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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0689**

State of Minnesota,
Respondent,

vs.

Joel Alejo-Rubio,
Appellant

**Filed April 3, 2017
Affirmed
Stauber, Judge**

Mower County District Court
File No. 50-CR-15-915

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Kristen M. Nelson, Mower County Attorney, Austin, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia M. Villalva Lijo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Rodenberg, Judge; and John Smith, Judge.*

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

UNPUBLISHED OPINION

STAUBER, Judge

On appeal from his convictions of two counts of first-degree criminal sexual conduct, appellant argues that the district court (1) abused its discretion by imposing an upward departure on count one; (2) unfairly exaggerated the criminality of his conduct by imposing a 420-month sentence that included consecutive sentences for counts one and two; (3) abused its discretion by ordering restitution to be left open indefinitely; and (4) plainly erred by admitting the complainant's videotaped statement. Appellant also filed a pro se supplemental brief challenging his convictions. We affirm.

FACTS

Appellant Joel Alejo-Rubio and C.A. were married in September 2009. C.A. had four children at the time, and two additional children were born during the marriage. In January 2015, the parties separated. Shortly thereafter, C.A.'s daughter, P.J.C., alleged that she had been sexually abused by appellant. C.A. immediately contacted law enforcement, and, during a videotaped interview with Detective Patrick Retterath, P.J.C. disclosed that appellant began sexually abusing her when she was five or six years old and that the abuse continued until she was nine years old. P.J.C. also alleged that appellant sexually abused her more than 25 times and that the abuse involved three different orifices. Appellant was subsequently charged with eight counts of first-degree criminal sexual conduct.

Prior to trial, the state moved to admit P.J.C.'s interview with Detective Retterath. Appellant did not object, and the district court granted the state's motion. Both P.J.C. and

Detective Retterath later testified at trial, and the videotape of P.J.C.’s interview with Retterath was admitted as Exhibit 1 and played for the jury during Retterath’s testimony.

A jury found appellant guilty of all eight charged offenses. The district court then sentenced appellant to an upward durational departure of 276 months on count one and a consecutive 144-month sentence on count two, for a total aggregate sentence of 420 months. The district court also ordered appellant to pay restitution in the amount of \$11,344.23, but at the state’s request, left restitution open “indefinitely.” This appeal followed.

DECISION

I.

Appellant challenges the district court’s imposition of an upward departure on count one. The Minnesota Sentencing Guidelines were created to ensure “uniformity, proportionality, rationality, and predictability in sentencing.” *State v. Misquadace*, 644 N.W.2d 65, 67 (Minn. 2002); *see also* Minn. Sent. Guidelines 1.A (2014). A district court must impose the presumptive guidelines sentence unless “identifiable, substantial, and compelling circumstances” warrant departure. Minn. Sent. Guidelines 2.D.1 (2014). Substantial and compelling circumstances are those showing that the defendant’s conduct was significantly more serious than that typically involved in the commission of the offense. *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). The facts underlying the departure must be found by a jury or admitted by the defendant. *State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009). The district court must then explain how these facts create a substantial and compelling reason to impose an upward departure. *State v. Rourke*, 773 N.W.2d 913, 919 (Minn. 2009).

When the district court states its reasons for a departure, the reviewing court “examine[s] the record to determine if the reasons given justify the departure.” *State v. McIntosh*, 641 N.W.2d 3, 8 (Minn. 2002). Whether a stated reason for departure is “proper” is a legal question that is subject to de novo review. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). Once this court determines as a matter of law that the district court has identified proper grounds justifying a challenged departure, the decision whether to depart is reviewed for an abuse of discretion. *Id.*

Here, count one of the complaint charged appellant with first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(h)(iii) (2014), for having a significant relationship where P.J.C. was under the age of 16 at the time of penetration and the abuse involved multiple acts committed between March 20, 2014, and September 20, 2014. In sentencing appellant on this count, the district court stated that the 276-month sentence was “based on a criminal history score of zero and, also, in consideration of the aggravating factor which was found by the jury, also, of multiple forms of penetration.”

