This opinion is nonprecedential except as provided by Minn.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

STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0184

State of Minnesota,
Respondent,

vs.

Oluwatobi Samson Taiwo,
Appellant.

Filed January 13, 2025
Affirmed in part, reversed in part, and remanded
Reyes, Judge

Anoka County District Court
File No. 02-CR-22-4662

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

Brad Johnson, Anoka County Attorney, Carl E. Erickson, Assistant County Attorney, Anoka, Minnesota (for respondent)

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

Considered and decided by Bratvold, Presiding Judge; Reyes, Judge; and Schmidt, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

Following his two convictions of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1a(e) (Supp. 2021), appellant argues that the district court erred by (1) imposing a lifetime conditional-release term on his conviction on the second count

because he had no prior sexual-conduct convictions under Minn. Stat. § 609.3455, subds. 6, 7(b), 7(c) (Supp. 2021), and (2) imposing an upward durational departure on the same count because neither appellant's admissions regarding certain aggravating factors nor the district court's findings support departure. We affirm in part, reverse in part, and remand.

FACTS

In early 2022, appellant Oluwatobi Samson Taiwo, then 19 years old, became acquainted with the 12-year-old victim through friends. Appellant, his four friends, and victim had a group chat on Snapchat. On February 3, 2022, appellant and victim texted each other, victim asked appellant to come to her house, and they had oral and vaginal sex in a truck parked next to her house. On March 13, 2022, appellant and victim again had oral and vaginal sex in the truck next to her house. After both encounters, appellant messaged the group chat about engaging in sexual contact with victim. These friends had also engaged in sexual contact with victim.[1]

On June 20, 2023, appellant pleaded guilty to two counts of first-degree criminal sexual conduct as part of a plea deal and admitted to the following two aggravating sentencing factors: multiple forms of penetration and committing the crime as part of a group of three or more people. *See State v. Adell*, 755 N.W.2d 767, 774 (Minn. App. 2008); Minn. Sent'g Guidelines 2.D.3(b)(10) (2021). In exchange, the state dismissed three other charges and withdrew the aggravating factor based on victim's age. Minn. Sent'g

[1] While the record is mostly consistent on the point that appellant did not know victim's true age, this is neither an element of nor a defense to the charged crime. Minn. Stat. § 609.342, subd. 1a(e).

Guidelines 2.D.3(b)(1) (2021). During the plea hearing, appellant admitted to penetrating victim orally and vaginally, communicating about these sexual encounters in the group chat after each incident, and that he was aware that these friends were also engaging in sexual contact with victim. At the end of the hearing, the clerk asked whether the district court accepted appellant's guilty pleas. The district court responded: "And the pleas are both accepted . . . if I did not say that earlier."

The district court sentenced appellant on November 3, 2023. The district court adjudicated appellant guilty on the first count (count I) and sentenced him to 158 months in prison, subject to ten years' conditional release. The district court then adjudicated appellant guilty on the second count (count II) and imposed a concurrent sentence of 252 months in prison, an upward departure of 36 months, subject to a lifetime conditional-release term. This appeal follows.

DECISION

I. The district court erred by imposing a lifetime conditional-release term on count II.

Appellant argues that the district court erred by imposing a lifetime conditional-release term on his conviction on count II because he had no prior sexual-conduct convictions under Minn. Stat. § 609.3455, subds. 6, 7(b), 7(c). We agree.

Whether a sentence conforms to the requirements of a statute or the sentencing guidelines is a question of law that appellate courts review de novo. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009). This court "may at any time correct a sentence not authorized by law." Minn. R. Crim. P. 27.03, subd. 9.

In *State v. Nodes*, the Minnesota Supreme Court acknowledged that a "prior sex conviction" for purposes of Minn. Stat. § 609.3455, subd. 7(b), is defined in Minn. Stat. § 609.02, subd. 5 (2022), as "any of the following *accepted and recorded* by the court: (1) a *plea of guilty*; or (2) a verdict of guilty by a jury or a finding of guilty by the court." 863 N.W.2d 77, 80 (Minn. 2015) (emphases added). In *Nodes*, both parties agreed that the district court accepted the defendant's two guilty pleas simultaneously at the sentencing hearing, so the supreme court had to determine only whether the pleas were recorded. *Nodes*, 863 N.W.2d at 80. The supreme court relied on its opinion in *State v. Martinez-Mendoza*, 804 N.W.2d 1, 6 (Minn. 2011), and held that a "court reporter's transcription of the proceedings[]is all that is required for a conviction to be recorded." *Nodes*, 863 N.W.2d at 81 (quotations omitted).

In *State v. Brown*, we held that "when a district court convicts an offender simultaneously of multiple sex offenses in the same hearing, the offender does not have a prior sex-offense conviction and is not subject to a lifetime conditional-release term under Minn. Stat. § 609.3455, subd. 7(b)." 937 N.W.2d 146, 157 (Minn. App. 2019).

Here, the district court accepted appellant's guilty pleas simultaneously at the plea hearing on June 20, 2023, when it stated, "And the pleas are both accepted . . . if I did not say that earlier." *See* Minn. Stat. § 609.02, subd. 5. Appellant, therefore, "[did] not have a prior sex-offense conviction and [was] not subject to a lifetime conditional release-term under Minn. Stat. § 609.3455, subd. 7(b)." *Brown*, 937 N.W.2d at 157.

