Law PLLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Segal, Chief Judge; and Kirk, Judge.*

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

## NONPRECEDENTIAL OPINION

**SEGAL**, Chief Judge

In this direct appeal, appellant challenges his conviction under Minn. Stat. § 609.343, subd. 1(h)(iii) (2018), for second-degree criminal sexual conduct—significant relationship, complainant under 16, multiple acts over an extended period of time. Appellant argues that we should modify our interpretation of what qualifies as a "significant relationship" between a defendant and a complainant and that the evidence at trial was insufficient to prove beyond a reasonable doubt that appellant committed multiple acts over an extended period of time. Appellant also argues that the district court abused its discretion by imposing a 90-month presumptive sentence because it unfairly exaggerates the criminality of his conduct. We affirm.

## FACTS

N.B., the sexual-assault victim, grew up with her father in Iowa for most of her life.[1] Shortly after N.B. was born, N.B.'s father started a relationship with M.H. and eventually they had a child together, R.S. N.B. came to view M.H. as a stepmother figure and M.H.'s family as her family. After N.B.'s father and M.H. ended their relationship, M.H. began dating appellant David Stephan Herr. M.H. moved with Herr and her daughter, R.S., to Minnesota. Herr and M.H. married in 2010 and, a few years later, they moved to Maple Grove.

[1] The facts are summarized from the evidence presented at trial viewed in the light most favorable to the conviction. *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016) (citing *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989)).

Beginning in about 2016, N.B. began visiting and spending time with the Herr family (Herr, M.H., R.S., and two other children). N.B. spent the summers of 2018 and 2019 and her March 2019 spring break with the Herrs in Maple Grove, participated in two family vacations to Florida over that period, and attended a wedding with the family. During these visits, the Herrs also discussed the possibility of N.B. moving in with them on a full-time basis. The Herrs never discussed adopting N.B. or becoming her legal guardian. N.B.'s father was involved in conversations about N.B. moving and allowed N.B. to make the decision.

N.B. spent the Christmas holiday in 2018 with the Herr family in Maple Grove, staying with them between December 21 and 26. N.B., who was 15 years old at the time, slept in the basement bedroom of the Herr house—her usual spot when she visited. During the December visit, Herr sexually assaulted N.B. N.B. testified that Herr "first" entered her bedroom on December 22. N.B. testified that she remembered the night because she was wearing a pair of Grinch-themed pajamas. Herr got onto N.B.'s bed, laid down next to her, and put his hand on her vagina, first over her clothes then moving under her clothes. Herr sucked on N.B.'s breasts and had her touch his penis.

When asked how many times Herr came to her bedroom during the December visit, she could not "remember for sure," but knew that it was "at least once." In response to a question about whether she did "anything to try to make it stop," she answered: "The first time, no. But in the future times, I would try to say that I was on my period, thinking that maybe he would be grossed out." She also testified that he would start touching her vagina by laying down next to her in her bed. She testified that "[s]ometimes he would just lay

on his back, but other times he would, like, spoon me." When asked "[h]ow would it end" with "him being in [her] bedroom," she explained: "Sometimes he would just leave, like, after. Sometimes if I went to the bathroom or went upstairs and if I took a while, he would leave. But then sometimes he would come back in later." N.B. also testified that Herr told her "that no one could ever find out" about "[h]im touching" her and that "we would get in really big trouble."

N.B. moved in full-time with the Herrs in late May 2019. Rather than staying in her previous bedroom in the basement, N.B. was given an upstairs bedroom. N.B. continued to live with the Herrs into the fall and began attending high school in Maple Grove in September 2019.

In October 2019, N.B. went to the Maple Grove Police Department with her father and her half-sister, R.S., to report Herr's sexual assault. N.B. alleged several incidents, including the December 2018 assaults, that occurred when she was with the Herrs between the summer of 2018 and the fall of 2019. A detective conducted a follow-up interview with N.B. four days later. N.B. never specifically mentioned the time frame of December 2018 in her second interview with the detective, although she did generally describe conduct that occurred in the basement bedroom during her visits to the Herrs.

Respondent State of Minnesota ultimately charged Herr with five counts of criminal sexual conduct. Count I asserted a violation of Minn. Stat. § 609.343, subd. 1(h)(iii), for second-degree criminal sexual conduct occurring between May 1, 2018 and June 24, 2019, involving a complainant "under 16 years of age" when "the actor has a significant relationship to the complainant" and "the sexual abuse involved multiple acts committed

over an extended period of time." Counts II, III, and IV were for second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(g) (2018), which requires only a significant relationship between the actor and the complainant and that the complainant was under the age of 16 at the time of the sexual contact. Count V was for fourth-degree criminal sexual conduct under Minn. Stat. § 609.345, subd. 1(f) (2018). Counts II through V broke down the offense dates into segments: count II covered May 1 to September 30, 2018; count III covered December 1, 2018 to January 31, 2019; count IV covered May 1 to June 24, 2019; and count V covered June 25 to October 8, 2019.