Appellant argues that the district court abused its discretion by imposing a 276-month sentence on count one because, although the district court recited the aggravating facts found by the jury, it did not explain why these facts constituted a substantial and compelling reason to impose an upward departure. We disagree. The sentencing guidelines contain a nonexclusive list of aggravating factors that may justify an upward durational departure. Minn. Sent. Guidelines 2.D.3.b (2014). One of these factors is that

the victim was treated with particular cruelty. Minn. Sent. Guidelines 2.D.3.b.(2). In *Rourke*, the supreme court discussed whether this factor is an “additional fact” that is required to be “submitted to the jurors in a *Blakely* trial¹ or a ‘reason’ which explains why the additional facts provide the district court a substantial and compelling reason or basis to impose a sentence outside the range on the grid, and which are outside the purview of a *Blakely* jury.” 773 N.W.2d at 920 (footnote added). Relying on the language of the sentencing guidelines, the supreme court concluded

that the particular cruelty aggravating factor is a reason that explains why the additional facts found by the jury provide the district court a substantial and compelling basis for imposition of a sentence outside the range on the grid. This conclusion is consistent with our past descriptions of aggravating factors as *reasons* explaining why the *facts* of the case provide the district court a substantial and compelling basis to impose a sentence outside the range on the grid.

Id.

Here, in addition to finding appellant guilty of first-degree criminal sexual conduct, the jury also found that appellant subjected the victim to “multiple forms of penetration.” It is well settled that “multiple forms of penetration is a valid aggravating factor in first-degree criminal sexual conduct cases.” *State v. Yaritz*, 791 N.W.2d 138, 145 (Minn. App. 2010) (quotation omitted), *review denied* (Minn. Feb. 23, 2011); *see State v. Adell*, 755 N.W.2d 767, 770, 775-76 (Minn. App. 2008) (stating that “multiple

¹ *See Blakely v. Washington*, 542 U.S. 296, 301, 303-04, 124 S. Ct. 2531 (2004) (explaining that any fact, other than a prior conviction, that is necessary to support a sentence exceeding the maximum authorized by the facts established by a guilty plea or a guilty verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt).

penetrations alone will generally justify a double . . . upward durational departure” and affirming 288-month sentence, a departure from presumptive 144-month sentence, for first-degree criminal sexual conduct based on factors of physical injury to victim and multiple forms of penetration (quotation omitted)), *review denied* (Minn. Nov. 25, 2008). The district court then cited the “multiple forms of penetration” as “the aggravating factor which was found by the jury” as justification for imposing the upward departure. Although some further explanation may have been helpful, under *Rourke*, no further explanation was necessary because the aggravating factor of multiple forms of penetration is the reason that explains why the additional facts found by the jury affords the district court with a substantial and compelling basis for departing upwardly. *See* 773 N.W.2d at 920. Therefore, the district court’s imposition of an upward departure on count one was not an abuse of discretion.

II.

Appellant argues that his 420-month sentence, which includes a “mix of an upward durational departure” and a permissive consecutive sentence, “unfairly exaggerates the degree of [his] criminality.” This court reviews a district court’s decision to impose permissive consecutive sentences for an abuse of discretion. *State v. Vang*, 774 N.W.2d 566, 584 (Minn. 2009). “A [district] court’s decision regarding permissive, consecutive sentences will not be disturbed unless the resulting sentence unfairly exaggerates the criminality of the defendant’s conduct.” *State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998). Past sentences imposed on similarly situated defendants provide

guidance in determining whether a sentence exaggerates the criminality of a defendant's conduct. *Id.*

In *State v. Perleberg*, the defendant sexually abused his teenage daughter “in many forms, over several years, on at least 250 occasions, including Christmas day, and often in the family home or during regularly scheduled errands.” 736 N.W.2d 703, 706 (Minn. App. 2007), *review denied* (Minn. Oct. 16, 2007). The defendant was convicted of six counts of first-degree criminal sexual conduct, and on appeal this court affirmed the district court's imposition of three consecutive sentences totaling 432 months imprisonment. *Id.* at 707; *see also State v. Bauer*, No. A07-1836, 2009 WL 112842, at *8 (Minn. App. June 20, 2009) (affirming consecutive sentences totaling 288 months following convictions of two counts of first-degree criminal sexual conduct because the sentences did not exaggerate the criminality of the defendant's conduct of sexually abusing the 12-year-old neighbor girl on at least four different occasions).

Here, appellant's conduct consisted of sexually abusing his step-daughter in many different forms. The abuse took place over the course of several years, at the family home, often when C.A. went to the grocery store. This conduct is akin to the conduct perpetrated in *Perleberg*, for which the defendant received a sentence similar to that of appellant's. *See* 736 N.W.2d at 706. And, although the number of estimated acts of abuse was higher in *Perleberg* than the number of acts proved in this case, appellant's conduct is no less egregious. Appellant engaged in various types of penetration with P.J.C., including anal penetration. The record also reflects that the sexual abuse began

when P.J.C. was five or six years old. Finally, the record reflects that P.J.C. has a sexually transmitted disease.