We conclude that the district court erred by imposing a lifetime conditional-release term on count II, and we reverse and remand to the district court with instructions to impose

the statutory ten-year conditional-release term for that offense. *See* Minn. Stat. § 609.3455, subd. 6.

II. The district court did not err by finding a basis for an upward departure based on multiple forms of penetration, but it erred when it imposed an upward departure on the basis that three or more people committed the crime.

Appellant next argues that, unless there is evidence that he committed the charged offense with particular cruelty, multiple forms of penetration alone cannot support an upward departure. Appellant also argues that, although he admitted that three or more people were also engaging in sexual contact with victim and because only he and victim participated in the charged sex offenses, the facts do not support an upward departure on this factor. We address each issue in turn.

A district court must impose the presumptive sentence unless substantial and compelling circumstances warrant an upward departure. *State v. Grampre*, 776 N.W.2d 347, 350 (Minn. App. 2009). Circumstances are substantial and compelling when "the defendant's conduct in the offense . . . was significantly more or less serious than that typically involved in the commission of the crime in question." *Id*. (quotation omitted). A district court must provide a substantial and compelling reason when it departs from the sentencing guidelines, *State v. Mohamed*, 779 N.W.2d 93, 96 (Minn. App. 2010), but it has broad discretion to depart from a presumptive sentence when aggravating factors are present. *Adell*, 755 N.W.2d at 771. "[A] single aggravating factor is sufficient to uphold an upward departure." *Mohamed*, 779 N.W.2d at 97. Whether a particular reason for an upward departure is permissible is a question of law that we review de novo. *Grampre*, 776 N.W.2d at 350.

A. Multiple forms of penetration is a sufficient aggravating factor to support an upward departure from a presumptive sentence.

Minnesota courts recognize that "the fact that a defendant has subjected a victim to multiple forms of penetration is a valid aggravating factor in first-degree criminal sexual conduct cases." *Adell*, 755 N.W.2d at 774-75 (citing cases supporting this proposition). In *Adell*, the appellant engaged in both vaginal and oral sex. *Id*. at 770. We concluded that "multiple forms of penetration is not typical" of first-degree criminal sexual conduct and is a proper factor for district courts to consider for a sentence enhancement. *Id.* at 775 (quotations omitted). Similarly here, we conclude that the district court did not err by determining that multiple forms of penetration is a sufficient basis to support an upward departure.

B. The district court erred by imposing an upward departure when it determined that appellant committed the crime "as part of a group of three or more offenders who all actively participated in the crime."

The Minnesota Sentencing Guidelines recognize that, when "[t]he offender committed the crime as part of a group of three or more offenders *who all actively participated in the crime*," an upward sentencing departure may be warranted. *Id*. (emphasis added); Minn. Sent'g Guidelines 2.D.3(b). The district court determined that this factor was present based on the finding that appellant "admitted to participating in a group and sexually abusing [the victim] as part of a group," and, as a result, it imposed an upward durational departure of 36 months.

The question before this court is whether the record supports the district court's finding that appellant acted as part of a group "who all actively participated in the crime." Minn. Sent'g Guidelines 2.D.3(b). It does not.

There is no indication that the individuals actively participated in a group with appellant to engage in sexual contact with victim, that they had any involvement in appellant's sexual contact with victim on March 13, 2022, or that the other individuals and appellant were pressuring victim to engage in sexual contact with them. As the state admitted at oral argument, only appellant and victim were present during the charged sexual contact. Appellant discussed his sexual contact with the victim in a group chat with his friends and victim, but only *after* the incident, and was aware that these individuals were also engaging in sexual contact with the victim. But this evidence does not demonstrate that appellant "committed the crime as part of a group of three or more offenders who all actively participated in the crime." *Id*. We conclude that the district court erred when it determined that appellant's conduct constituted a permissible ground for an upward departure based on this factor.

C. Because the record is unclear on whether the district court would have imposed the same sentence on count II if it had relied only on the valid aggravating factor, we remand to the district court.

Because we have concluded that the district court relied on both valid and invalid factors by imposing an upward departure on count II, we must decide "whether it is necessary to remand [the] case to the district court to permit resentencing." *Mohamed*, 779 N.W.2d at 100. When deciding whether to affirm a sentence or remand, "we must determine whether the district court would have imposed the same sentence absent reliance

upon the improper aggravating factor[s]." *Id*. (quotations omitted). "[W]e consider the weight given to the invalid factor[s] and whether any remaining factors found by the court independently justify the departure." *Id*. (quotations omitted). We will affirm the sentence imposed by the district court "only if we can conclude from the record that the district court would have imposed the same sentence absent its reliance on the improper aggravating factors." *Id*. (quotations omitted).

At sentencing, the district court identified the two departure grounds, multiple forms of penetration and participating in the crime as a group, and stated, "I'm finding . . . substantial and compelling reasons to depart upward . . . because I think there needs to be some recognition that [appellant] abused [victim] multiple times and in multiple ways; in particular, multiple forms of penetration on the second offense date." This limited record does not make clear how much weight the district court gave to the valid multiple-forms-of-penetration factor compared to the invalid group-crime factor. Because "we cannot discern the weight given to the invalid factor[] as compared to the valid factor," we cannot conclude that the district court would have imposed the same sentence if it had only considered the valid aggravating factor. *Id*.

We therefore remand to the district court to determine appellant's appropriate sentence on count II based on the sole aggravating factor of multiple forms of penetration.

Affirmed in part, reversed in part, and remanded.