The case proceeded to trial in May 2023. The officer and detective who interviewed N.B. testified, as did N.B., N.B.'s father, and R.S., along with other witnesses on behalf of the state and the defense. The jury found Herr guilty of counts I and III, but found Herr not guilty of counts II, IV, and V. The district court ordered the entry of a judgment of conviction for count I, the more serious charge.

Herr moved for a downward departure, arguing particular amenability to probation. The district court denied Herr's motion and imposed a "bottom-of-the-box" presumptive sentence of 90 months in prison.

## DECISION

### I. The evidence is sufficient to sustain Herr's conviction.

Herr challenges his conviction, arguing that he should not have been found to have had a "significant relationship" with N.B. and that the evidence was not sufficient to prove that he had committed "multiple acts" of sexual contact over "an extended period of time." When reviewing a claim of insufficient evidence, we "carefully examine the record to

determine whether the facts and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016) (quotation omitted). In doing so, "we view the evidence in the light most favorable to the verdict and assume that the factfinder disbelieved any testimony conflicting with that verdict." *State v. King*, 990 N.W.2d 406, 416 (Minn. 2023) (quotation omitted). "This is especially true whe[n] resolution of the case depends on conflicting testimony, because weighing the credibility of witnesses is the exclusive function of the [factfinder]." *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). We review de novo whether a defendant's conduct meets the definition of a particular offense. *State v. Hayes*, 826 N.W.2d 799, 803 (Minn. 2013). And when "a sufficiency-of-the-evidence claim turns on the meaning of a statute, we review the question of statutory interpretation de novo." *State v. Loveless*, 987 N.W.2d 224, 247 (Minn. 2023).

To analyze Herr's arguments we must, as a preliminary matter, identify the time frame of the criminal conduct on which his conviction is based. As noted above, Herr was found guilty of two counts: count I, the count of which he was convicted, that has an offense date range of May 2018 through June 2019; and count III, that has an offense date range of December 2018 through January 2019. But the jury found Herr not guilty of counts II, IV, and V, which cover the full offense date range in count I except for the December 2018 through January 2019 time frame. The only way to reconcile the jury verdicts is to conclude that the offense must have occurred in the December 2018 to January 2019 time frame. And because the only evidence presented at trial of criminal sexual conduct in that

time frame occurred during N.B.'s stay with the Herr family between December 21 to 26, 2018, the offense could only have occurred—as the state concedes—between those dates. Using December 21 to 26 as the offense date range, we now address Herr's sufficiency-of-the-evidence arguments.

**A. The record supports that Herr had a "significant relationship" with N.B.**

As applicable here, the phrase "significant relationship" is defined by statute as "mean[ing] a situation in which the actor is . . . an adult who jointly resides intermittently or regularly in the same dwelling as the complainant." Minn. Stat. § 609.341, subd. 15(3) (2018). In *State v. Sebasky*, we construed the phrase "resides intermittently" as including "frequent, but discontinuous, stays of two to six days at a time." 547 N.W.2d 93, 100 (Minn. App. 1996), *rev. denied* (Minn. June 19, 1996). Herr concedes that N.B.'s "frequent, but discontinuous, stays" with the Herr family are sufficient under *Sebasky* to satisfy the statutory requirement of a "significant relationship" between N.B. and Herr.

Herr argues, however, that we should overrule *Sebasky* on this issue because we relied on a definition of the word "reside" from *Black's Law Dictionary* and *Black's* no longer contains a definition for that word. Herr asks us to adopt, instead, a definition from another dictionary to the effect that "reside" means to dwell permanently or continuously. We are not persuaded. Herr's suggested definition—that the word "reside" is limited to a permanent or continuous living situation—is contrary to the statutory definition of the phrase "significant relationship." That definition, as noted above, includes not just permanent living situations, but also covers situations where the complainant and defendant "jointly reside[] *intermittently*." Minn. Stat. § 609.341, subd. 15(3) (emphasis

added). We therefore conclude that under our precedent, as Herr concedes, the evidence supports that Herr had a "significant relationship" with N.B.

### B. The evidence is sufficient to establish that Herr committed multiple acts of sexual contact over an extended period of time.