We acknowledge that the imposition of consecutive sentences, which increased appellant's total aggregate sentence to 420 months, may seem excessive, particularly in light of *State v. Suhon*, in which the defendant received three consecutive sentences totaling 278 months for committing an "estimated 832 acts of sexual abuse on his daughter over a ten-year period." 742 N.W.2d 19, 25 (Minn. App. 2007), *review denied* (Minn. Feb. 19, 2008). But the district court has a unique perspective on all stages of a case, including sentencing, and it is in the best position to evaluate the offender's conduct and weigh sentencing options. *Hough*, 585 N.W.2d at 397. Moreover, it is well settled that the district court's discretion to impose consecutive sentences is very "broad." *Perleberg*, 736 N.W.2d at 703. Accordingly, in light of the district court's broad sentencing discretion, appellant's egregious conduct, and the similarities between this case and *Perleberg*, we conclude that the permissive consecutive sentence imposed here does not exaggerate the criminality of appellant's conduct.

III.

"A crime victim has the right to receive restitution as part of the disposition of a criminal charge." *State v. Terpstra*, 546 N.W.2d 280, 282 (Minn. 1996) (quotation omitted); Minn. Stat. § 611A.04, subd. 1(a) (2014) (stating that a district court may order a criminal to pay his victim's restitution). "The primary purpose of restitution is to restore crime victims to the same financial position they were in before the crime." *State*

v. Johnson, 851 N.W.2d 60, 65 (Minn. 2014). District courts have broad discretion in awarding restitution. *State v. Tenerelli*, 598 N.W.2d 668, 671 (Minn. 1999).

Appellant argues that the district court “abused its discretion by ordering restitution to remain open indefinitely.” Conversely, the state argues that appellant has “forfeited” his restitution argument by failing to raise it below.²

Generally, “[a]n offender may challenge restitution, but must do so by requesting a hearing . . . within 30 days of sentencing A defendant may not challenge restitution after the 30-day time period has passed.” Minn. Stat. § 611A.045, subd. 3(b) (2014). But the supreme court has held that a restitution challenge to the district court’s legal authority to award restitution, not to the amount or type of restitution, is not subject to the 30-day time limit. *State v. Gaiovnik*, 794 N.W.2d 643, 647, 649 (Minn. 2011). In that case, the supreme court reasoned that requiring a defendant to comply with the 30-day time limit conflicts with Minn. R. Crim. P. 27.03, which permits a defendant to raise other sentencing issues at the sentencing hearing and have those issues reviewed in a direct appeal from the judgment of conviction. *Id.* at 648. A defendant may, therefore, preserve a challenge to the district court’s legal authority to award restitution by raising the issue at sentencing without submitting a written challenge within 30 days. *Id.* at 649.

² The state also contends that even under a plain-error analysis, appellant’s restitution argument fails. But in *State v. Thole*, this court explained that the plain-error analysis is limited to trial errors. 614 N.W.2d 231, 235 (Minn. App. 2000). Thus, the plain-error analysis is not applicable to appellant’s restitution argument.

Here, the district court ordered appellant to pay restitution of \$11,344.23 and left restitution open “indefinitely” at the state’s request due to additional costs anticipated in connection with P.J.C.’s continuing medical treatment. But appellant did not object to the district court’s restitution order. Instead, the record here reflects that appellant’s restitution argument is raised for the first time in this appeal. The supreme court in *Gaiovnik*, acknowledged that a challenge to the legal authority of the court to order restitution must be raised in the district court. 794 N.W.2d at 648. Ordinarily, this court does not consider issues raised for the first time on appeal. *State v. Williams*, 794 N.W.2d 867, 874 (Minn. 2011). Accordingly, appellant has forfeited the argument.

Moreover, even if we were to address the question on the merits, appellant raises no issue concerning the current restitution award of \$11,344.23. His argument is limited to speculation that, should additional amounts be awarded in the future, the further award might be improper. Presumably, the district court will comply with Minn. Stat. § 611A.04, subd. 1(b) (2014), which permits amendment of a restitution award so long as appellant remains committed to the Commissioner of Corrections, is on probation, or is on supervised release. If an amendment to the award were attempted after the expiration of the prescribed time period, the amendment would be improper. But, unless and until there is some restitution award that is made other than in compliance with the statute, there is nothing for us to review.