Herr next argues that the evidence is insufficient to support his conviction because N.B.'s testimony does not establish that Herr engaged either in "multiple acts" of sexual contact or that they were "over an extended period of time." Minn. Stat. § 609.343, subd. 1(h)(iii). Herr contends that N.B.'s testimony does not support that "multiple acts" occurred, because she could not remember how many times Herr came to her bedroom during her December visit, stating only that it was "at least once." Herr also argues that the time frame of the offense—December 21 through 26—is too short to constitute an "extended period of time."

When reviewing a sufficiency-of-the-evidence challenge based on direct evidence, an appellate court "must ascertain whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged." *State v. Jones*, 4 N.W.3d 495, 501-02 (Minn. 2024) (quotation omitted). Herr argues that, instead of the direct-evidence standard of review, we should apply the heightened circumstantial-evidence standard because, to find him guilty, the jury needed to infer that multiple acts of sexual contact had occurred in December 2018. *See State v. Al-Naseer*, 788 N.W.2d 469, 474-75 (Minn. 2010) (describing the heightened, two-step standard of review to be applied when circumstantial evidence is used to prove an element of a crime). But here, the evidence establishing Herr's

guilt was provided by the testimony of N.B. "Testimony provided by a witness, concerning what the witness saw or heard, is considered direct evidence." *State v. Brazil*, 906 N.W.2d 274, 278 (Minn. App. 2017), *rev. denied* (Minn. Mar. 20, 2018). Because proof of the elements of the offense challenged by Herr on appeal was presented through N.B.'s testimony, we must apply the direct-evidence, not the circumstantial-evidence, standard of review.

*Multiple Acts*

We address first whether the evidence is sufficient to demonstrate that Herr engaged in "multiple acts" of sexual contact. The statute contains no definition of the phrase "multiple acts." But in a very recent nonprecedential opinion, cited here for its persuasive value, we defined the word "multiple" as meaning "more than one."[2] *State v. Sosa Saavedra*, No. A23-0796, 2024 WL 3493357, at *6 (Minn. App. July 22, 2024) (relying on the definition in *Merriam-Webster's Collegiate Dictionary* 816 (11th ed. 2003)); *see also The American Heritage Dictionary of the English Language* 1157 (5th ed. 2018) (defining "multiple" as "more than one").

Applying that definition, we must determine whether N.B.'s testimony establishes that Herr engaged in more than one act of sexual contact with her. We conclude that it does. While N.B. testified at one point that Herr visited her bedroom "at least once," other points in her testimony support that the acts of sexual contact occurred more than once.

[2] "Nonprecedential opinions . . . are not binding authority except as law of the case, res judicata or collateral estoppel, but . . . may be cited as persuasive authority." Minn. R. Civ. App. P. 136.01, subd. 1(c).

For example, as set out in the facts section above, after being asked whether she did anything to stop Herr from assaulting her, she testified: "The first time, no. But in the future times, I would try to . . . ." The use of the terms "the first time" and "future times" conveys that it occurred more than once. And when describing the sexual abuse, N.B. again used terms demonstrating that the abuse occurred multiple times. For example, N.B. testified that "[s]ometimes he would just lay on his back, but other times he would, like, spoon me." We thus conclude that the direct evidence provided through N.B.'s testimony is sufficient to establish that Herr engaged in "multiple acts" of sexual contact.

*Extended Period of Time*

As to the "extended period of time" element of the offense, Herr argues that the December 21 to 26 time frame is too short to constitute an "extended period." Here again, the statute contains no definition. Herr also offers no definition. He argues only that other cases involving juvenile victims and convictions under Minn. Stat. § 609.343, subd. 1(h)(iii), involved sexual abuse that occurred over a much longer period of time. But that does not mean that the December 21 to 26 time frame fails to satisfy the statutory requirement.

Herr contends that this court implicitly held in *State v. Campa*, 399 N.W.2d 160, 162 (Minn. App. 1987), *rev. denied* (Minn. Feb. 13, 1987), that the phrase "extended period" means longer than 26 days. Herr misapplies that opinion. *Campa* dealt with the issue of whether the district court erred in assigning a custody-status point for the purpose of calculating Campa's criminal-history score. The district court found that the acts of sexual abuse of which Campa was convicted "began as early as January 1982" and could

not have happened after April 1983 when Campa moved out of the victim's home. *Id.* Campa was on probation for all but the last 26 days of that time period. *Id.* The district court determined that the state met its burden of demonstrating that, "inferentially," at least several incidents of sexual abuse occurred during the 13 months when Campa was still on probation and that Campa should be awarded a custody-status point because he committed "multiple acts" of sexual abuse while he was on probation. *Id.* We affirmed the district court's determination on that issue. The opinion, however, did not address, implicitly or otherwise, the issue of what constitutes an "extended period of time." *Campa* is thus inapposite.

In this case, the jury was asked to determine whether the evidence established that the acts of sexual contact occurred over an extended period of time. The jury found that it did. And as long as the "factfinder could reasonably decide that the defendant is guilty of the charged offense based on the evidence offered, [appellate courts] will not disturb the verdict." *State v. Bradley*, 4 N.W.3d 105, 111 (Minn. 2024) (quotation omitted). Viewing the evidence in the light most favorable to the verdict, we conclude that the jury could reasonably reach this decision and that the evidence is, therefore, sufficient to support Herr's conviction.

## II. The district court did not err by imposing a presumptive sentence.

Finally, Herr argues the district court "unfairly exaggerated" his criminality at sentencing. The Minnesota Sentencing Guidelines establish presumptive sentences for felony offenses. Minn. Stat. § 244.09, subd. 5 (2018). Absent substantial and compelling circumstances, a district court must impose a presumptive sentence. *State v. Pegel*, 795

N.W.2d 251, 253 (Minn. App. 2011); Minn. Sent'g Guidelines 2.D.1 (2018). The presumptive sentence here, with Herr's criminal-history score of zero, was 90 to 108 months, and the district court imposed the lowest sentence within the presumptive range, as was recommended in the presentence investigation report (PSI).

"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). "A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *State v. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017). A district court properly exercises its discretion "as long as the record shows [it] carefully evaluated all the testimony and information presented before making a determination." *Pegel*, 795 N.W.2d at 255 (quotation omitted). Only in rare cases will an appellate court reverse a district court's imposition of a presumptive sentence. *State v. Olson*, 765 N.W.2d 662, 664 (Minn. App. 2009).

Herr's motion was titled as a motion for a downward dispositional and durational departure at sentencing. But his argument before the district court focused exclusively on the criteria for a dispositional departure. Substantial and compelling circumstances may support a downward dispositional departure from the presumptive sentence if the defendant is "particularly amenable" to probation. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) (quotation omitted). To the extent that Herr's argument on appeal is a challenge to the district court's denial of his motion for a downward dispositional departure, Herr fails to identify any abuse of discretion by the district court.

The district court stated on the record that it reviewed both the PSI and the testimony presented at the sentencing hearing in determining that there were no substantial and compelling reasons to justify a downward dispositional departure. The district court's review included an acknowledgment in the PSI that the offense may involve both mitigating and aggravating factors. The PSI noted that several factors supported a dispositional departure, including Herr's stable employment, strong support system, and amenability to conditions of probation. But the PSI additionally noted several factors that weighed against a dispositional departure and the presence of mitigating factors does not require a district court to grant a departure. *See State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984) (stating that the district court was "not obligate[d]" to depart despite "[t]he fact that a mitigating factor was clearly present"). The district court judge also acknowledged the loss that would be caused to Herr's family by sending Herr to prison, but noted that this, of itself, "does not provide a substantial and compelling reason for me to not punish the crime that was committed." The record thus supports that the district court considered and weighed the information presented when it imposed a presumptive sentence. We thus discern no abuse of discretion by the district court in its denial of Herr's motion.

We also note that Herr's arguments on appeal do not focus on the district court's denial of a downward dispositional departure. Rather, Herr argues that a 90-month sentence "unfairly exaggerates" the severity of his conduct because most multiple-act convictions "involve younger victims, victims with closer familial relationships to the defendant, and multiple acts of penetration." This argument focuses on the factors relevant to a motion for a downward *durational* departure. And while Herr labeled his motion as

seeking both a downward dispositional and durational departure, he made no arguments to the district court concerning the criteria for a durational departure. His arguments focused only on amenability to probation—a factor relevant to a downward dispositional departure. *Trog*, 323 N.W.2d at 31. We generally do not consider arguments raised for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

In addition, the argument that a sentence "unfairly exaggerates" the criminality of an offense relates not to a motion for a downward departure, but to the judicially created exception to the single-behavioral-incident rule. *State v. Rhoades*, 690 N.W.2d 135, 138 (Minn. App. 2004) (citing *State v. Marquardt*, 294 N.W.2d 849, 850-51 (Minn. 1980)). That exception applies only when the district court imposes multiple sentences for offenses involving multiple victims. *See State v. Barthman*, 938 N.W.2d 257, 265 (Minn. 2020) (applying exception). Here, Herr received one sentence on count I for one victim and only presented arguments for a downward dispositional departure. The record here supports that the district court considered the information and arguments presented in support of a downward departure and we discern no abuse of discretion by the district court in imposing a "bottom-of-the-box" presumptive sentence.

**Affirmed.**