IV.

“Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion.” *State v. Amos*, 658 N.W.2d 201, 203

(Minn. 2003). On appeal, the appellant bears the burden of establishing that the district court abused its discretion and that the appellant was prejudiced as a result. *Id.*

Appellant argues that the district court abused its discretion by admitting P.J.C.'s videotaped statement because the statement was inadmissible under rules 807 and 801(d)(1)(B) of the Minnesota Rules of Evidence. But appellant concedes that he "did not object" to the admission of this evidence. Where a defendant fails to object to the admission of evidence, this court may review appellant's claim under the plain-error standard. *State v. Dao Xiong*, 829 N.W.2d 391, 395 (Minn. 2013). "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). If all three prongs of the plain-error analysis are satisfied, the reviewing court "may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *State v. Washington-Davis*, 881 N.W.2d 531, 541 (Minn. 2016).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Hearsay is inadmissible unless an exception applies. Minn. R. Evid. 802. But a hearsay statement may be admitted if (1) it has "equivalent circumstantial guarantees of trustworthiness" to statements covered by enumerated hearsay exceptions; (2) it is offered as evidence of a material fact; (3) it is "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts"; and (4) admitting the statement will best serve the general purposes

of the evidentiary rules and the interests of justice. Minn. R. Evid. 807; *see State v. Ahmed*, 782 N.W.2d. 253, 259 (Minn. App. 2010).

The only factor challenged by appellant is the trustworthiness of P.J.C.’s statement. To determine whether the extrajudicial statement has circumstantial guarantees of trustworthiness equivalent to other hearsay exceptions, we follow the totality-of-the-circumstances approach, accounting for “all relevant factors bearing on trustworthiness.” *State v. Robinson*, 718 N.W.2d 400, 408 (Minn. 2006) (quotation omitted). In child-abuse cases, Minnesota caselaw enumerates several relevant circumstances:

whether the statement was spontaneous, whether the questioner had a preconceived idea of what the child should say, whether the statement was in response to leading questions, whether the child had any apparent motive to fabricate, whether the statements are of the type one would expect a child of that age to fabricate, whether the statement remained consistent over time, and the mental state of the child at the time of the statements.

Ahmed, 782 N.W.2d at 260 (“The relevant circumstances under rule 807 are those circumstances actually surrounding the making of the statements.” (quotation omitted)); *see also Robinson*, 718 N.W.2d at 410 (applying these factors to assess extrajudicial statement).

Based on the relevant circumstances, P.J.C.’s statement bears the circumstantial guarantees of trustworthiness. In fact, appellant does not challenge any of the above-mentioned circumstances. Instead, he argues that based on the *Ortlepp* factors, P.J.C.’s statement was unreliable because (1) she was not subject to “meaningful cross-

examination” since her testimony did not cover the details of the alleged sexual abuse; (2) the statement was “not against her penal interests”; and (3) her prior statement “was not consistent with her trial testimony.” See *State v. Ortlepp*, 363 N.W.2d 39, 44 (Minn. 1985) (relying on the following factors in concluding that a statement had circumstantial guarantees of trustworthiness: (1) the witness was available for cross-examination; (2) the witness admitted making the statement; (3) the statement was against the witness’s penal interest; and (4) the statement was consistent with other evidence introduced by the state). But the *Ortlepp* factors are not applicable here because in *Ortlepp*, the state’s witness recanted his prior statement at trial that incriminated both himself and the defendant. 363 N.W.2d at 44. In contrast, P.J.C. did not recant her earlier video-recorded statement.

The record reflects that in admitting P.J.C.’s statement under the residual hearsay exception, the district court contemplated the relevant factors and concluded that (1) the statements “will be offered as evidence of a material fact”; (2) the statements “are more probative on the point for which they will be offered (specifically to show that . . . P.J.C. has been consistent in her statements, which is relevant to credibility) than any other evidence which the State can procure through reasonable efforts”; and (3) the “general purposes of the Rules of Evidence and the interests of justice will best be served by admission of the statements into evidence.” Appellant is unable to show that this decision was an abuse of discretion. Therefore, the district court did not plainly err by admitting P.J.C.’s videotaped statement. And because the videotaped statement was

admissible under rule 807, we need not address the admissibility of the statement under rule 801(d)(1)(B).³

Affirmed.

³ We have fully considered the arguments raised in appellant's pro se supplemental brief and conclude that they are without merit.